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[Weekly Reporter, Oct. 26, 1901.]

THE

WEEKLY REPORTER,

1900-1901

(FORTY-NINTH YEAR),

CONTAINING

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE

WITH

APPEALS TO THE HOUSE OF LORDS AND THE PRIVY COUNCIL,

FROM THE 24TH OF OCTOBER, 1900, TO THE 12TH OF AUGUST, 1901.

TOGETHER ALSO WITH SOME CASES DECIDED PREVIOUSLY TO THAT PERIOD.

TO WHICH ARE ADDED

A DIGESTED INDEX

AND

A TABLE OF THE NAMES OF ALL CASES

REPORTED DURING THAT PERIOD,

WITH

REFERENCES TO CONTEMPORANEOUS REPORTS AND PUBLICATIONS.

VOL. XLIX.

EDITED BY

MARTIN JOSEPH BLAKE,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

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PREFACE.

In the forty-ninth volume of the WEEKLY REPORTER the characteristics of the publication will be found unaltered. Every endeavour has been made to render the reports succinct and accurate, and they have been published as soon as possible after the decisions have been pronounced. It is believed that the cases in this volume may be cited with the confidence which the Profession has always placed in the WEEKLY REPORTER.

The Annual Digest contains a summary of the cases published from the 3rd of November, 1900, to the 7th of September, 1901 (both inclusive), in the WEEKLY REPORTER, and to the end of August, 1901, in the Law Reports, the Law Journal Reports, and the Law Times Reports.

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FROM THE 24TH OF OCTOBER, 1900, TO THE 12TH OF AUGUST, 1901.

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1900—1901.

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(BANKRUPTCY CASES)	PAUL M. FRANCKE, Barrister-at-Law.
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A TABLE

OF

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NOTE.—In the following Table the cases are arranged in the Alphabetical order of the PLAINTIFFS' names; but for convenience of reference, with respect to cases having double titles—*e.g.*, *In re Smith*, *Brown* v. *Jones*—this Table gives the names of such cases under both titles.

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———, *In re*. *Ex parte* Taylor	BKCY.	510	9	[1901] 1 Q. B. 744; 70 L. J. Q. B. 531; 84 L. T. 426
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——— v Howard. *In re* Howard	CH.D. FAR. J.	480	193	[1901] 1 Ch. 412; 70 L. J. Ch. 317; 84 L. T. 296
——— v London and County Banking Co.	C.A.	451	126	[1901] 2 Ch. 231; 70 L. J. Ch. 477; 84 L. T. 397
——— v Poncia	CH.D. HDY. J.	596	145	
Teede & Bishop, *In re*	CH.D. HDY. J.	—	35	70 L. J. Ch. 409; 84 L. T. 561
Thelluson v Liddard	CH.D. STI. J.	10	187	[1900] 2 Ch. 635; 69 L. J. Ch. 673; 82 L. T. 753
Thomas v Van Oss	Q.B.D.	57	98	[1900] 2 Q. B. 448; 69 L. J. Q. B. 665; 82 L. T. 845
Thompson v Ashington Coal Co.	C.A.	—	109	84 L. T. 412
——— v City Glass Bottle Co.	K.B.D.	—	112	[1901] 2 K. B. 483
Thomson v Selous. *In re* Selous	CH.D. FAR. J.	440	85	[1901] 1 Ch. 921; 70 L. J. Ch. 402; 84 L. T. 318
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Thurston v Nottingham Building Society	CHD. JOYCE, J.	56	74	[1901] 1 Ch. 88; 83 L. T. 424
Timmins v Leeds Forge Co.	C.A.	—	109	83 L. T. 120
Tomkins, *In re*	C.A.	294	12	[1901] 1 Q. B. 476; 70 L. J. Q. B. 223; 84 L. T. 341
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Townsend v Jarman	CH.D. FAR. J.	158	132	[1900] 2 Ch. 698; 83 L. T. 366
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———. *In re* Riggs	BKCY.	624	11	[1901] 2 K. B. 16; 70 L. J. K. B. 541; 84 L. T. 428
Tunbridge Wells (Mayor) v National Telephone Co.	Q.B.D.	—	46	83 L. T. 525
Turnbull v Hayes. *In re* Hayes	CHD. BYRNE, J	23	139	[1900] 2 Ch. 332; 69 L. J. Ch. 691
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Tweedie v Hayward. *In re* Hayward	CHD. BYRNE, J	296	63	[1901] 1 Ch. 221; 70 L. J. Ch. 155; 84 L. T. 256
——— v Maunder. *In re* Megret	CH. D. HDY. J.	—	37	[1901] 1 Ch. 547; 70 L. J. Ch. 451; 84 L. T. 192
Tyrer v Hessler	K.B.D.	—	166	84 L. T. 653
Underwood v London Music Hall	CH. D. HDY. J.	507	28	[1901] 2 Ch. 309; 84 L. T. 759
Uneeda Trade-Mark, *In re*	CH. D. HDY. J.	—	175	[1901] 1 Ch. 550; 70 L. J. Ch. 318; 84 L. T. 259
Union Lighterage Co. v London Graving Dock Co.	CH. D. HDY. J.	—	56	[1901] 2 Ch. 300; 70 L. J. Ch. 558; 84 L. T. 527
United Service Association, *In re. Ex parte* Young	CH D. WRI. J.	216	33	[1901] 1 Ch. 97; 70 L. J. Ch. 15; 84 L. T. 145
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Walker, *In re.* Summers v Barrow	CH. D. FAR. J.	167	182	[1901] 1 Ch. 259; 70 L. J. Ch. 229
———, *In re.* Walker v Duncombe	CH. D. FAR. J.	394	73	[1901] 1 Ch. 879; 70 L. J. Ch. 417; 84 L. T. 193
——— v Brisley. Grinter v Fleming	Q.B.D.	23	79	[1900] 2 Q. B. 735; 69 L. J. Q. B. 875
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Watson v Watson. *In re* Beverley	CH. D. BUCK, J.	343	63	[1901] 1 Ch. 681; 70 L. J. Ch. 295; 84 L. T. 297
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West Ham Guardians v London County Council	K.B.D.	443	137	[1901] 1 Q. B. 720; 70 L. J. K. B. 503; 84 L. T. 471
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White, *In re.* White v Edmund	CH. D. BUCK, J.	429	143	[1901] 1 Ch. 570; 70 L. J. Ch. 300; 84 L. T. 199
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Wood v Rendell. *In re* Rendell	CH. D. HDY. J.	131	3	[1901] 1 Ch. 230; 70 L. J. Ch. 265; 83 L. T. 625
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——— v Sharman. *In re* Sharman .	CH. D. KEK. J.	555	203	[1901] 2 Ch. 280; 70 L. J. Ch. 671; 84 L. T. 859
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Youmans' Will, *In re* . .	CHD. JOYCE, J.	509	203	[1901] 1 Ch. 720; 70 L. J. Ch. 430; 84 L. T. 201
Young, *Ex parte. In re* United Service Association	CH. D. WRI. J.	216	33	[1901] 1 Ch. 97; 70 L. J. Ch. 15; 84 L. T. 145
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THE

WEEKLY REPORTER,

1900-1901.

Court of Appeal.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — Aug 8, 1900.

SACCHARIN CORPORATION *v.* CHEMICAL AND DRUGS CO. (*a.*)

Patent—Infringement—Account of profits—Discovery—Disclosure of names of customers.

Where, in a successful action for the infringement of a patent, the plaintiff has elected to take an account of the profits, the defendant is under an obligation to disclose the full names and addresses of the customers to whom the infringing articles have been supplied, irrespective of any possible consequences which may thereby result to the customers in question.

Per Lord Alverstone, M.R.—Non constat *that there is any such obligation in cases in which such disclosure would clearly constitute an abuse of the process of the court, or is clearly intended to be used by the plaintiff for an improper purpose.*

Decision of Cozens-Hardy, J., *reversed.*

Appeal from a decision of Cozens-Hardy, J.

An action having been brought by the plaintiff corporation to restrain the defendant company from infringing the patent No. 25,273 of 1894 (Monnet's) for the manufacture of saccharin, which was the property of the plaintiff corporation, North, J., decided at the trial of the action (1) that the patent in question was valid; and (2) that the defendant company had infringed it; and he directed that an account should be taken of the profits of all articles made by the defendant company in infringement of the said patent.

In the course of taking the account in question the defendant company produced their books, but had covered up the names of the customers to whom they had sold the articles in question, and persistently refused to disclose the same.

On application by the plaintiff corporation to Cozens-Hardy, J., the learned judge decided that it would be oppressive to compel the defendant company to disclose the names in question, having reference to the fact that such discovery would enable the plaintiff corporation to proceed against such customers by legal process.

From this decision the plaintiff corporation now appealed.

Fletcher Moulton, Q.C., and *J. C. Graham*, for the appellant corporation.—To ask for the names of customers in the course of an inquiry as to profits is no abuse of discovery, even though it be true that we should not be entitled to ask for the names directly for the sake of taking action. But having discovered the names of customers, as it were, by chance, we are then, of course, entitled to proceed against them.

A. J. Walter, for the respondent company.—The plaintiff company would be entitled to the names of customers had they elected to take damages; having elected to take an account of profits they are not now so entitled: *Neilson* v. *Betts*, 19 W. R. 1121, L. R. 5 H. L. 1, *per* Lord Westbury, at p. 22. (That case was commented on by the House of Lords in *De Vitre* v. *Betts*, 31 W. R. 705, L. R. 6 H. L. 319.) [Lord ALVERSTONE, M.R.—I should like to call your attention to *Powell* v. *The Birmingham Vinegar Co.*, 14 Rep. Pat. Cas. 1, in which it was decided that a plaintiff who had elected to take an account of profits was entitled to discovery of the names and addresses of customers, though the same objection was taken in that case—*i.e.*, that such discovery might cause them irreparable injury.] *Powell* v. *The Birmingham Vinegar Co.* was a trade-mark case, and is distinguishable as such. [Lord ALVERSTONE, M.R., drew attention to *Murray* v. *Clayton*, 21 W. R. 118, 498, L. R. 15 Eq. 115, and *The Leather Cloth Co.* (*Limited*) v. *Hirschfeld*, 11 W. R. 933, 1 H. & M. 295.]

Lord ALVERSTONE, M.R. — This case was not argued before the learned judge in the court below in the full way in which it has been argued before us. In nothing that I shall say do I wish to throw any doubt on the distinction between a patentee who elects to take an inquiry as to profits, and a patentee who elects to take an inquiry as to damages. As was pointed out by the House of Lords in *Neilson* v. *Betts*, L. R. 5 H. L. 1, at p. 22, and as has, to my knowledge, been recognized for many years, the patentee who elects to take profits stands in the shoes of the infringer, and, so to speak, condones the wrong done him, and is entitled only to the profits. But we also have to consider whether, where there is an inquiry as to profits—the entries in books being obviously *primâ facie* material in order to ascertain what those profits may be—we have to consider whether under those circumstances the wrong-doing defendant is entitled to cover up any part of an entry upon the ground that the plaintiff may make some improper use of it, or make some use of it which is not germane to the proceeding in the action. Speaking for myself, if I thought that this action was really an abuse of the process of the court, or was going to be used for an improper purpose, I should not hesitate to say that he might do so; but I think that it would be going too far to say that a simple allegation by the defendant who has to account that he will have to disclose the names of his

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

customers is sufficient to justify the court in ordering the names to be covered up. Now it is not disputed that in the case of an inquiry as to damages there exists no right to cover up the names. That was decided in *Murray* v. *Clayton* upwards of twenty years ago, and has been followed since in *The American Braided Wire Co.* v. *Thomson*, 5 Rep. Pat. Cas. 375, and in more than one other case. The same principle was applied in the case of *The Leather Cloth Co. (Limited)* v. *Hirschfeld*, where, although it is quite true that the form of the inquiry was as to damages, the actual inquiry was as to the number of articles which the defendant had disposed of, and where an objection was actually taken to the names of the customers being disclosed. I think, however, upon principle, that the rule laid down in *Murray* v. *Clayton* was right—*i.e.*, that when you are dealing with the case of a wrongdoer you must not be very astute to prevent him from giving full discovery merely because certain consequences may follow from the discovery which has been occasioned by his own wrongful act. But when I come to the case in this court of *Powell* v. *The Birmingham Vinegar Brewery Co.*, which was a case of profits—a case where, in respect of the infringement of a trade-mark, or of a trade-name—if I remember rightly—an account was directed showing the sales, and an objection was raised against disclosing the names of customers, upon the very ground now suggested—when I come to that case I find Lindley, M.R., pointing out in his judgment that, although disastrous results might possibly ensue as a consequence of allowing full discovery, yet that such results could not be treated as a reason for allowing the defendant not to give the information. He went so far in that case as to order the defendants actually to give a list of the names of customers. I think, accordingly, that, where an account of profits is ordered, the plaintiff is *primâ facie* entitled to have full information as to how those profits are arrived at. I do not think that that full information can be cut down because it is suggested that in the course of that information being given the names of customers will be disclosed, and that it would be injurious or might be injurious to the defendants' trade if they should be so disclosed. In this case the only objection that has been taken to the learned judge's decision is to that part of it which directs that the names of customers shall be previously sealed up. I think, having regard to the practice which has hitherto existed with respect to inquiries as to damages and accounts in patent and trade-mark cases, the rule ought to be enforced, and that the privilege now claimed by the defendants ought not to be allowed; and in that case it follows that, in my opinion, the learned judge ought to have made an order for the full entries to be shown to the plaintiffs.

RIGBY, L.J.—I am of the same opinion. It appears to me that in *Powell* v. *The Birmingham Vinegar Brewery Co.* the point has really already been discussed and decided by this court.

COLLINS, L.J.—I am of the same opinion. I think that, apart from authority, when the problem is worked out on principle, the result must be perfectly clear. Here we begin the discussion with an admission on the part of the defendants of the relevancy of the entries containing the names of the customers. That being so, they are bound to disclose them, unless they can bring themselves under some principle of privilege which relieves them from so doing. They have been unable to vouch any such principle; and when they are thrown back on the authorities, they find that, not only are those authorities unable to vouch it, but that it has actually been decided in terms that the particular ground of refusal now set up—*i.e.*, the consequent disclosure of their customers, is not a ground which the court will treat as one privileging them from giving discovery. Therefore, apart altogether from authority—though it is also clearly established by authority—we arrive at the proposition that the defendants are not relieved from disclosing the names of their customers.

Appeal allowed.

Solicitors, *J. H. & J. Y. Johnson; Joseph W. Asprey.*

App. Bankruptcy.
(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 20, 31, 1900.

In re HARRISON.
Ex parte WHINNEY. (*a.*)

Bankruptcy—Voluntary settlements of policies of life assurance—Payment of premiums of settled policies within ten years of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

Although circumstances might easily arise in which moneys paid within ten years of bankruptcy for the purpose of effecting a policy of assurance which is taken out and settled within that period might constitute a settlement within the meaning of section 47 *of the Bankruptcy Act,* 1883, *yet, where the policy has been taken out and settled at a period more remote than ten years from the date of the settlor's bankruptcy, the premiums subsequently voluntarily paid by the settlor within the said ten years in order to keep alive the policy do not constitute such a settlement.*

No proportionate part of the moneys ultimately payable under a policy of assurance is represented by the payment of any particular premium.

Decision of Wright, J. (44 SOLICITORS' JOURNAL, 451, 82 *L. T. Rep.* 623, 48 *W. R. Dig.* 21), *reversed.*

Appeal from the decision of Wright, J., given on the 7th of May, 1900 (44 SOLICITORS' JOURNAL, 451, 82 L. T. Rep. 623, 48 W. R. Dig. 21).

The bankrupt, the late Cartmell Harrison, had insured his life, prior to April, 1877, by four several policies of assurance for the total sum of £9,000.

In April, 1877, he assigned these four policies, by a post-nuptial settlement, to certain trustees upon trust to invest the policy-moneys, when received, and to pay the income to his wife for life, and after her death to hold the investments in trust for such of his children as he should appoint, and, in failure of appointment, upon certain other trusts which were therein more particularly specified.

This settlement contained no covenant on the part of the settlor to pay the respective premiums of the four policies as the same should from time to time become due.

On the marriage of a daughter in 1895, Harrison appointed three-fifths of the aforesaid policy-moneys to the daughter by a deed dated in July, 1895.

The deed of appointment again contained no covenant on the part of the settlor to pay the premiums on the policies.

A receiving order was subsequently made against Harrison on the 17th of November, 1899, and a few days later (on the 27th of November) the bankrupt died.

All the premiums except two up to the date of his death had been paid by Harrison. The total amount received from the insurance company in respect of the

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

four policies amounted to £10,919. The total amount as premiums paid amounted to £4,686.

It was admitted by the trustees of the settlement of April, 1877, that they were unable to prove that the settlor had been solvent at any time within the period of ten years immediately preceding his bankruptcy.

It was admitted, however, by the trustee in the bankruptcy that the appointment of three-fifths of the assurance moneys to a daughter on her marriage in 1895 was a settlement made for valuable consideration.

On the 7th of May, 1900, Wright, J., decided that the payment of the premiums was part of the consideration for the insurance; and that the payment of each part of the consideration was *pro tanto* a purchase of the right to the amount assured, and, being paid for the purpose of acquiring or securing the settled fund, and so converted into a portion of the settled fund, seemed to be a fresh settlement from time to time as the payments were made. He made, accordingly, a declaration that the trustee in bankruptcy was entitled under the provisions of section 47 of the Bankruptcy Act, 1883, to so much of the value of the policies as represented the premiums paid during the ten years before the bankruptcy, after deduction of so much of that value as represented three-fifths of the premiums paid between the commencement of the ten years and the appointment to the daughter in 1895.

From this decision the trustees of the settlement of April, 1877, now appealed.

Section 47 of the Bankruptcy Act, 1883, provides as follows: "(1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years after the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof. . . . (3) 'Settlement' shall for the purposes of this section include any conveyance or transfer of property."

H. Reed, Q.C., and *Leigh Clare*, for the appellants.—The cases relied on by the respondent in the court below (*Holt* v. *Everall*, 24 W. R. 471, 2 Ch. D. 266; *Stokoe* v. *Cowan*, 9 W. R. 801, 29 Beav. 637; *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 143, 34 Ch. D. 234) are all distinguishable from the present case. "A policy of insurance is not exactly a new contract every year, but is a contract made once for all with a condition to be performed *de anno in annum*": *per* Lord Hatherley in *In re Anchor Assurance Co.*, 18 W. R. 1183, L. R. 5 Ch. App. 632, at p. 638.

They referred also to *In re Leslie, Leslie* v. *French*, 31 W. R. 561, 23 Ch. D. 552; *In re Farnham*, [1895] 2 Ch. 799, 44 W. R. Dig. 98; *In re Plummer, Ex parte The Trustee*, 48 W. R. 634.

Levett, Q.C., and *Muir Mackenzie*.—Each premium goes to purchase a certain increment in surrender value. The payment of each new premium, accordingly, amounts in this case to a settlement.

They referred to *In re Tankard, Ex parte The Official Receiver*, 47 W. R. 624, [1899] 2 Q. B. 57, at p. 59; *French* v. *French*, 4 W. R. 139, 6 De G. M. & G. 915.

Leigh Clare replied.

Cur. adv. vult.

July 31.—Lord ALVERSTONE, M.R., after stating the facts, read the judgment of the court: The case is by no means free from difficulty. Circumstances might easily arise in which the moneys paid to effect a policy within ten years of the date of the bankruptcy—which policy has been taken out and settled within that period—might be held to be a settlement within the meaning of section 47. On the other hand, we think it is clear, from decided cases, that, if money paid by the bankrupt was in fact only money advanced to enable the premiums to be paid, it would not of necessity constitute a settlement, because the payment had been made within the ten years.

The question in this case is, Within which category do these payments fall? We are of opinion that no part of the payments can be regarded as being settlements within section 47. The policies were settled as far back as 1877; and at that time had already been in existence for some years; and the payments made by the bankrupt were payments made to the insurance company to prevent the lapsing of the policies. The view taken by the learned judge seems to have been that each payment of premium secured a certain part of the money assured by the policy. We cannot take that view. The whole of the premiums were paid for the continuance of the policy; and no proportionate part of the moneys payable under the policies is represented by the payment of any particular premium. Nor do we think that the actual amounts paid for premiums can be regarded as settlements within the meaning of section 47. The amounts so paid were not intended to be ear-marked or kept separate; nor, as we have said, can they now be considered to be represented by any specific amount. We think the amounts must be treated as paid by the bankrupt to keep up the policies as between himself and the insurance company, or as moneys paid to enable the trustees to keep the policies alive.

For this reason we are of opinion that the trustee of the bankrupt is not entitled to any part of the moneys paid by the insurance company, and that this appeal should be allowed.

Appeal allowed.

Solicitors, Harrison & Powell; Black & Moss.

From Chan. Div.
(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) } July 12, 13, 16, 1900.

EARLE v. KINGSCOTE. (*a.*)

Married woman—Wife's tort—Contract—Husband's liability in damages—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.

In May, 1898, *the defendant G. K., the wife of the defendant H. K., induced the plaintiff, a widow, to lend her* £5,300, *the only security being her I O U. In July,* 1898, *the plaintiff was asked by G. K. to join her in the purchase of some shares which she said had been recommended to her by a financier, and for that purpose she asked the plaintiff to raise a sum of* £2,000 *to be*

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

invested in the purchase. The plaintiff, at first unwilling, consented to raise the £2,000 when the shares had been purchased. Shortly after, the plaintiff, relying on the representation of G. K. that she had bought the shares, signed two promissory notes for £1,000 each, and, her solicitor having discounted them, paid the proceeds to G. K., and the plaintiff paid the notes on maturity. G. K. never in fact purchased any shares at all with the moneys. The defendant H. K. was made a co-defendant by amendment. In an action for damages by the plaintiff against the defendants,

Held, by Byrne, J., *and the* Court of Appeal, *that the contract was effected prior to and independently of the misrepresentation; that the misrepresentation was not the means of effecting or inducing the contract; and that the husband was liable in damages for his wife's tort.*

There is nothing in the Married Women's Property Act, 1882, *which deprives a plaintiff in such a case, by giving him a right against the separate estate of the wife which may or may not exist, of the right to go against the husband in respect of a tort committed by the wife after the marriage.*

The distinction between Liverpool Adelphi Loan Association *v.* Fairhurst, 2 *W. R.* 233, 9 *Exch.* 422, *and* Wright *v.* Leonard, 9 *W. R.* 944, 11 *C. B. N. S.* 258, *explained and approved.*

Seroka *v.* Kattenburg, 34 *W. R.* 542, 17 *Q. B. D.* 177, *followed.*

This was an appeal from the judgment of Byrne, J., in an action brought by a widow who in May, 1898, had been induced by Mrs. Kingscote, one of the defendants, to lend her £5,300, the only security being Mrs. Kingcote's I O U. In July, 1898, the plaintiff was requested by Mrs. Kingscote to join her in the purchase of some shares which Mrs. Kingcote said had been recommended to her by a financier, and for that purpose she asked the plaintiff to raise a sum of £2,000 to be invested in the purchase—one-half of the shares to go to each, but Mrs. Kingscote to be responsible for any loss by the plaintiff, and her shares to be charged accordingly with that liability. The plaintiff stated that she was at first unwilling, but on Mrs. Kingscote's representation that she would by the investment in the shares be able in three months to repay the £5,300, the plaintiff consented to find or raise by promissory note the sum of £2,000 to pay for the shares when they had been purchased. On the 23rd of July, 1898, Mrs. Kingcote telegraphed to the plaintiff that she had bought the shares and that it (meaning the investment) was a real good thing, and on the 25th she further telegraphed to the plaintiff to direct a solicitor (the same that had acted in the £5,300 transaction) to let her (Mrs. Kingcote) have £2,000 on the plaintiff's guarantee; by a later wire she asked her not to mention the shares to him. The plaintiff, relying on Mrs. Kingscote's representation, telegraphed to the solicitor and signed and posted two promissory notes or bills for £1,000 each, payable to the solicitor. The name of Mrs. Kingscote did not appear upon the bills, but they were accepted by the solicitor, discounted by Jay, and the proceeds paid to Mrs. Kingscote, as the plaintiff stated, for the purpose of paying for the shares. When the bills became due, the plaintiff paid and took them up. The plaintiff brought this action to protect her interests in the shares, but Mrs. Kingcote swore that she had never purchased any shares with the £2,000. While the motion was proceeding, £500 had been paid to the plaintiff on account, but no further sum. The above facts were admitted, and it was also agreed that judgment should be entered against the wife for £1,500 and costs, in the form as settled by the court in *Scott* v. *Morley*, 36 W. R. 67, 20 Q. B. D. 120. The question now was whether the other defendant, Colonel Kingscote, was liable for his wife's tort, he not having participated in the use of the money and not having authorized his wife's transactions.

Byrne, J., held that the husband was liable in damages.

The husband appealed.

Latham, Q.C., *Elgood*, and *Stuart Sankey*, for the appellant.—The contract and tort were mixed up together all through, and there would have been no contract but for the fraud which produced the contract. The £500 taken by the plaintiff at a time when the husband was not a defendant must have been on account of the contract moneys and not damages. The wife cannot be responsible for the fraud, and so the husband cannot be sued for it together with her: *Liverpool Adelphi Loan Association* v. *Fairhurst*, 2 W. R. 233, 9 Exch. 422; *Wright* v. *Leonard*, 9 W. R. 944, 11 C. B. N. S. 258. As to the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), a married woman had always been capable of committing a tort apart from her husband, but could not be sued alone. The husband, accordingly, was brought in, but not because he was actually liable: *Seroka* v. *Kattenburg*, 34 W. R. 542, 17 Q. B. D. 177. The proof of this is that if the wife died during the action, the action could not proceed against the husband. But now under the Act there is no technical need to sue the husband in order to sue the wife; consequently you cannot sue him: Bacon's Abridgment; *Capel* v. *Powell*, 13 W. R. 159, 17 C. B. N. S. 743; *Wainford* v. *Heyl*, 23 W. R. 849, L. R. 20 Eq. 321; *Seroka* v. *Kattenburg*; *Weldon* v. *Winslow*, 33 W. R. 219, 13 Q. B. D. 784.

Levett, Q.C. and *W. Baker*, for the respondent.—The contract was entered into prior to the fraud and entirely independent of it, and the fraud was not the means of effecting the contract. *Liverpool Adelphi Loan Association* v. *Fairhurst* and *Wright* v. *Leonard* do not therefore apply. The husband and wife are merged in one and to be treated as one for liability for the tort; *Burnard* v. *Haggis*, 11 W. R. 644, 14 C. B. N. S. 45. and Bullen and Leake on Pleading, (3rd ed.), p. 339, referred to. The husband is not liable on the contract, but there is nothing in the Married Women's Property Act, 1882, to take away his liability for tort after marriage: sections 13, 14, 15 referred to, also *Butler* v. *Butler*, 34 W. R. 132, 16 Q. B. D. 374; *Seroka* v. *Kattenburg*; *In re Jupp*, 36 W. R. 712, 39 Ch. Div. 148.

Latham, Q.C., in reply.

THE COURT (Lord ALVERSTONE, M.R., and RIGBY and COLLINS, L.JJ.) dismissed the appeal.

Lord ALVERSTONE, M.R.—This is an appeal from Byrne, J. The facts are, very simply stated, that Mrs. Kingscote induced Mrs. Earle to enter into a contract to go into a joint speculation with her in shares, upon the representation that thereby she would be able to repay a certain debt and would be responsible for any loss the plaintiff might make. That bargain having been made in the month of July, 1898, Mrs. Kingscote telegraphed to the plaintiff stating that she has bought the shares, and, on the faith of that telegram, the plaintiff sent her back £2,000. The question is whether the transaction is such that no action could have been brought before the Married Women's Property Act or now, on the ground that the fraudulent representation was so connected with the contract that the action would not lie against the husband upon the ground that

there had been an attempt to turn a contract into a tort. Byrne, J., has considered that the law as shown by the authorities to which he referred must be limited to cases (I am quoting his language) in which the fraud is not only directly connected with the contract and part of the same transaction, but it is also the means of effecting the contract. In my judgment Byrne, J., rightly laid down the principle of the law and has properly applied it to the facts of the case. No doubt the line may, at times, be difficult to draw, and it is easy to see that on many occasions the fraudulent representation may be such that it could easily be turned into an action under an implied warranty, but in this case I think the distinction is correctly pointed out by the judgment of Byrne, J., that here there was an existing contract which existed between Mrs. Earle and Mrs. Kingscote, and that supervening upon that, there was a transaction whereby by a fraudulent and false representation Mrs. Earle was induced to part with £2,000. I think it would be narrowing the principle too much if we were to hold that the husband was not liable in such a case. Counsel for the appellant criticized such language as "inducing the contract," but I think when the authorities are looked at, it appears that principle has been laid down for practically fifty years. The language of the judgment in the *Liverpool case* at p. 429 of 9 Exch. was "When the fraud is directly connected with the contract with the wife and is the means of effecting it and part of the same transaction," and when that case came to be considered in *Wright* v. *Leonard*, Willes, J. (who argued it for the Liverpool Adelphi Association), when on the bench, practically reaffirmed the same law. I come to the conclusion in this case that the representation was not the inducement of the contract, it was not the means of effecting of the contract, and it must be regarded as an independent representation in respect of which the husband would be liable before the Married Women's Property Act. It was then contended by counsel for the appellant that all this law is swept away by the Married Women's Property Act, and that now a husband is not liable in respect of the wife's torts committed after marriage or before. He did not dispute that the case of *Seroka* v. *Kattenburg*, decided by Mathew, J., and Smith, L.J., is an authority against his contention, but he asked us to overrule it. Speaking for myself I think not only is the judgment quite right, but I should come to the same conclusion if there had been no authority to guide us. The language of section 1 (2) of the Married Women's Property Act uses the expression that the husband need not be joined either as plaintiff or defendant. The reason for those words is, to my mind, fully obvious. The Act was an enactment which altered the law to the extent of making a married woman able to sue, and capable of being sued as if she were a *feme sole*, and accordingly the words "need not be joined" were to get rid of the old obligation to join the husband in those cases. But counsel for the appellant says it is involved in that, that the husband shall not be joined; but the consequence of that view of the law would be so serious that I think that nothing but express words would be sufficient to take away the husband's hability. I do not think it is necessary to consider whether the foundation of the rule which made the husband liable is to be found in the principle suggested by counsel for the respondents, to which I should not be disposed altogether to assent—namely, that for all purposes the husband and wife are to be treated as one person, or on the principle suggested by the appellant's counsel, that it is a question of procedure and for the purpose of conformity. At any-rate, in 1882 it had been established for many years that whether the wife had separate estate or not, an action lay against the husband during his lifetime for the wife's tort, and the result was that there was that practical remedy whether those torts were committed before or after the marriage. Section 14 and 15 of the Married Women's Property Act, as Smith, L.J., pointed out, expressly deal with torts before marriage and limit the liability of the husband in that case as well as others to the estate which came to him by virtue of the marriage. I think it would be a very strong thing to suggest that there being no language in the section or in the statute dealing with torts after the marriage, under the words "need not be joined" in section 1, sub-section 2, the liability of the husband was taken away. I think *Seroka* v. *Kattenburg* is good law, and for that reason I think the point raised on the Married Women's Property Act in this case will not avail the appellant, and this appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. The representation actually made by the wife in this case was a false representation, and to my mind it did not induce any contract at all. It only induced the plaintiff to suppose that the occasion on which the contract would involve her sending money had arrived, although it had not. Therefore on that ground I think the learned judge was right in saying that this would not fall within those cases where a representation induced a contract and in fact the contract is founded on the misrepresentation.

As to the construction of the Married Women's Property Act I have had considerable doubts, not now for the first time, but over and over again, and I do not think that if I were to consider it ever so long I should come to a perfectly clear conclusion as to what was meant. I think it safer, therefore, to say that I cannot find the very words which would release a husband from a liability which at common law he was subject to, and therefore I think, as the lesser of the two difficulties, it is better to say it is not intended that he should be released. To say that the Act provided in section 1, sub-section 2, that the husband should not be joined is not accurate. He need not be joined in those cases in which people choose to avail themselves of the new right of going against the wife in order that they may get satisfaction out of her settled property, but the fact that it is there mentioned does not, I think, authorize us to say that it was intended to apply generally.

COLLINS, L.J.—I am of the same opinion on both points. I think Byrne, J., has correctly applied the law as laid down in the *Liverpool Adelphi Loan Co.* v. *Fairhurst* on the one hand and *Wright* v. *Leonard* on the other. Those two cases, it seems to me, exactly define the distinction which Byrne, J., has made the ground of his decision in this case. The general rule of law appears to be clear and unquestioned that a husband is liable for his wife's fraud as well as other torts committed during the marriage. I need not deal with antecedent torts. That being so, a qualification was put on that rule so far as regards fraud, and it would apply also to other torts but for the difficulty of introducing the element I am about to deal with. It was stated that where you cannot separate the fraud in respect of which you are suing from the contract, you cannot by framing your statement of claim in the shape of a tort, turn that which is essentially in its main features contract into tort so as to let in the liability of the husband where the two are inextricably mixed together. You can only treat the transaction in point of law as a contract and not as a tort. You cannot let in the liability of the husband by turning that which is essentially a

contract into a tort, in the mode stated. But that principle certainly could not and ought not to apply where the real substance and gist of the matter is in fact a tort and would naturally and properly be expressed as a tort, though by ingenuity you might frame it into a statement of a contract which in point of fact never really existed, but which would be an academical statement by an ingenious pleader which might possibly cover the circumstances of the case. Now, these two cases that I have referred to afford very good illustrations of the dividing line. You have, in the first case, a contract entered into upon a false and fraudulent representation, but there there was no question about it that the fraudulent representation was, or at all events was treated by the court as being, the basis of the contract, and it being the basis of the contract, the court held that the remedy was in contract and not in tort. In that case it meant that there was no remedy at all against the husband. Then came the case of *Wright* v. *Leonard*, in which the judges were of different opinions. Two judges thought the case was covered by the preceding case, and that a false representation was the basis of the contract and was directly connected with it within the principle of the earlier case and was the means of effecting it. The other two judges pointed out that, taking the declaration, as it was then called, and reading it fairly, it did not disclose a contract at all between the wife who made the representation and the would-be discounter who acted upon it. The person who was asked to discount a bill purporting to be accepted by the lady's husband asked the lady whether the signature was that of her husband. She said it was. They regarded that, rightly or wrongly in the circumstances of that case, as a fraud not inducing the contract but as separate misrepresentation coming in after the contract and separate from it. They guarded themselves by saying that if it should turn out when the case came to be tried that there was really a contract based upon fraudulent misrepresentation, that then and not till then, it would come within the decision of the other case.

Now we come to the case before us, which is beyond all question on the other side of the dividing line which those judges laid down in the case which they differed on. There was room, in that case, for considerable doubt as to on which side of the line the case came, but in the present case it seems there can be no doubt. As has just been pointed out by Rigby, L.J., here a contract had been unquestionably made between these two ladies. That contract embraced certain obligations on the one side and on the other, and existed entirely independently of the fraud; the fraud had nothing to do with inducing the parties to enter into the contract. Then when the time arrived when in certain events an obligation would fall on one of the parties, the defendant, by a false and fraudulent representation that that event had happened, made it appear that the time, when under the contract the plaintiff was to pay the money, had arrived. All that the contract did in this case was to afford a convenient opportunity to the defendant to commit a fraud if she were so minded. It had no other relation to the fraud. The fraud might have been committed absolutely independently of that, and therefore it seems to me in this case the fraud is distinctly separated from the contract and in no view can it be said to be the means of effecting it. If you try to show that the fraud in this case was part and parcel of the contract and the means of effecting it, you have to leave out all the original arrangements between the parties that formed the only contract that was made between them. You have to leave that altogether out of the discussion and begin your consideration at the date when the defendant wrote stating as a fact that she had bought shares which in fact she had not bought. If you are going to turn a statement false in fact followed by actions on the part of the plaintiff into a contract, I am unable to see, and the learned counsel were unable to suggest to me, any form of fraud or fraudulent misstatement of facts followed by action on the part of the person to whom they were made that might not to some extent, as in the instance before us, be shaped in the form of contract. If that were so the effect would be to simply wipe out fraud as one of the torts for which the husband would be liable if the wife committed it. That seems to me impossible having regard to the great strength of the authorities from very early times which have laid down that the husband is liable for fraud as well as other torts of the wife. It seems to me that the only principle which can be found in relation to fraud and contract is the principle which was laid down in the *Liverpool case*, which is the principle which has been acted upon by Byrne, J.—namely, that when the fraud is directly connected with the contract with the wife, and is the means of affecting it and is a part of the same transaction, the husband cannot be sued for it together with his wife. That seems to me to be the principle, and that principle does not cover the case before us. Therefore I think that Byrne, J., was perfectly right on that.

Now, on the other point as to the Married Women's Property Act it seems to me I cannot usefully add anything to the judgment of Willes, J., in the case of *Weldon* v. *Winslow* and the judgment of the Divisional Court in *Seroka* v. *Kattenburg*; they seem to put the whole thing beyond reasonable doubt, and but for the hesitation of Rigby, L.J., I should have thought the thing perfectly clear—namely, that the Married Women's Property Act did allow a married woman to be treated as a *feme sole* for certain purposes only, and gave her rights and liability in respect of her separate property. It also relieved the husband from his common law liability for her torts and contracts made before marriage to the extent to which he took a benefit from her property by the marriage; but having done that, it left things as they were and it has not had the result that a person who has been injured by the wife's tort and who knows that the wife has no separate property is now by the operation of this Act limited to an action against her in respect of her separate estate—a separate estate which may or may not exist. In my judgment it has not deprived him, by giving him a right against the separate estate which may or may not exist, of the right to go against the husband in respect of a tort committed by the wife. It seems to me that the law is reasonably clear on that point and the appeal ought to be dismissed.

Solicitors, *Powell & Burt; Fraser & Christian.*

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) } June 19, 1900.

LADIES' DRESS ASSOCIATION (LIMITED) v. PULBROOK. (*a*.)

Company—Calls—Liability of past member—Forfeited shares—Liquidation—Reduction of capital—Irregularity in resolutions—Certificate of registration—Companies Act, 1862 (25 & 26 *Vict.* c. 89), *ss.* 38, 51

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *ss.* 11, 15, 16.

The defendant was the holder of certain part-paid shares in the plaintiff company. The articles of association did not contain any power to reduce the capital of the company. The articles empowered the company to forfeit the shares of members who made default in paying calls, and provided that any member whose shares were so forfeited should nevertheless be liable to pay to the company all calls owing upon the shares at the time of the forfeiture. A resolution was passed to amend the articles by empowering the company to reduce its capital, and a further resolution was subsequently passed to reduce the capital. Each of these resolutions was confirmed, but in neither case did an interval of fourteen days elapse between the passing of the original resolution and the confirmation, as required by section 51 *of the Companies Act*, 1862. *An order of the court giving effect to the resolutions was duly registered, and the registration was duly certified in accordance with section* 15 *of the Companies Act*, 1867. *A resolution was passed to call up the balance of the uncalled capital, and, the defendant having made default in payment of the calls in respect of the shares of which he was the holder in consequence of the order of the court, his said shares became forfeited. More than a year after the forfeiture a resolution was passed to wind up the company. In an action for the calls,*

Held, first, that the defendant was not protected from liability by section 38 *of the Companies Act*, 1862; *secondly, that any irregularity in the confirmation of the resolutions for amending the articles and reducing the capital was cured by the certificate of the registrar, by virtue of sections* 15 *and* 16 *of the Companies Act*, 1867.

Appeal from the judgment of Ridley, J., on the trial of an action without a jury.

The action was brought to recover calls on shares, the plaintiff company being in liquidation.

The defence was, first, that the defendant had ceased to be a member of the company more than a year before the commencement of the winding up, and was therefore protected from liability by section 38, sub-section 1, of the Companies Act, 1862; and secondly, that the calls were a nullity, because the shares in respect of which they were made were the result of an invalid reduction of capital.

The defendant was originally the registered owner of thirty-seven part-paid £5 preference shares and nine part-paid £5 ordinary shares. The articles of association did not contain any power to reduce the capital of the company, but article 9 empowered the company from time to time by resolution of a general meeting to subdivide its shares or any of them into shares of a less amount than was fixed by the memorandum of association. The company was empowered to forfeit the shares of members who made default in paying calls, and by article 140 it was provided that any member whose shares were so forfeited should nevertheless be liable to pay to the company all calls, defaults, and instalments owing upon the shares at the time of the forfeiture.

On the 3rd of June, 1886, a resolution was passed at an extraordinary general meeting of the company to add to article 9 words empowering the company to reduce its capital. This resolution was confirmed at an extraordinary general meeting held on the 17th of June, 1886, the interval of fourteen days required by section 51 of the Companies Act, 1862, not having elapsed since the passing of the original resolution. At the same meeting of the 17th of June a resolution was passed to reduce the nominal amount of the shares from £5 to £3 3s., and to divide each of the issued shares into three shares of £1 1s. each. This resolution was confirmed at an extraordinary general meeting held on the 1st of July, 1886, the interval of fourteen days not having elapsed since the passing of the original resolution.

On the 24th of July, 1886, an order of the court was made under section 11 of the Companies Act, 1867, giving effect to the above resolutions and confirming the reduction.

On the 24th of August, 1886, the order of the court was duly registered by the Assistant Registrar of Joint-Stock Companies, and such registration was duly certified by him in accordance with section 15 of the Companies Act, 1867.

In consequence of the order of the court the defendant became the holder of 111 preference shares of £1 1s. each and twenty-seven ordinary of £1 1s. each.

In November, 1894, a resolution was passed to call up the balance of uncalled capital.

On the 24th October, 1895, the defendant's shares became forfeited for non-payment of calls.

The resolution for the winding up of the company was passed on the 25th of November, 1896.

The writ in this action was issued on the 9th of August, 1898.

Ridley, J., gave judgment for the plaintiffs.

The defendants appealed.

Bramwell Davis, Q.C., T. Terrell, Q.C., and *W. Coldridge*, for the defendant, cited *Needham's case*, L. R. 4 Eq. 135, 16 W. R. Ch. Dig. 58; *Stocken's case*, 16 W. R. 322, L. R. 3 Ch. App. 412; *Webb* v. *Whiffin*, L. R. 5 H. L. 711; and *In re National Debenture and Assets Corporation*, 39 W. R. 707, [1891] 2 Ch. 505.

Carver, Q.C., and *Bartley Denniss*, for the plaintiffs.

VAUGHAN WILLIAMS, L.J.—The first point taken on the part of the defendant is that, as his shares were forfeited more than a year before the commencement of the liquidation, he is not liable to be placed either on the A list or the B list of contributories, by virtue of section 38 of the Companies Act, 1862. That may be so, but it seems to me to be immaterial. By the articles of association, on a forfeiture of shares there is to remain an unextinguished liability to pay calls which have already accrued due. A right of action for these calls was vested in the company when it went into liquidation, and it continued to exist afterwards.

The second point is that there was an irregularity in confirming the resolutions. In my opinion sections 15 and 16 of the Companies Act, 1867, show that the certificate of the registrar is conclusive, and we have no power to inquire into any irregularity which there may have been. I therefore think that the appeal must be dismissed.

ROMER, L.J.—I agree. With regard to the first point, the defendant is liable not as a past member or a present member of the company, but as a debtor. With regard to the second point, I think that the case of *In re National Debenture and Assets Corporation* is clearly distinguishable from the present case.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Simpson, Cullingford, Partington, & Holland.*

Solicitor for the defendant, *G. T. B. S. Thurnell.*

High Court of Justice.

Chan. Div. Stirling, J. } July 25, 26; Aug. 2, 1900.

GIBBON v. VESTRY OF THE PARISH OF PADDINGTON. (a.)

Metropolis—Management Acts—Street—Widening street—Compulsory purchase—Power of vestry to take part of houses—Injunction to restrain proceeding under notice to treat—Michael Angelo Taylor's Act (57 *Geo.* 3, *c.* 29), *ss.* 80, 82.

Where the authority having control of the streets in a metropolitan district has adjudged that part of a house obstructs and prevents the widening of a street, sections 80 *and* 82 *of* 57 *Geo.* 3, *c.* 29 *give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner; but where the part so desired to be taken is a substantial portion the taking of which will substantially injure the use of the house and prevent it from being occupied and enjoyed as the kind of building it was before, the authority has no such power, and can be compelled by an owner who is able and willing to sell and convey the whole to them, to take the whole.*

A limitation is to be placed on the word "part" in the construction of section 80 *of* 57 *Geo.* 3, *c.* 29.

Gordon v. Vestry of St. Mary Abbott's, Kensington, [1894] 2 *Q. B.* 742, *discussed.*

The question raised in this case was whether the defendant vestry was entitled, under the powers of Michael Angelo Taylor's Act (57 Geo. 3, c. 29), to take for the purposes of street improvement a portion of certain houses belonging to the plaintiff without taking the whole.

The plaintiff was the owner of four freehold houses in Moscow-road, in the parish of Paddington, in the county of London, and claimed an injunction to restrain the defendant vestry from further proceeding under a notice to treat, dated the 25th of October, 1899, or under a notice to summon a jury, dated the 29th of March, 1900, which notices were given by the defendant vestry to the plaintiff, or under any similar notices to take such parts of the four houses as were respectively mentioned in the notice to treat.

The notice to treat was given under the provisions of Michael Angelo Taylor's Act, and recited that an adjudication had been made by the vestry that the hereditaments and premises in question "did obstruct and prevent the same (*i.e.*, the widening of the road), and that the possession, occupation, and purchase of such hereditaments and premises would be necessary for effecting the said improvement." It then stated that the defendants required to purchase and take the hereditaments, and were willing to treat with the plaintiff for the purchase of them, and as to the sum to be paid or compensation to be made to the plaintiff for any injury or damage that might affect the plaintiff or be sustained by him by reason of the said improvement.

The hereditaments referred to in the notice were a part only of the four houses, being Nos. 1 to 4, Moscow-road, and the effect of taking them would be to remove the front walls of the houses, together with a strip of the property about 4 feet in width. The houses were small and of considerable age, and unlet at the time of the action. They extended some distance back from the road, being about 14 feet deep, and having gardens or yards at the rear. The front portions of the houses consisted of shops, and there were parlours and other rooms at the back.

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

It appeared from the evidence that three of the houses were in such condition that they might at some slight expense be made fit to be let and occupied as shops. No. 4 was not in such good condition structurally; in point of fact, the plaintiff had rebuilt No. 5, and had thrown into it part of No. 4. A considerable sum would have to be spent on No. 4 to make it fit to be let and occupied.

It also appeared that after the notice was served in October, 1899, there were negotiations between the parties, and terms were proposed by the plaintiff upon which he was willing to part with a portion of the property. Those terms were not accepted, and the negotiations came to nothing. The plaintiff then fell back on what he claimed to be his strict legal right, and brought this action to compel the vestry to take the whole of the property.

C. E. E. Jenkins, Q.C., and *F. Hoare Colt*, for the plaintiff.—The defendants are not entitled to take the front portions of the houses only and pull down the same so as to leave him in the ownership of only the rear portions in a dismantled condition and wholly unfit for such occupation or use as they had before enjoyed. There is no case to show that the local authority can take "part of a house," properly so-called; the cases generally deal with land, as *Thomas* v. *Daw*, 15 W. R. 113, L. R. 2 Ch. App. 1, and *Gard* v. *The Commissioners of Sewers*, 28 Ch. D. 486, 33 W. R. Dig. 102; moreover, section 96 of Michael Angelo Taylor's Act shows that the Legislature contemplated that the local authority might have some surplus land. The exact point is not covered by authority, but it is established in *Gordon* v. *Vestry of St. Mary Abbott's, Kensington*, [1894] 2 Q. B. 742, that it is not enough to come to the court and say "We take a part of the house and no more, and there is an end of it." The premises in their present condition are barely large enough for business purposes, and if they are further diminished by cutting off the whole frontage as proposed, the shops and houses would be practically unfit for business or any other purpose.

J. G. Butcher, Q.C., and *C. E. Allan*, for the defendants.—Under Michael Angelo Taylor's Act the vestry can only adjudge so much and take so much as is *bonâ fide* required for the improvements: *Thomas* v. *Daw*; *Gard* v. *Commissioners of Sewers*, 28 Ch. Div. 486, at pp. 494, 508, 512; *Teuliere* v. *Vestry of St. Mary Abbott's, Kensington*, 30 Ch. Div. 642, at p. 644; 34 W. R. Dig. 102, where the vestry was restrained from taking the whole; this proposition is supported in logic by the converse view expressed in *Aldis* v. *Corporation of City of London*, 47 W. R. 514, [1899] 2 Ch. 169. The vestry cannot be hit both ways, and to have adjudicated that the whole was necessary, as the plaintiff says that the vestry should have done, would have been *ultra vires*. The same principles are expressed in *Gordon* v. *Vestry of St. Mary Abbott's, Kensington*; it is only the *dicta* of a Divisional Court on an interlocutory application which in that case are cited against us. Section 73 of the Metropolis Management Act of 1862 (25 & 26 Vict. c. 102) is to be read with the Act of 1855 (18 & 19 Vict. c. 120), section 58 of which is applicable under the Act of 1862. Even if the defendants are wrong in this general proposition of law, there must be a distinction made between houses that are standing and not likely to come down, and houses that necessarily or probably will come down. It is clear that in May, 1899, the negotiations were taking place on the footing that they were to come down; the plaintiff has kept them up to force the hands of the vestry and is *malâ fide* making a claim in order to obtain excessive compensation. He did not require

the vestry to take the whole until the issue of the writ and statement of claim, and this was too late: *per* Kay, J., in *Lynch* v. *Commissioners of Sewers*, 34 W. R. 226, 32 Ch. D. 72, at p. 78. The evidence shows that the frontages could have been pulled down without endangering the whole: *Fernley* v. *Limehouse Board of Works*, 43 SOLICITORS' JOURNAL, 332, 64 J. P. 328, 47 W. R. Dig. 130.

Jenkins, Q.C., in reply.

Cur. adv. vult.

STIRLING, J., described the facts of the case substantially as above, and said that practically the defendant vestry desired to take between a third and a quarter of the plaintiff's property. After stating that in his opinion the parties had very wisely not desired to rely on an objection raised late in the trial as to the strict form of the adjudication, his lordship continued:

This case raises a question of very considerable difficulty which is only partially covered by authority. It has been touched upon in many cases, but has only been dealt with specifically in one to which I will presently call attention. The difficulty arises in this way, that Michael Angelo Taylor's Act differs from the Lands Clauses Consolidation Act, 1845, with which we are more familiar, inasmuch as it does not contain any provision equivalent to that in the latter Act that the promoters of an undertaking desiring to take part of a house shall take the whole if the owner be ready and willing to sell the whole. The material portions of the Act are sections 80 and 82. [His lordship read section 80 of the Act, and continued:] It will be observed that in the first portion of this section which I have read, the Act speaks of "houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof," but in the remainder of that section and in section 82, which confers compulsory powers, the language simply is "to purchase such houses, lands, tenements, and hereditaments." Under these circumstances the question arose as to whether the local authority authorized to act under this section could compulsorily take part of a house. After being mooted in many cases the question came to be considered by a Divisional Court of the Queen's Bench Division in *Gordon* v. *Vestry of St. Mary Abbott's, Kensington*, [1894] 2 Q. B. 742, and the decision of that court is binding on me. It was decided in that case that where the authority having control of the streets in a metropolitan district *bonâ fide* adjudge that part of a house or building obstructs or prevents the widening of a street, sections 80 and 82 of Michael Angelo Taylor's Act give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner, and he cannot require them to take the whole house or building, though he be able and willing to sell and convey the whole to them. There the case came before the court, as here, upon an interlocutory application for an injunction, and the court decided that there was jurisdiction to take part of a house under certain circumstances. The reasons were given by both the learned judges who formed the court, and a few words from the judgment of Collins, J., will show how it was put. [His lordship read from the said judgment at p. 752, from the words "The construction which has been put upon section 80" to the words "so carried on in section 82."] The court, having arrived at that conclusion, refused to grant an injunction, but they proceeded to express the view which they entertained of the state of the law in a way which it appears to me I am not at liberty to disregard. It was suggested that, having come to that conclusion, the logical result upon the construction of the Act was this, that the local authority being at liberty to take part of a house was bound under section 82 to give proper compensation, including (1) the value of the piece of land taken, (2) the sums necessary to be expended by the owner in order to repair any damage done to the house by the severance, and (3) any diminution in value of the portion left. That was not the view, however, of the two learned judges, because they expressed the limitation which they put upon the words. [His lordship read from the judgment of Cave, J., at p. 749, from the words "You may divide a piece of land" down to "which they are seeking to take," and from the judgment of Collins, J., at p. 754, from the words "It is not enough to oust the jurisdiction" down to "short of taking the whole."] As I said before, it is my duty to give effect to that exposition of the law, and the result of it seems to be that a limitation must be placed on the word "part" in the construction of this section. If a local authority desires to take part of a house the portion taken must be something which can fairly be called a part. If, for instance, there is a porch, a conservatory, or a cellar which can be removed without substantially destroying the house as a house, that might be taken; but if, on the other hand, a substantial portion is taken, so that the use of the house is substantially injured, and the house can no longer be occupied and enjoyed as the kind of building it was before, then it seems to me that it is laid down that the whole must be taken. Applying this to the present case, it seems to me that even if the owner rebuilds the front wall the shops will be substantially reduced in size, and the houses will no longer be so convenient nor be capable of being used for the same purposes as before. In my judgment the plaintiff is here entitled to say that the vestry must take the whole of the houses in question.

But it was contended that the plaintiff had lost his right to do so by reason of what had passed between him and the vestry. No doubt there were negotiations and the plaintiff had contemplated pulling the houses down at some date or other and rebuilding them, as it was said a prudent person with capital would do. But as regards the negotiations, it seems, upon the evidence, that the plaintiff was willing to sell a portion on certain terms which were not acceded to, and he then said that he would fall back upon his legal right, which is what I have explained. As to his intention to rebuild, I have no doubt that he contemplated doing so at some time earlier or later; but if according to the law of this country an owner is at liberty to deal with his property at whatever time he finds most convenient, and if a vestry, for their own purposes, desires to anticipate the period at which the owner is willing to do that, they must follow the course pointed out by the law. The plaintiff is entitled in this case to compel the vestry to take the whole of the houses, and there must be an injunction in the terms asked for. I think that in such a case as this a vestry is in a very difficult position in the present state of the decisions. My sympathies are with the vestry and the ratepayers, but this is simply a question of legal right, and the costs must follow the event.

Solicitors, *J. Ernest Moore; J. H. Hortin.*

Chan. Div. Stirling, J. } May 29, 30; June 30, 1900.

THELLUSSON v. LIDDARD. (a.)

Vendor and purchaser—Conveyance—Expressed grant of fee—Leasehold title in equity—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 63—*Merger.*

The question whether the merger of an equitable interest has taken place is one of intention.

Where the grantor purports to convey in fee by way of mortgage, but has only in equity a leasehold interest in the property, such interest passes to the grantee under section 63 *of the Conveyancing Act,* 1881.

Action.

The substantial question in the action was what were the respective rights and interests of the plaintiff and the defendant respectively in and to six houses, Nos. 1 to 6, Pepys-road, Raynes Park, and three houses, Nos. 1 to 3, Worple-road, Raynes Park.

Both sets of houses formed the subject of a complicated series of transactions between William Went, a builder, and Henry George Heather, a solicitor, now deceased.

By an indenture dated the 12th of November, 1891, the sites of all these houses were conveyed to Heather in fee.

By six leases, two dated the 6th of February, 1893, two the 21st of February, 1893, and two the 14th of March, 1893, Heather demised the houses in Pepys-road to Went, each for a term of ninety-nine years from the 25th of March, 1892, at the respective rents and subject to the conditions and covenants thereof reserved and therein contained.

By six several indentures of mortgage, two bearing date the 6th of February, 1893, two the 21st of February, 1893, and two the 14th of March, 1893, Went sub-demised each of the houses in Pepys-road to Heather for the term of ninety-nine years less the last day thereof by way of mortgage to secure a sum of £575.

By a deed dated the 4th of April, 1893, after reciting to the effect that Heather was seised in fee simple of all the houses in Pepys-road subject to the indentures of lease in favour of Went, and that Heather had agreed to sell to Went the hereditaments subject to the leases at the price of £1,482 1s. 3d., it was witnessed that Heather in consideration of that sum (of which the receipt was acknowledged) conveyed the houses, together with the rents reserved by the leases and the benefit of the covenants and conditions therein respectively contained, to Went in fee subject to the respective leases and the terms of years thereby respectively created.

By an indenture dated the 6th of April, 1893, after reciting to the effect that Went was seised in fee of the six houses in Pepys-road, subject to the several indentures of lease whereby the same were respectively demised to Went for the terms of years therein specified, and that Went had agreed to sell to the plaintiffs the houses subject to the leases at the price of £1,675 7s. 6d., it was witnessed that in consideration of that sum (of which the receipt by Went was acknowledged) Went conveyed the houses, together with the rents reserved by the leases and the benefit of the covenants and conditions therein contained, to the plaintiffs in fee subject to the leases and the terms of years thereby respectively created.

By three several indentures dated the 4th of July, 1893, Heather demised the three houses in Worple-road to Went for a term of ninety-nine years from the 25th of March, 1892, at the rent and subject to covenants and conditions thereby reserved and therein contained.

By three several indentures bearing the same date Went sub-demised each of these houses to Heather for the term of ninety-nine years less the last day by way of mortgage to secure a sum of £575.

By two several indentures dated the 12th of July, 1893, Went assigned to Heather the equity of redemption in all these houses. Both deeds were in the same form. The recitals were first of all of the leases, then of the indentures of mortgage, and then it was also recited that the several respective sums mentioned in the second column of the second schedule still remained due and owing on the security of the mortgages, and that Went had agreed to sell to Heather the premises comprised in the indentures of lease for the unexpired residue of the term of ninety-nine years subject to the rents and covenants and conditions therein reserved and contained and subject also to the indentures of mortgage of the principal sums secured thereunder at the price of £300. It was witnessed that in consideration of the sum of £300 Went, as beneficial owner, assigned to Heather the messuages and the hereditaments described in the first column of the schedule thereto and all other (if any) hereditaments comprised in the several indentures of lease "to hold the same unto the said Henry George Heather for all the residue now unexpired of the said terms of ninety-nine years subject to the rent reserved by the said several indentures of lease and the covenants and conditions in the same indentures contained thenceforth on the part of the lessee to be observed and performed, and subject also to the several indentures of mortgage and the six several principal sums of £575 secured thereunder, and all interest henceforth to become due in respect of the same." Then it was provided that Heather covenanted with Went, that he, Heather, "will, during the residue of the said term, pay the rents respectively reserved by the said indenture of lease, and observe and perform the covenants and conditions therein contained, and which henceforth on the lessee's part ought to be observed and performed, and will keep indemnified the said William Went and his estate and effects from and against all claims and demands on account of the same, and also in respect of the said six several indentures of mortgage, and the several principal sums due thereunder, and all interest henceforth to become due in respect of the same."

By an indenture dated the 20th of July, 1893 (precisely similar in form to that of the 4th of April, 1893), Heather, in consideration of £669 11s. 9d. (for which receipt was acknowledged), conveyed to Went in fee the three houses in Worple-road subject to and with the benefit of the three leases thereof in a similar way to which the conveyance of the 4th of April, 1893, was expressed.

By an indenture dated the 29th of July, 1893 (precisely similar in form to that of the 6th of April, 1893), Went, in consideration of £756 18s. 6d., conveyed to the plaintiffs in fee the three houses in Worple-road subject to and with the benefit of the three leases thereof.

The Conveyancing Act, 1881, s. 63, provides: (1) Every conveyance shall, by virtue of this Act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same. (2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Butcher, Q.C., and *Waggett*, for the plaintiff.

Upjohn, Q.C., and *Carson*, for the defendant.

STIRLING, J., after stating the facts, continued: The plaintiffs thus acquired a title to all the nine houses subject to and with the benefit of the several leases which had been granted to Went. The defendant's title rests on an indenture dated 20th of December, 1894, whereby Heather purported to convey all the nine houses to the defendant in fee by way of mortgage to secure £2,600 and interest. It was admitted at the trial by the plaintiffs that the defendant acquired her title without notice of their title. It was admitted at the trial by the defendant that she cannot under the deed of the 20th of December, 1894, claim a title to the fee simple of the property; but she insists that under section 63 of the Conveyancing Act, 1881, there passed to her whatever estate, right, or interest Heather had in the property at the date of the deed. I think this contention is well founded, and the question is whether he had any estate, right, or interest therein at that time.

The case is somewhat simpler as regards the Pepys-road property than as regards Worple-road, and I begin with the former.

On the 4th of April, 1893, Heather was entitled to the Pepys-road houses for terms of ninety-nine years less one day by way of mortgage. Went was entitled to the same houses for terms of ninety-nine years, subject to Heather's mortgage, and Heather was entitled to the reversion in fee expectant on the determination of the terms of ninety-nine years. On that day he conveyed his reversions to Went, and I assume (without deciding) that the terms of ninety-nine years vested in Went merged in the reversions, but Heather's sub-terms of ninety-nine years (less one day) and his rights as mortgagee remained unaffected. On the 6th of April, 1893, Went conveyed the six houses subject to and with the benefits of the terms, to the plaintiffs. That conveyance could not and did not affect the position of Heather.

On the 12th of July, 1893, Went assigns the equity of redemption in the terms of ninety-nine years to Heather. At that time Heather had parted with his reversion in fee and had only a limited interest in the property. According to the ordinary presumption in equity as regards his mortgagee, that mortgage would be kept on foot for his benefit. As regards his position at law he still held the terms of ninety-nine years less one day. These interests were unaffected by anything which happened subsequently and, as it appears to me, passed to the defendant by the conveyance of the 20th of December, 1894.

The case as to the Worple-road houses stands somewhat differently.

On the 12th of July, 1893, Heather was entitled to these houses for terms of ninety-nine years less one day by way of mortgage. Went was entitled for terms of ninety-nine years subject to the mortgage in favour of Heather, and Heather was entitled to the reversion in fee expectant on the determination of the terms of ninety-nine years. On that day Went conveyed the houses to Heather for all the residue unexpired of the terms of ninety-nine years. It is said that Heather's sub-terms of ninety-nine years less one day merged in these terms of ninety-nine years and that the latter merged in the fee, of which Heather thus became owner; and that this being so, there is no presumption in equity that the mortgage was intended to be kept on foot. He afterwards, on the 20th of July, conveyed to Went in fee subject to and with the benefit of the several indentures of lease; but it is said that the leases were then gone, and that as Went could not get the benefit stipulated for, so he was exempted from the burden of those leases, and acquired by his covenant a fee simple in possession. In like manner when on the 29th of July, Went conveyed to the plaintiffs in fee subject to and with the benefit of the leases the plaintiffs acquired a fee simple in possession and not a reversion. If this reasoning be sound the plaintiffs will have acquired a benefit for which they did not bargain. The conveyance to them purports to be a conveyance of a reversion expectant on the determination of certain terms, not of a fee simple in possession. The contract as recited in the conveyance is for the purchase of hereditaments subject to leases. The entries in Heather's books, put in evidence by the plaintiffs themselves, show that the purchase-money was paid for ground-rents. The sum of £575 was advanced on the lease of each of the three houses, for the reversion of the three only £669 11s. 9d. was paid. This appears to show that the value of the leases was substantial; and certainly it cannot be assumed that the price paid for the reversion expectant thereon was an adequate price for the fee simple in possession. The foundation of the argument for the defendant is the deed of the 12th of July, 1893. Now, that deed affords strong intrinsic evidence of an intention on the part both of Heather and of Went that the terms of ninety-nine years and the mortgage should remain on foot. If that was not so why should Heather covenant to indemnify Went against the rent and covenants in the leases and the principal and interest secured by the mortgage?

I shall assume that the existence of such an intention would not be sufficient to prevent a merger according to the rules of the common law; the rules, however, of equity are different, and section 25 (4) of the Judicature Act, 1873, provides that "there shall not . . . be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity."

In *Hopkins* v. *Hopkins*, 1 Atk. 581, at p. 592, the rule as to merger of purely equitable interests is there laid down: "In the cases of merger there are many instances where there would be mergers of legal estates, and yet courts of equity have never suffered mergers of trusts where the legal estate continued in the trustees, but have been against the merger if the justice of the case required it." In a long line of subsequent cases recently recognized and followed by the House of Lords in *Thorne* v. *Cann*, [1895] A. C. 11, 43 W. R. Dig. 121, it has been established that the question whether two equitable interests are merged or not is one of intention. It is contended that the like rule applies where a merger of legal estates has actually taken place. The subject was much considered by Kindersley, V.C., in *Brandon* v. *Brandon*, 9 W. R. 825, 31 L. J. Ch. 47. The decision appears to rest on the ground that there had been a course of dealing between the parties which rendered it inequitable that the legal merger should be set up.

The case of *Snow* v. *Boycott*, 40 W. R. 603, [1892] 3 Ch. 110, is an authority that intention alone is now sufficient to prevent a merger at law where there would be none in equity.

In the present case, as I have said, the deed of the 12th of July, 1893, affords evidence of an intention that the terms of ninety-nine years should remain in existence, but there is also evidence of much more than that. On the 20th of July, 1893, Heather conveys the property to Went subject to and with the benefit of the leases. That conveyance, if it had been executed by Went, might have operated at law as a fresh demise to Heather on the terms of the old leases in accordance with the principles laid down in *Doe* v. *Lock*, 2 A. & E. 705, and *Wickham* v. *Hawker*, 7

M. & W. 63, and although in the absence of such execution it cannot have that effect it may be used as evidence of an agreement on his part to make such a redemise. At all events this deed of the 20th of July contains a recital of an agreement by Heather to sell subject to the leases, and when read in conjunction with the deed of the 12th of July, seems to me to establish that Heather and Went dealt with one another on the footing that the leases were or were to be deemed to be in existence. This being so I think it would be inequitable to allow Went to treat those leases as at an end, and as the plaintiffs purchased from Went expressly subject to the leases they are in no better position.

It is said, and with truth, that both Went and the plaintiffs took, not merely subject to the leases, but with the benefit of them; and it is further said that, inasmuch as the leases are, as I assume, merged at law, the plaintiffs do not find themselves in the position which they bargained for. Now, prior to the Judicature Act, 1873, Heather could only have established his rights in a court of equity, and, on seeking the aid of such a court with the object of having the leases treated as still subsisting, he must, as the price for obtaining relief, have submitted to such equitable terms as the court saw fit to impose, and these would have included the acceptance by him of legal leases on the same terms as the old. Since the Judicature Act, 1873, any judge of every court is bound to give effect to every equitable estate or right (section 24, sub-section 2). In my judgment Heather had, under the law as it stood prior to the Judicature Act, 1873, an equitable interest in the Worple-road property, subject to the condition of accepting a proper lease in the way I have stated. That interest appears to me to have passed to the defendant by the conveyance of the 20th of December, 1894. I also think that Heather had a similar interest in the Pepys-road property.

The defendant at the bar expressed her willingness to accept from the plaintiffs legal leases of the three houses on the same terms as the old; under these circumstances it becomes unnecessary for me to consider how the new rule under the Judicature Act is to be worked out.

Solicitors, *Golding & Hargrove; Hardisty, Rhodes, & Hardisty.*

Chan. Div. } July 26; Aug. 3, 1900.
Buckley, J. }

PELHAM CLINTON *v.* DUKE OF NEWCASTLE. (*a.*)

Will—Construction—Estate in special tail—Issue—Male descendants—Gift to A. if he marries a gentlewoman and has issue male, to such issue male and their male descendants.

"*Issue*" *is* primâ facie *a word of limitation equivalent to heirs of the body, and not a word of purchase in limitations of real estate.*

The effect of limitations of real estate to A. if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which then over, is to give A. an estate in special tail male.

Page *v.* Hayward, 2 *Salk.* 570, *applied.*

Action.

Henry Pelham, fourth Duke of Newcastle, by the fifth codicil, dated the 14th of August, 1846, to his will, dated the 31st of January, 1814, willed and bequeathed to his son, Lord Charles Pelham Pelham Clinton, certain estates, and after providing that his eldest son, the Earl of Lincoln, might purchase and redeem those estates for certain sums of money, the testator continued as follows: "The proceeds to go with the limitations of this will—that is to say, to my son Charles if he marries a fit and worthy gentlewoman and has issue male, to such issue male and their male descendants, in failure of which" then over.

At the date of that codicil Lord Charles was unmarried. On the 10th of August, 1848, he married Elizabeth Grant.

On the 12th of January, 1851, the testator died.

On the 14th of December, 1894, Lord Charles died.

The plaintiff in the present action was the eldest son of the marriage of Lord Charles with Elizabeth Grant.

The action came on under an order dated the 18th of June, 1900, made upon the application of the defendant, Duke of Newcastle, and upon an admission by him of the marriage, and that Elizabeth Grant was a fit and worthy gentlewoman, and that the plaintiff was the eldest son of the marriage, and that Lord Charles died as above stated, for the determination of the point of law whether upon the true construction of the fifth codicil the same codicil conferred on Lord Charles a mere life estate or an estate in tail male, or in tail, or an estate in fee simple.

Swinfen Eady, Q.C., and *Peterson*, for the plaintiff.

Haldane, Q.C., Vaughan Hawkins, Ingle Joyce, and *Benn*, for the defendant.

Aug. 3.—BUCKLEY, J., after stating the facts, said: The plaintiff says that the fifth codicil conferred a mere life estate on Lord Charles. The defendant disputes that. First, as to some things which, I think, are plain. The form of the gift is in the first place to Charles in such terms as would, if there were nothing more, give him the fee simple, but the words which direct that the proceeds, if the Earl of Lincoln purchases, are "to go with the limitations of this will" make it plain that whether the estates are purchased or not the estates or their proceeds are to go on the limitations which are expressed with regard to the proceeds. Secondly, as regards these limitations, I think it is clear that the words are to be read as if a comma or the word "and" were inserted next after the word "Charles," so that the limitations will be "to my son Charles, and if he marries," &c., to such issue male. Thirdly, I think that the words "and has issue male" mean "and has issue male by a fit and worthy gentlewoman." And, fourthly, I think that the words "if he marries," &c., are not words of condition, but words limiting or defining the issue male whom the testator calls "such issue male." To express these last three points concisely, I think the meaning of the words is the same as if the testator had said, "to my son Charles, and such issue male as he may have by marriage with a fit and worthy gentlewoman, and their male descendants, in failure of which" then over. The contention which the plaintiff put forward was that the rule in *Shelley's case* has no application to these limitations, for that upon authorities to which he referred the rule is that if to the words of limitation of the inheritance there are superadded words of limitation which alter the course of descent the rule in *Shelley's case* does not apply, and that in such case the heirs take, not by descent, but as purchasers: *Hamilton* v. *West*, 10 Ir. Eq. 75; *Dodds* v. *Dodds*, 11 Ir. Ch. 374, and other cases of that kind. It was argued that in this case Charles cannot take an estate tail, for that the limitation is such as that not all but only a selected class of his issue male are to take. Thus, for instance, if Charles married a fit and worthy gentlewoman and

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

had issue male, and then married a lady who did not satisfy those words, and again had issue male, the latter class of issue are not to take by virtue of the gift. The argument that this exception exists to the application of the rule in *Shelley's case* is, I think, well-founded, and, in fact, it was not disputed by the defendant. But the first answer given was that the rule in *Shelley's case* has nothing to do with this case; that the effect of these limitations is to give to Charles an estate in special tail male. For that proposition reliance was placed upon *Page* v. *Hayward*, 2 Salk. 570, and more fully reported in Piggott on Recoveries 176. There Nicholas Searle by his will devised to his niece, Mary Bryent, and the heirs male of her body, upon condition and provided that she intermarry with and have issue male by one surnamed Searle. Holt, C.J., held that the estate devised to Mary was a good estate tail, but a special entail, an estate to her and the heirs male of her body begotten by a Searle, which is a middle entail, not the highest nor the least, for it might have been to her and the heirs of her body begotten by J. Searle, which had been more particular; yet this is a good estate tail within the statute *de donis*, for it is within the reason of the statute. Further, that the estate tail of Mary does not cease by marrying one that is not a Searle, for the remainder over is in default of both conditions, and in the meantime it is limited to her and the heirs male of her body, and she may survive the first husband and marry a Searle, and so there is a possibility as long as she lives. As to this case, it was argued in reply that what was given to Mary was an estate in tail male followed by a condition which could be defeated by barring the entail. But the contrary was held, for the second ruling of the Chief Justice was that the words "upon condition," &c., though they are express words of condition, shall be taken to be a limitation. This, therefore, appears to me to be a direct authority that a good estate in special tail may be created by words of limitation to the issue male of a marriage with a person of a certain name. In Challis on the Law of Real Property (2nd ed.), p. 268, *Page* v. *Hayward* is referred to as an authority for the proposition that "on a gift to a single donee in special tail the wife (or husband) assigned to the donee is not necessarily a specified individual, but may be one of a special class; for example, may be any person bearing a specified name." In Preston on Estates, vol. 2 of 1827, at p. 412, it is stated: "An estate tail special in this particular ascertains the person by whom, or on whose body, the heirs inheritable to the entail shall be begotten; thus . . . fourthly, on the body of any person who is not his wife, and although she be the wife of another man, and whether the donee be a single or a married man; or on the body of a person of particular rank, as a person of the degree of peerage; or on the body of a person being a Protestant, &c., or a person who shall have a given portion, as £10,000." It seems to me that, without any recourse to the rule in *Shelley's case*, there is here created (subject to something which I must say upon the word "issue") a valid estate in special tail. As regards the word "issue," it has been said that a devise to A. and his issue is the aptest way of describing an estate according to the statute: see *per* Lord Thurlow in *Hockley* v. *Mawbey*, 1 Ves. jun. 143, at p. 149. *Primâ facie*, I think issue is a word of limitation equivalent to heirs of the body, and not a word of purchase. In *Roe dem. Dodson* v. *Grew*," 2 Wils. 322, and Wilmot 272, a devise to my nephew George to hold unto George for life, and after his decease to the use of the issue male of his body lawfully to be begotten and the heirs male of the body of such issue male, and for want of such issue male then to George, his heirs and assigns for ever was held to be an estate tail in George, and Gould, J., said: "The word issue is used in the statute *de donis* promiscuously with the word heirs. The term issue comprehends the whole generation as well as the word heirs, and in my judgment the word issue is more properly in its natural signification a word of limitation than of purchase." The decision of the House of Lords in *Boddy* v. *Fitzgerald*, 6 H. L. C. 823, is another authority directly in point upon this part of the case. There was there a gift over "in failure of issue," and the House held that in such a case it is presumed that issue means heirs of the body. Here the gift over is "in failure of which," that is, "in failure of such issue male and their male descendants." It is, I think, therefore to be presumed that the word issue has been used by the testator as meaning "heirs of the body," and it is for the parties seeking to give it another meaning to show clearly from the context of the will that the testator intended to give it a different meaning. As regards the meaning of the words "male descendants," I may refer to *Bernal* v. *Bernal*, 3 My. & Cr. 559, at p. 581. For these reasons it seems to me that, apart altogether from the rule in *Shelley's case*, 1 Rep. 93, Charles took an estate in special tail male. But, further, if the rule in *Shelley's case* has application, I first observe that there is here no gift in express terms to Charles of a life estate. The first gift in the will to him would, without more, give him the fee simple. The limitations stated with regard to the proceeds do not express his estate to be a life estate, and I apprehend that what I have to look at is to see whether the testator did not intend to make the estate travel through the defined class of issue male generally. If he did, then I can only give effect to that intention by giving to the ancestor an estate in tail; otherwise, as Lord Cairns said in *Bowen* v. *Lewis*, 9 App. Cas. 890, at p. 907, 33 W. R. Dig. 245, "the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue." So here, if I were to hold that there is not an estate in special tail male in Charles, but that the first taker in the series of issue took by purchase, it would follow that only the descendants of that particular head of the issue would take, and the words "in failure of which" would not be satisfied. Upon the principle, therefore, of *Jesson* v. *Wright*, 2 Bli. 1, and *Van Grutten* v. *Foxwell*, 46 W. R. 426, [1897] A. C. 658, I ought to say that the rule in *Shelley's case* is to be applied so as to give effect to the general intention of the testator that the whole class of issue male by a fit and worthy gentlewoman shall be exhausted before the gift over shall take effect. For these reasons I hold that, on the true construction of the fifth codicil, Lord Charles took not a mere life estate, but an estate in special tail male.

Solicitors for the plaintiff, *Blair & W. B. Girling*.

Solicitors for the defendant, *Richard Smith & Sons*, for *Marshalls & Bate*, East Retford.

Q. B. Div.
(Grantham and Channell, JJ.) June 16, 1900.

STOKES *v.* SPENCER.

HAYDON AND ANOTHER, *Claimants*. (*a*.)

Bill of sale—Validity—Registration—Name of grantor—Bill of sale given and registered in true name—

(*a*.) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Grantor known by assumed name—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *s.* 10, *sub-section* 2.

The Bills of Sale Act has no provision that the name of the grantor of a bill of sale should be correctly stated in the affidavit filed on the registration of the bill of sale; and therefore, if the grantor of a bill of sale, who has assumed and become known by a name other than his own, is described in the bill of sale and in the affidavit filed on its registration by his true name instead of the name by which he is known, such registration is valid in the absence of an intention on the part of the grantor to defraud or mislead creditors.

Appeal from Judge Stonor at Marylebone County Court, in a remitted interpleader issue as to the validity of a bill of sale and the registration thereof.

An unmarried woman of the name of Ott lived for many years with a man named Spencer as his wife. She took the name of Spencer and became known as Mrs. Spencer, and that name alone. In 1893 Mr. Spencer made a settlement upon her and her children of a leasehold house, and in this settlement she was described under her true name of Ott and as a spinster. In 1899 certain proceedings were taken in the matter of these trusts in an action in the Chancery Division, and ultimately on her application to the court that a certain part of the trust funds might be applied in payment of her debts incurred for the maintenance of herself and her children, the court made an order that the trustees of the settlement should apply the sum therein specified in payment of her debts, she undertaking in consideration of the payment of her debts to assign to the trustees all her household furniture and effects in her residence.

In pursuance of this order of the Chancery Division and of her undertaking, Mrs. Spencer as beneficial owner made an absolute assignment by deed to the trustees (the present claimants) of her household furniture and effects, and this assignment was duly registered as a bill of sale. In all these proceedings in the Chancery Division, and in the deed of assignment or bill of sale, and the registration of it, Mrs. Spencer was described in her true name of Ott and as a spinster, and there was no reference therein to the name of Spencer.

After the bill of sale was registered the judgment creditor (Stokes) recovered a judgment against Mrs. Spencer in a county court. He knew her by the name of Spencer alone and under that name she contracted the debt with him and in that name he sued her and recovered judgment against her. The judgment creditor under his judgment seized the goods and chattels comprised in the bill of sale, and the trustees claimed the goods under the bill of sale.

On the trial of an interpleader issue between the judgment creditor and the trustees, an objection was taken on behalf of the judgment creditor that the bill of sale was bad under the Bills of Sale Act, 1878, on the ground that the description of the grantor by her maiden name of Ott, without the name of Spencer, under which alone the debtor was known, was insufficient, and that the registration was therefore invalid.

The county court judge found as a fact that the execution debtor did not execute the bill of sale in her original instead of her usual name with a view or in order to mislead creditors, but simply in pursuance of the order made in the Chancery Division and in performance of her undertaking, and in consequence of her being a party to the suit in which the order was made in her original name. He therefore, on the authority of *Central Bank of London* (*Limited*) v. *Hawkins*, 62 L. T. Rep. 901, 38 W. R. Dig. 21, overruled the objection, and gave judgment for the claimants.

The judgment creditor appealed.

Shortt, for the judgment creditor.—The registration is a condition precedent to the validity of the bill of sale, and there was no proper registration of the bill of sale under the Bills of Sale Act. There was a misdescription in the name of the grantor. The object of these provisions in the Bills of Sale Act was to protect creditors and enable them to see if their debtors had parted with their property by having executed a bill of sale, and that object would be completely defeated in the present case. The grantor was known by the name of Spencer and by that name alone, and she had passed for many years under that name. The judgment creditor knowing her by that name would naturally search for the name of Spencer in the register, and he would know nothing of the name of Ott. In the cases of *Ex parte McHattie, In re Wood*, 27 W. R. 327, 10 Ch. Div. 398, and *Downs* v. *Salmon*, 36 W. R. 810, 20 Q. B. D. 775, the misdescription was only in the Christian name, but not in the surname as here, and therefore those cases are distinguishable.

Scarlett, for the claimants.—The case is really concluded by *Central Bank of London* v. *Hawkins*, as the judge found.

GRANTHAM, J.—In this case we have come to the conclusion that the learned judge was right. The only difficulty in the case arises from this, that it is an admitted fact that this woman was known by the judgment creditor and was known generally by those amongst whom she moved by the name of Spencer. That undoubtedly is an argument in favour of the contention of the judgment creditor; and it requires some explanation how a person known in that name can give a bill of sale in another name and that bill of sale be valid. The difficulty arises from the fact that the Act, which regulates the granting of bills of sale and their registration, does not require that the grantor's name should be inserted. So long as the consideration is properly stated and there is nothing to mislead in the bill of sale or in its preparation the grantee of it can defend the property which is the subject of the bill of sale in an action brought by someone who may have traded with the grantor under another name. We are bound by the case of *Central Bank of London* (*Limited*) v. *Hawkins*, if by no other case, to come to the conclusion that the bill of sale in this case was good. There is, no doubt, a great deal to be said for the judgment creditor, that he only knew this woman by the name of Spencer, but on the other hand, the grantor and the trustees say that they had no power in the matter and that so far as the Chancery Division and the trustees were concerned they were bound to use the name by which this woman was rightly known and which was her real name, and to describe her as a spinster, as in fact she was. Under these circumstances it seems to me the trustees were justified in what they did, and I cannot see that there was any obligation on them to do what was suggested they should have done as to the description of the grantor. If, in this deed, the grantor had been described as Miss Ott, otherwise Spencer, then I think the bill of sale would have been absolutely correct and valid; but I see nothing to have made it necessary for them to have done that, although they may have been aware that the grantor was known by the name of Spencer. I think the case is governed completely by that of *Central Bank of London* (*Limited*) v. *Hawkins*, where it was held that these difficulties did not prevent the bill of sale from being a good bill of sale.

CHANNELL, J.—I am of the same opinion. We start with this fact, that the deed or bill of sale is sufficient at common law to vest the property in the trustees, and undoubtedly it would do so apart from the requirements of the Bills of Sale Act. Outside the Bills of Sale Act there may be cases where a name has been used for a fraudulent purpose which would make the bill of sale bad at common law. It is clear that this is not such a case, and there is no suggestion that it is. That being so, the only question is whether or not the validity of this bill of sale is affected by any provision in the Bills of Sale Act. That Act is intended to protect creditors and to enable them to see whether or not their debtors have executed a bill of sale, and parted with their property. That object is endeavoured to be attained by certain specific things being required by the Act to be done, but it may be that there is something which ought to be required to be done to carry out fully the intention of the Legislature, which has been omitted, and I think this and the previous cases on the subject show that that is so. The registration is a condition precedent to the validity of the bill of sale itself, and one of the conditions precedent to the validity of the registration is that the description of the residence and the occupation of the grantor should be filed, but there is no corresponding requirement that the name of the grantor should be so dealt with. That is pointed out in all the cases referred to, but most clearly by Thesiger, L.J., in *Ex parte McHattie, In re Wood*. It is there pointed out that the statute has happened not to make the correctness of the name of the grantor a condition precedent to the validity of the registration. That gets rid of any difficulty or question so far as there is an inaccuracy in the name of Spencer. For the present purpose the name of Ott was no doubt a wrong name; it was not the name by which the person was known, but the only way in which the wrong name can be used to invalidate a bill of sale in a case of this kind is that, if it is combined with an insufficient or inaccurate description either of the residence or the occupation of the grantor, it may show that the description of the residence and occupation which would be sufficient if the name were correct is made insufficient and misleading because it is combined with a wrong name. So far as I can see that is the only way in which any misstatement as to the name of the grantor may be made available for the purpose of making the registration under the Bills of Sale Act invalid. It seems to me, therefore, that the objection fails, and that the judgment of the county court judge must be affirmed.

Appeal dismissed.

Solicitor for the judgment creditor, *T. K. Warhurst.*

Solicitor for the claimants, *G. J. Fowler.*

Q. B. Div.
(Grantham and Channell, JJ.) June 14, 1900.

In re JOHN REID & SONS. (*a.*)

Companies—Winding up—Liquidator—Appointment of—Order by court for winding up—Jurisdiction of court to appoint permanent liquidator—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 92—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 4, 6.

The court, on making an order for the compulsory winding up of a company, has no jurisdiction to appoint a permanent liquidator other than the official receiver for the district.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

By section 4 *of the Companies (Winding-up) Act*, 1890, *the official receiver becomes, by virtue of his office, provisional liquidator; and, under section* 6, *he has to summon a meeting of the creditors of the company, and, until they have been thus consulted as to the appointment of the liquidator, the court has no power to appoint a permanent liquidator.*

Appeal by an official receiver in bankruptcy for the Leeds district from an order made by Judge Bompas, Q.C., whereby he appointed one Mr. Blackburn liquidator of a company upon the compulsory winding up of the company.

The company—namely, John Reid & Sons (Limited), of Leeds—was registered in 1895 as a limited company, with the object of carrying out an agreement to purchase the business of John Reid, with the goodwill, stock-in-trade, and effects of the business. The nominal capital of the company was £35,000 in £10 shares, but very little of the capital was paid up, and the only shares taken were those of the seven signatories, and little business was done.

In March, 1900, the shareholders, who consisted of the seven signatories, passed a resolution for the voluntary winding up of the company, and appointed one Mr. Blackburn as voluntary liquidator.

On the 27th of March the petitioning creditors, who had on the 16th of March obtained judgment against the company for a sum of £132, including costs, for goods sold and delivered, but who had been unable to realize their judgment as a receiver of the assets of the company had been appointed by the Chancery Division on behalf of the debenture-holders, presented a petition in the Leeds County Court for the compulsory winding up of the company by the court. The company was then in the course of voluntary liquidation and Mr. Blackburn was the voluntary liquidator.

On the 1st of May Mr. Blackburn, the voluntary liquidator, called a meeting of the creditors, who, with a few dissentients, passed a resolution for the continuance of the voluntary winding up, and they continued Mr. Blackburn as liquidator with a committee of inspection.

On the 14th of May the petition for the winding up by the court was heard. Counsel appeared for the voluntary liquidator and opposed the making of an order for the compulsory winding up and asked that, if an order were made, Blackburn should be continued as liquidator.

Counsel for the petitioners pointed out to the judge that he had no jurisdiction to appoint Blackburn as liquidator, as the official receiver would be liquidator. The judge, however, expressed the opinion that it would be desirable that Blackburn should be appointed liquidator, and that he had power to do so; and he made an order for the winding up of the company by the court, and he appointed Blackburn the liquidator.

The Board of Trade, for the official receiver, appealed against so much of the order of the learned judge as appointed Blackburn to be liquidator, as they contended that the judge had no jurisdiction to appoint a liquidator, and they asked that the official receiver should be appointed as the provisional liquidator.

The Companies (Winding-up) Act, 1890 (53 & 54 Vict. c. 63), provides: Section 4.—(1) "On an order being made by the court for winding up a company the officer hereinafter mentioned shall, by virtue of his office, become the provisional liquidator of the company, and shall continue to act as such until he or another person becomes liquidator and is capable of acting as such."

(2) "The said officer shall be the official receiver, if any, attached to the court for bankruptcy purposes, or if there is more than one such official receiver, then

such one of them as the Board of Trade may appoint, or, if there is no such official receiver, then an officer appointed for the purpose by the Board of Trade."

Section 6.—(1) "When the court has made an order for winding up a company the official receiver shall summon separate meetings of the creditors and contributories of the company for the purpose of—(*a*) determining whether or not an application is to be made to the court for appointing a liquidator in the place of the official receiver," &c. "The court may make any appointment and order required to give effect to any such determination," &c.

Hon. Arthur Russell, for the official receiver.—The judge had no jurisdiction to appoint the voluntary liquidator (Blackburn) to be the permanent liquidator. By section 4 of the Companies (Winding-up) Act, 1890, the official receiver is by his office the provisional liquidator, and under section 6 his duty is to call a meeting of the creditors who are to determine whether the official receiver is to be continued as liquidator or whether another person is to be appointed as liquidator. Until this meeting of creditors has been consulted in this way after the winding up order is made, the court has no power to appoint the permanent liquidator: *In re North Wales Gunpowder Co.*, 40 W. R. 561, [1892] 2 Q. B. 220.

P. F. S. Stokes, for the voluntary liquidator.—The judge had power under section 92 of the Companies Act, 1862, to appoint the permanent liquidator. Section 4 of the Act of 1890 only says that the official receiver is to be provisional liquidator, but that does not prevent the judge from appointing a permanent liquidator. The power so to appoint under the Act of 1862 is not expressly taken away by the Act of 1890 and it still exists. As to the point that the creditors ought to have been again consulted, it would have been a useless expense, as they had already been consulted, and they appointed Blackburn.

Muir Mackenzie, for the petitioning creditors.

GRANTHAM, J.—This matter, no doubt, is not free from difficulty. Anyone, however, reading these sections of the Act—sections 4 and 6—cannot but see that the whole scheme of appointment in the later Act of 1890 is inconsistent with the scheme of appointment under the earlier Act of 1862. Lindley, L.J., in his judgment in the case of *In re North Wales Gunpowder Co.*, [1892] 2 Q. B., at p. 223, says that it was perfectly well known why the former Act was altered. It was because of costs, as he says. In all the earlier appointments it was always a subject of dispute who should be liquidator, and it was for the money to be made out of it. Therefore this Act of 1890 did away with the appointment as a provisional liquidator of the liquidator who was a friend of one or other of the creditors. Under these circumstances we think that the provisions of the Act of 1890 on this matter are so thoroughly inconsistent with the provisions of the former Act of 1862—and there being no authority to the contrary—that the county court judge had no power to appoint this man liquidator. There was the official liquidator, and it was his duty to summon the meeting of creditors to determine who should be appointed, and as that was not done the appointment was invalid.

CHANNELL, J.—I am of the same opinion. I quite agree with the argument that the power is not expressly taken away of appointing the liquidator at the hearing; but I think that the scheme of the Act of 1890 is inconsistent with that. I think the scheme of the Act of 1890 is to have an official who shall be both provisional and permanent liquidator unless another person is appointed, and that that other person is not to be appointed until the creditors have been consulted. It is true that in this case it happens that the creditors had been consulted, and if the learned judge had discretion in the matter I do not think he has wrongly exercised it, because he might not unreasonably think that it would be a useless expense to summon the creditors again and ask them the very same question that had been asked them before. It is not absolutely clear that the creditors in this case might not have come to a different conclusion if they had been consulted the second time; but I think it is a sufficient ground to show that this appeal must be allowed, that the creditors have not in fact been consulted in the way in which the Act of 1890 says that they should have been consulted prior to any appointment. I therefore think this appeal should be allowed.

Appeal allowed. Costs out of the assets of the company.

Solicitor for the official receiver, *The Solicitor to the Board of Trade.*

Solicitors for the liquidator, *Vincent & Vincent*, for *North & Sons*, Leeds.

Solicitors for the petitioning creditors, *Wrensted & Hind*, for *Scott & Holmes*, Bradford.

IN BANKRUPTCY.

Q. B. Div. (Wright and Darling, JJ.) — May 14, 1900.

In re PHILLIPS.
Ex parte BARTON. (*a*.)

Bankruptcy—Act of bankruptcy—Assignment of property for the benefit of creditors generally—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (a)—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *s.* 19.

Where the act of bankruptcy alleged in a petition is a deed of assignment for the benefit of creditors generally, a receiving order ought not to be made if the deed relied upon is for the benefit of trade creditors only. The expression "creditors generally" must be construed to mean "all creditors."

Appeal by the debtor against a receiving order made against him by the registrar of the county court at Cheltenham.

The debtor had carried on business as a livery stable proprietor together with a partner named March in the style of Phillips & March. The firm of Phillips & March made an assignment to trustees for the benefit of their trade creditors only of all their stock-in-trade and partnership property. Within three months from the date of the execution of such assignment, a private creditor of Phillips presented a petition in bankruptcy against him. The only act of bankruptcy alleged in the petition was that the debtor had made "an assignment of his property to trustees for the benefit of his creditors generally": Bankruptcy Act, 1883, s. 4, sub-section 1 (*a*). The registrar held that Phillips had committed the act of bankruptcy alleged, and made a receiving order against him.

Phillips appealed against this decision.

Butterworth, for the appellant.—The receiving order was wrongly made. The only act of bankruptcy alleged was an assignment of the debtor's property for the benefit of creditors generally, which must be construed to mean "all creditors": see section 19 of

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

the Deeds of Arrangement Act, 1887, where the expression "creditors generally" is defined as including "all creditors who may assent or take the benefit of a deed of arrangement." In this case the only assignment made by the debtor was limited to a certain class of creditors—viz., trade creditors.

He cited *Ex parte Glen*, 15 W. R. 1156, L. R. 2 Ch. App. 670; *Tomlin* v. *Dutton*, 16 W. R. 1167, L. R. 3 Q. B. 466; *European Central Railway* v. *Westall*, 14 W. R. 177, L. R. 1 Q. B. 167.

A. J. David, for the respondent.—All the assets of the partnership were assigned by the deed relied upon as an act of bankruptcy, and such an assignment by a partner in an insolvent firm is fraudulent against creditors and an act of bankruptcy: *Bowker* v. *Burdekin*, 11 M. & W. 128; *Ex parte Snowball, In re Douglas*, 20 W. R. 786, L. R. 7 Ch. App. 534.

Butterworth replied.

WRIGHT, J.—There is no direct authority on this point, and it seems to me safest to follow the words of the section, and to hold that the expression "creditors generally" means all creditors and not any particular class. The object of the section seems to be to bring within the scope of the Act transactions which are not fraudulent in the sense of being with intent to defeat or delay creditors, but which have the effect of withdrawing from administration in bankruptcy affairs which the Act intended to be wound up in bankruptcy.

DARLING, J.—The act of bankruptcy alleged in this case has not been proved; this assignment is not for the benefit of creditors generally. If we were to decide otherwise we should make "creditors generally" mean nothing at all, and I do not see that it can mean anything but "all creditors." There is no direct authority on the question, but I think that *Tomlin* v. *Dutton* and *Ex parte Glen* are in point.

WRIGHT, J.—We think that the receiving order ought to be discharged, but the case must be sent back to the registrar with leave to the petitioning creditor to amend his petition by alleging an act of bankruptcy within section 4, sub-section 1 (*b*), of the Bankruptcy Act, 1883: "If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

Appeal allowed.

Solicitors for the appellant, *Goodale & Hobson*, for *Butterworth & Co.*, Swindon.

Solicitors for the respondent, *Heath & Cockerell*, Cheltenham.

Court of Appeal.

From County Palatine of Lancaster. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 5, 6; Aug. 9, 1900.

In re LEYLAND AND TAYLOR'S CONTRACT. (*a*.)

Vendor and purchaser—Sale by public auction—Condition as to compensation in case of "errors," "misstatements," and "omissions" in particulars of sale—Omission by vendor to disclose previous service of notices under the Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55)—*Compensation.*

Leasehold property was sold subject to a condition that, if any "error, misstatement, or omission" should be discovered in the particulars, the same should not annul the sale, but should be a subject for compensation. It was subsequently discovered, before the completion of the purchase, that notices to sewer, flag, and pave the adjoining street had prior to the sale been served upon the vendor by the local authority under the provisions of the Public Health Act, 1875. *These notices had not been complied with, nor had they been disclosed to the purchaser at the time of the sale. The purchaser elected to complete his purchase, without prejudice to any claim that he might have to compensation for the non-disclosure of the notices in question.*

Held, that, inasmuch as the property would always have continued liable to the service of these notices in the hands of the purchaser from the moment of his purchase, supposing they had not been previously served; and, inasmuch as it was accordingly impossible to believe that the market value of the property could be affected in the slightest degree by the question whether such notices, as a matter of fact, had or had not been given at the time of the sale, the purchaser must be taken to have suffered in fact no practical injury (damnum) *from the non-disclosure of what had actually happened.*

Held, accordingly (Collins, L.J., dubitante), *that, even if such non-disclosure constituted an "error" or "omission" within the meaning of the condition, yet, since no practical injury* (damnum) *had in fact been done, no compensation could be given the purchaser under the provisions of that condition.*

Per Collins, L.J.—*The non-disclosure of the notices constituted an "error" or "omission" on the part of the vendor within the meaning of the condition.*

Appeal from the decision of the Vice-Chancellor of the County Palatine of Lancaster.

On the 8th of May, 1899, certain cottage property at Radcliffe, in Lancashire, was put up for sale by auction by Mr. Henry Leyland under (*inter alia*) the following conditions of sale:

Condition 3 provided that, "The purchaser . . . as from the day appointed for completion . . . shall pay all outgoings affecting (the property) . . . and for the purpose of this condition the said . . . outgoings shall, if necessary, be apportioned. . . ."

Condition 4 provided that, "If before the completion of the purchase the vendor shall have expended any money in complying with any requirement enforceable against him, and made after the sale by the municipal corporation, local board of health, or other local authority of the city, borough, or district within which such property is situated, in respect of such property, or of the paving, or flagging, or sewering of, or other works in, the roads, streets, or passages on or adjoining the same, the purchaser shall, on the completion of the purchase, repay to the vendor the amount so expended by him; and in case any such requisition shall not have been complied with before the completion of the purchase, the purchaser shall indemnify the vendor in respect thereof."

Condition 13 provided that, "If any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, but if the same shall be pointed out in them by the vendor or purchaser before the completion of the purchase (and not otherwise) compensation shall be allowed or given by the vendor or purchaser as the case may require. . . ."

The above conditions were among those officially approved of by the Manchester Law Association. The property in question was held by the vendor for the residue of a term of ninety-nine years, about twenty of which remained unexpired on the 8th of May, 1899. At the sale by auction under the above-

(*a*.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

mentioned conditions on the 8th of May, 1899, Mr. James Taylor purchased the cottage property in question for the sum of £300; and the date fixed for completion was the 8th of June, 1899.

It was discovered, however, on investigation of the title that on a date (13th of April, 1899) prior to the sale to Mr. Taylor notices had been served on the vendor by the local authority to pave, flag, and sewer the street opposite the cottages in question, under the provisions of the Public Health Act, 1875. The sale to Mr. Taylor was completed, however, on the 19th of June, 1899, and the purchase-money was paid, but without prejudice to the question as to whether the purchaser was entitled to compensation for the suppression of all mention of these notices on the part of the vendor at the time of the sale by auction.

No steps were taken either by the vendor or the purchaser to satisfy the requisitions of the local authority; and the works in question were ultimately executed by the latter body in January, 1900. The cost of executing the works thereupon became a charge upon the property under the provisions of section 257 of the Public Health Act, 1875.

A summons having been taken out by the vendor, by agreement with the purchaser, in the Palatine Court of Lancaster, asking for a declaration that the purchaser was not entitled to compensation under condition 13 of the conditions of sale, Hall, V.C., decided: (1) That the particulars of sale were not full and fair as between the vendor and purchaser, inasmuch as they omitted to state a fact of great importance in determining the value of the property; (2) that condition 4 of the conditions of sale was so framed as to lead to the inference that no notice of the kind had been given to the vendor prior to the sale, and that consequently it was of a nature calculated to mislead. In the circumstances the learned judge was of opinion that the purchaser was entitled to compensation under the terms of condition 13.

From this decision the vendor now appealed.

The parties agreed in the court below to a statement of facts, in paragraph 5 of which it was stated that if the purchaser had known that the notice in question had been served upon the vendor he would either not have bid at all, or would not have bid so much as £300. It was also agreed between the parties that the omission to disclose the notices did not arise from any fraudulent intention on the part of the vendor. It was alleged at the trial on the part of the purchaser that the execution of the works in question, by raising the level of the adjoining street, had injuriously affected the purchased property.

Daniel Jones and *W. Ambrose Jones*, for the appellant.—(1) The purchaser has suffered no monetary injury. The property would always have continued in his hands liable to the service of these notices, supposing they had not been already served at the time of the sale; and it is impossible, therefore, that in fixing the price he should have been influenced in any way by his ignorance of what had happened. (2) But, under any circumstances, he is not now entitled to complain, because it was open to him before the auction to discover the fact for himself: Public Health Act, 1875, s. 150. (3) The notice did not constitute a "charge" upon the property such as it was the duty of the vendor to disclose. The money expended by the local authority became a "charge" only on the completion of the work: *Hornsey Local Board* v. *Monarch Building Society*, 37 W. R. 556, 23 Q. B. D. 149, 38 W. R. 85, 24 Q. B. D. 1. (4) As to condition 4, it means exactly what it says, and is not in any sense misleading.

Upjohn, Q.C., and *J. A. Tweedale*, for the respondent.—(1) It was the duty of the vendor to disclose the existence of the notice: *Stevens* v. *Adamson*, 2 Stark. 422, cited in Lord St. Leonards' Vendors and Purchasers (14th ed.), at p. 331; Dart's Vendors and Purchasers (6th ed.), p. 127. (2) It is untrue that the purchaser was in a position to ascertain for himself the fact that this notice had been given prior to the date of the sale. "Persons interested therein" in section 150 of the Public Health Act, 1875, means having a definite legal interest, not a mere idle curiosity. No one would be entitled under that section to obtain the information in question simply because there was a vague possibility of their afterwards becoming a purchaser. (3) But here the vendor not only failed in conveying information which it was his duty to disclose, but he actually contrived by the use of condition 4 to give quite a wrong impression. (4) The liability arising under this notice was an "outgoing" for which the vendor must be held liable under the terms of condition 3: *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, 45 W. R. Dig. 168.

Daniel Jones, in reply.—In *Stevens* v. *Adamson* the information was a secret locked up in the bosom of the vendor, and the purchaser was in a position to obtain his information from no other source. Here any and every possible purchaser was entitled under section 150, as a matter of course, to the information in question if he troubled to inquire for it. *In re Boor*, *Boor* v. *Hopkins*, 37 W. R. 349, 40 Ch. D. 572, is a decision in my favour.

Cur. adv. vult.

Aug. 9.—Lord ALVERSTONE, M.R.—I have very considerable difficulty in arriving at a conclusion in this case. The Vice-Chancellor of the County Palatine has decided that the neglect by the vendor to disclose the fact that notices to curb, sewer, and channel had been served upon him by the Urban Sanitary Authority of Radcliffe, prior to the property being put up for auction, entitles the purchaser to compensation under condition 13.

Now, in the face of the agreed statement of facts, I do not think it is possible to hold that the non-disclosure of the notice was immaterial. The purchaser, however, elected to complete the contract and to rely upon his rights under condition 13. I have felt very considerable difficulty in coming to the conclusion that the neglect by the vendor to disclose the notice was an error, misstatement, or omission of particulars within the meaning of condition 13; but, upon the whole, I am not prepared to say that, if the omission to disclose these notices could have affected the value of the property, no claim for compensation could have been made. The ground upon which I come to the conclusion that the judgment of the Vice-Chancellor cannot be supported is that I do not see how the mere omission to disclose such notices can possibly have affected the value of the property sold. The time when, and the circumstances under which, such notices may be served, and the character of the works to be executed under them, rest with the local authority; and, buying such property, the purchaser must be taken to have known that such notices might be served at any time, and to have bought subject to such a contingency. In my opinion, then, the fact that the notices were served at one time or the other could not possibly have affected the value of the property sold for the purpose of the contract. For these reasons I think the appeal must be allowed.

RIGBY, L.J.—The purchaser in this case must be taken to have known the state of the property, and the fact that the local authority might serve such notices, as were in fact served, at any time before or

after the sale. It is plain, also, that the purchaser can have no greater or other right than that, if any, which he has under condition 13. Completing the purchase without prejudice to that claim cannot alter or extend the claim. The purchaser in fact elected to go on with, and complete, the purchase, taking his chance of compensation under condition 13. The owner of so partial an interest as is dealt with in this case could not reasonably be expected himself to incur on behalf of all parties the expense of doing the works, and it may have been assumed, and rightly, on both sides throughout the case, that the works, if done at all, would be done by the local authority. Now the only matter relied upon is the omission, without fraudulent intention, to disclose the service of the notices. It is necessary, therefore, to ascertain correctly the consequences of that non-disclosure. The non-disclosure could not affect to the smallest extent the works to be done by the local authority, or the sums to be charged to the owners in respect thereof; or, in this case, the time or manner at or in which the sum would turn out to be payable.

Different considerations might arise if the vendor were claiming of the purchaser specific performance, or the purchaser were claiming rescission. The purchaser says, in substance, "If I had known of the notices, I would not have entered into the contract." Whether, if specific performance were being claimed against him, or if he were bringing an action for rescission, an omission without fraudulent intent to disclose the notices would have been sufficient ground to entitle him to a decision in his favour, it is not necessary, and therefore not proper, to determine now. Any such point has nothing to do with that which is really now before us. All that need be said is that, if the omission be for any reason not within condition 13, it does not seem that that condition could in any way interfere with a right to rescind otherwise existing.

To return to the consequences of non-disclosure of the notices. Whether the execution of the works would be an advantage or a disadvantage to the purchased property is not for us to say; nor have we the means of judging. It suffices that the local authority act within their jurisdiction as to levels (see section 157 of the Public Health Act, 1875) as well as everything else, though there is not the slightest evidence that the level of the road has been or is to be altered. The omission of the vendor to disclose in no way tends to burden the purchased property. The local authority are alone liable, and if it were assumed that their action in any way injures the purchased property they alone are responsible, and would justify under the Act; and the vendor accordingly cannot be treated as having caused or contributed to the injury. Condition 13 is only meant to apply in cases where there is an omission which tends in some way to render the property less valuable; and where the court can see its way to the principle on which the amount of compensation is to be estimated. The material words are: "If any omission in the particulars be discovered the same shall not annul the sale, but if the same shall be pointed out by the purchaser before the completion of the sale compensation shall be allowed by the vendor, and the amount of such compensation shall be settled," &c. No case was cited to show that the vendor was bound to insert in the particulars the fact of the service of the notices, except *Stevens* v. *Adamson*, but there, as the consequence of the omission, the purchaser had been ejected. If it clearly appears that the omission of the vendor in itself causes no damage, condition 13 is inapplicable, even if the nondisclosure of the notices were an omission in the particulars.

Condition 4 has been referred to as deceptive. It refers to a possible state of circumstances which has not arisen, and provides for the case of a requirement made after the sale by a local authority, and the indemnity of the vendor in respect thereof. No such requirement has been made in the present case; and, therefore, condition 4 in no way applies. Further, it contains no statement of fact whatsoever; and I am at a loss to understand how a condition in favour of a vendor in a particular case which does not happen can involve a holding out that another case, not within the scope of the condition, has not arisen; especially where the condition is in general language, and would cover cases not even presumably excluded from possibility, or even probability, by the notices actually served. I cannot see how condition 4 can be deceptive; though, even if it were, I do not understand how that could be important on the question now to be decided. It is not the course of the court to punish arbitrarily mistakes which cannot be shown to have themselves caused damage, and which have not been fraudulent; and it would be a mere arbitrary punishment if the vendor were charged with the consequences of works done by the local authority within their statutory authority. The purchaser has been wrong in this litigation throughout, and there should be a declaration that he is not entitled to compensation under condition 13.

COLLINS, L.J.—I think the failure to state the fact that the notices had been served by the local authority was such an error, or omission, on the part of the vendor as to entitle the buyer to compensation if he could have shown that it affected the value of the property bought. Though I have had some doubt whether we can say that, as a matter of law, such compensation could not be more than nominal, I am not prepared to differ from my brethren who think it could not; and if so it ought not be sent to a referee to determine the amount.

Appeal allowed.

Solicitors, *Nicol, Son, & Jones*, for *Pickstone & Jones*, Radcliffe; *Woodcock, Rylands, & Parker*, for *Alfred Grundy, Son, & Co.*, Manchester.

From Prob. Div. & Adm. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 23, 24; Aug. 8, 1900.

COWLEY v. COWLEY. (*a*.)

Divorce — Title of honour — Right of wife who has divorced husband to continue to use his title—Subsequent re-marriage to commoner—Injunction.

The former wife of a peer, who has divorced her husband, has no legal right to continue to use his title.

If, however, she continue to do so, that fact alone does not constitute an injuria *cognizable at law; and the court, accordingly, will not restrain her from so doing by injunction.*

The existence of any social usage in the matter might be material in any proceeding where malice was part of the cause of action, but it is otherwise irrelevant.

Decision of Gorell Barnes, J. (48 *W. R.* 463, [1900] *P.* 118), *reversed.*

Appeal from a decision of Gorell Barnes, J., given on the 7th of February, 1900, restraining the lady who had formerly been the wife of Earl Cowley, but had divorced her husband, and had subsequently married a commoner, from continuing to call herself "Countess Cowley" (48 W. R. 463, [1900] P. 118).

(*a*.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

The petitioner in the divorce suit, whose maiden name was Lady Violet Neville, and who was a daughter of the Marquis of Abergavenny, had intermarried with the respondent, the third Earl Cowley, on the 17th of December, 1889.

On the 17th of June, 1896, the petitioner instituted a suit in the Divorce Court for the dissolution of her marriage with the respondent, and on the 2nd of February, 1897, obtained a decree *nisi*, which was made absolute on the 9th of August, 1897.

The petitioner afterwards married her present husband, Mr. Biddulph, but continued to style herself "Countess Cowley."

On the 11th and 15th of December, 1899, the respondent, Earl Cowley, moved in the Probate, Divorce and Admiralty Division, before Gorell Barnes, J., for an injunction to restrain his former wife from continuing to use the style and title which she had acquired by her first marriage.

On the 7th of February Gorell Barnes, J., granted an injunction restraining the lady from using the style or title "Countess Cowley."

From this decision the lady now appealed.

Lawson Walton, Q.C., and *Mark Romer*, for "Countess Cowley."—(1) The court has no jurisdiction to interfere in matters of the kind now in question. Questions of the sort were formerly cognizable, down to the time of James II., in the courts of the Earl Marshal. Such courts have fallen quite into desuetude; but their jurisdiction has not been transferred by the Judicature Act to the High Court of Justice. (2) The assumption of a family name by a stranger is not a cause of civil action in England unless it be in connection with some trade or business: *Du Boulay* v. *Du Boulay*, 17 W. R. 594, L. R. 2 P. C. 430. (3) The courts are unwilling unnecessarily to extend their jurisdiction by injunction: *Day* v. *Brownrigg, Ashford Lodge case*, 27 W. R. 217, 10 Ch. D. 294; *North London Railway* v. *Great Northern Railway*, 31 W. R. 490, 11 Q. B. D. 30. (4) This lady is only exercising a right which has always been recognized by social usage.

They also referred to the following authorities: Coke upon Littleton, 16*b* (Thomas' ed. (1818), Vol. I., 117); *Haward* v. *Duke of Suffolk*, 1 Dyer, 79*a*; *Countess of Rutland's case*, Coke's Rep. (ed. 1826), Vol. III., Part VI., 360; *Austrian Emperor* v. *Kossuth*, 9 W. R. 712, 3 De G. F. & J. 217; *Monson* v. *Tussaud*, [1894] 1 Q. B. 671; *Bonnard* v. *Perryman*, 39 W. R. 435, [1891] 2 Ch. 269; *Fendall (or Goldsmid)* v. *Goldsmid*, 2 P. D. 263, 26 W. R. Dig. 153; Elphinstone's Introduction to Conveyancing (5th ed.), p. 55.

Bargrave Deane, Q.C., and *Willock*, for Earl Cowley.—The only person legally entitled to call herself "Countess Cowley" is the wife of the present Earl Cowley. No person who has availed herself of an Act of Parliament to divorce Earl Cowley can have this right. Even the wife of a dead earl is entitled to his title only with the addition of "Dowager." [Lord ALVERSTONE, M.R.: Would you object to this lady styling herself, "Violet, Countess Cowley"?] Entirely. The usages of society have been urged on behalf of the lady, but they cannot amount to law. *Emperor of Austria* v. *Kossuth*, 3 De G. F. & J., at p. 217, is a distinct authority to show that the court will restrain the unauthorized use of a name. *Fendall* v. *Goldsmid* is distinctly in our favour, for here the lady has acquired a new name by repute—*i.e.*, by marrying Mr. Biddulph.

They referred also to *Aslatt* v. *Mayor of Southampton*, 29 W. R. 117, 16 Ch. D. 143.

Lawson Walton, Q.C., in reply.—An injunction against the lady is futile, for how can you restrain hundreds of other people in society from continuing the practice?

Cur. adv. vult.

Aug. 8.—COLLINS, L.J., read the following judgment of the court: We have come to the conclusion that the judgment of Barnes, J., in this case cannot be supported. We agree with the learned judge in his statement of the legal *status* of the two parties to this litigation. There can be no doubt whatever that Earl Cowley possesses in his title an incorporeal hereditament, and that the petitioner has no legal right to the designation Countess Cowley. The authorities which the learned judge cites fully establish both propositions: see also *In re Sir J. Rivett-Carnac's Will*, 33 W. R. 837, 30 Ch. D. 136. But it is here, as the learned judge himself felt, that the real difficulty begins. The application, as is pointed out in the judgment, was made by the respondent, Earl Cowley, in a divorce suit in which his marriage with the petitioner had been dissolved at her instance, and was originally placed on the ground of molestation, upon which it was impossible to support it, and it is admitted that there is no element of malice in the case. The learned judge, however, dealt with it as though it were a proceeding instituted in the High Court invoking its general jurisdiction to restrain the commission of a legal wrong, and the question is, whether the earl has established such a legal wrong committed against him by the lady who was his wife as to entitle him to the relief which he seeks against her. It is a remarkable thing that, if such a right exists, no precedent can be produced of such relief ever having been sought or obtained, though there must have been many instances in which it was desired. The case is not even one of another person calling himself Earl Cowley, as to which possibly different considerations might arise, and the right claimed by the earl, which stands entirely outside the marital relation, must be put high enough to entitle him to enjoin anyone from using without his consent any mere courtesy title derivable under his own—for instance, to restrain his mother, if she married a commoner, from continuing to call herself countess, or his daughter from calling herself lady. These, having no legal justification in either case, would, on the argument, be equally invasions of his right, which, put broadly, is to insist on all such persons being remitted to their strict legal position if without his consent they purport to hold titles as members of his family. In this view, and counsel did not shrink from it, it would be immaterial whether the title was one usually accorded by the courtesy of society or not. Indeed, pushed home to its logical consequences, it would seem to cover a claim to interfere with and restrain the use of a name expressly sanctioned by the Crown, as mentioned in the judgment of Barnes, J., and the affidavit of Sir A. W. Woods there referred to. It is strange that no such right has ever been enforced. We have been unable to find, and counsel were unable to point out, any analogous cause of action. The owners of franchises can maintain actions if such franchises are invaded; for instance, the owner of a market may complain of another being opened, but it must be shown to be near enough, and held on such days, as to interfere with, and be "a nuisance" to, his own: see Comyn's Digest, Market, C. 2, Action on the Case for Nuisance A. The owner of a freehold office, whose case seems to present the nearest analogy, might have maintained an assize for disseisin, or an action on the case for disturbance: see Comyn's Digest, Assize B. 2; Action on the Case for Disturbance A. 5. But it must have been an office of profit, and there must have been

"dissesin" or "disturbance." The acts of the lady in this case fall far short of either the one or the other. Even if trespass could be maintained in respect of such a tenement, we do not think that the acts of the petitioner could by any latitude of expression be described as a "trespass." They at most amount to an assertion, which is true in fact, that she was at one time the wife of Lord Cowley. Section 57 of the Divorce Act, 20 & 21 Vict. c. 85, provides that the parties shall be at liberty to marry again, as though the prior marriage had been dissolved by death. Here the earl's enjoyment of his hereditament is unaffected. He has suffered, so far as we can see, no *injuria* or *damnum* cognizable by law. The learned judge was of opinion that the fact that there was property in the title carried with it the right claimed, thus distinguishing it from the case of names in which there is no property. But, even if the property in the title could found a claim to enjoin anyone else from assuming it, without proof of other facts, as to which we give no opinion, the title assumed here is not identical, and Earl Cowley's remedy, if any, would seem to be by some form of action on the case, for which we can find no foundation in the facts here proved. But we think the case does not rest merely on the negative evidence of absence of precedent. The existence of the cause of action for jactitation of marriage, and the conditions upon which alone it was maintainable, furnish an argument against the earl. Though a person has in English law no property in his name, his *status*, whether married or single, is recognized by law, and carries with it certain rights and obligations; yet he could not complain if a woman who was not his wife claimed to be his wife, or enjoin her from so doing, unless she did it maliciously. We are not, of course, dealing with a common law action of defamation, which might conceivably be supported by such facts. Peers were, no doubt, plaintiffs in suits for jactitation as often as other persons, yet, if the right here claimed existed, they had a much simpler remedy. Indeed the case of *Hawke* v. *Corri*, 2 Hag. Con. 280, is a good illustration of this. There, in a suit brought by Lord Hawke for jactitation of marriage, the oppugnant called herself Lady Hawke; she set up a case of marriage which she, however, abandoned, and rested her defence on the fact that Lord Hawke had at one time consented to her bearing the title. This was held by Sir W. Scott to negative malice on her part, and the suit failed. The experienced counsel, arguing for Lord Hawke before Sir W. Scott, are reported to have said, in excusing their client for proceeding after his former conduct to the lady (p. 284): "A suit of jactitation was the only remedy by which the party could protect himself and his family from such an assumption of a false relation to himself and to them." This is more than negative evidence. The suit for jactitation has itself fallen into disuse, and it seems late in the day to find a substitute for it in the case of titled persons. In the present case the lady has married again, but the right claimed by the earl would, if allowed, be equally effective to restrain her, whether she had married again or not. It is not necessary to consider how far, if at all, social usage would support the lady in continuing to use the style Lady Cowley. The existence of such usage might be material in any proceeding where malice was part of the cause of action, but it seems irrelevant on the present inquiry. We are of opinion that the appeal must be allowed.

Appeal allowed.

Solicitors, *Wontner & Sons; Lewis & Lewis.*

High Court of Justice.

Chan. Div. Byrne, J. June 19, 1900.

In re HAYES.
TURNBULL v. HAYES. (*a.*)

Power—Special power of appointment—Will prior to creation of special power.

A special power authorizing the donee to appoint an interest in favour of a particular person will not be exercised by a will made by the donee prior to the creation of such power wherein testator appoints to such person an interest in all the residue of the property over which, at the time of his death, he shall have a disposing power.

Summons.

This was an originating summons to determine whether the will dated the 29th day of December, 1884, of Henry Hayes the younger, operated as a valid appointment—under the power conferred upon him in that behalf by the will dated the 10th of June, 1893, of his father, Henry Hayes the elder—to the defendant Isabel Elliott Hayes, wife of the said Henry Hayes the younger, of the whole income during her widowhood of the sum of £4,000 and the share of residue by the father's will settled upon trusts in favour of the said Henry Hayes the younger and his issue, and of an annuity of £50 out of such income during the remainder of her life in case she should marry again.

The executors and trustees of the will of the said H. Hayes senior were plaintiffs, and the said Isabel E. Hayes and Basil H. Hayes, an infant, were defendants.

The facts of the case were as follow: By his will dated the 10th of June, 1893, H. Hayes the elder, father of H. Hayes the younger, empowered each child of his by his or her will or codicil to appoint to the whole or any part of the yearly income of his or her share in the residuary estate under the will bequeathed for the life of his or her wife or husband, or for any interest determinable on or before the death of such wife or husband; and the testator directed that a sum of £4,000, raisable under the will, should be held upon the same or like trusts and subject to the same or like powers as were thereinbefore declared with respect to the share of H. Hayes the younger in the residue as if the same were there repeated.

The said H. Hayes the younger by his will, which was dated the 29th of December, 1884, after bequeathing certain legacies, gave all the residue of the property over which at the time of his death he should have a disposing power to trustees upon trust for sale and conversion on the trusts therein mentioned, and directed the trustees to pay the yearly income arising from his trust estate to his wife for life or widowhood; but in case she should marry again, then he directed his trustees to pay her an annuity of £50, and he directed his trustees to stand possessed of his trust estate subject to the aforesaid trusts upon the trusts for his children and otherwise as therein mentioned.

On the 20th of March, 1893, the last-named testator added a codicil to his will, whereby he appointed trustees and executors different to those in the will mentioned and otherwise confirmed his said will. At the time of the execution of his will H. Hayes the younger had no power of appointment in favour of his wife vested in him under any instrument, but under a settlement he had a power of appointing certain property in favour of his issue.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

H. Hayes the elder died on the 19th of April, 1895, and H. Hayes the younger on the 8th of September, 1899. H. Hayes the younger left him surviving his widow, the defendant, and their children.

D. D. Robertson, for the trustees for the will and the infant defendant.—The special power to appoint in favour of his widow has not been exercised by the will, for in the first place the will is anterior in date to the document creating the power: Farwell (2nd ed.), p. 226; *Stillman* v. *Weedon*, 16 Sim. 26. Section 27 of the Wills Act only relates to the exercise of general powers of appointment: *Cave* v. *Cave*, 8 De G. M. & G. 131, 4 W. R. Ch. Dig. 63; *In re Wells, Hardisty* v. *Wells*, 38 W. R. 229, 42 Ch. D. 646; *Hope* v. *Hope*, 2 W. R. 674, 5 Giff. 13; *In re Cotton, Wood* v. *Cotton*, 37 W. R. 232, 40 Ch. D. 41; *In re Milne*, 57 L. T. Rep. 828.

Adams, for the widow.—H. Hayes the younger in making his will refers to the possibility that some such power might be vested in him, and his aim was to exercise such prospective power. It is impossible to say that he had not a disposing power over the property appointed. It makes no difference whether the power was a general or a special one. *In re Milne*; *Thornton* v. *Thornton*, L. R. 20 Eq. 599, 24 W. R. Dig. 330; *In re Wells*; Farwell on Powers (2nd ed.), p. 494.

Robertson, in reply.—I do not say that under no circumstances will a will operate on a power subsequently created. There must, however, be some reference to the property or the power. It is not enough to use general words to sweep in everything.

BYRNE, J.—It is clear upon the authorities that the 27th section of the Wills Act applies to general and not to special powers of appointment: see *Airey* v. *Bower*, 35 W. R. 657, 12 App. Cas. 263; *Boyes* v. *Cork*, 28 W. R. 754, 14 Ch. D. 53; and *Foulkes* v. *Williams*, 42 Ch. D. 93, 37 W. R. Dig. 137. So far as the reasoning of the Vice-Chancellor in the case of *Stillman* v. *Weedon* is founded upon the application of section 27 of the Wills Act, such reasoning must be disregarded in view of later decisions. It is also clear that the combined effect of sections 24 and 27 of the Act is to enable a general power of appointment by will to be well exercised by a will executed prior to the date of the instrument creating the power. Unless *Stillman* v. *Weedon* is to be read as an authority to the contrary, I have been unable to find any case in which it has been decided that a special power of appointment by will can be executed by a will dated prior to the creation of the power, by virtue of the operation of section 24 of the Act, and the opinion of Stirling, J., in *In re Wells*, and the actual decision of the Master of the Rolls in Ireland in the case of *Doyle* v. *Coyle*, [1895] 1 Ir. R. 205, are distinctly opposed to any such conclusion. The case of *Stillman* v. *Weedon* may, I think, perhaps be reconciled with the last mentioned cases, either upon the ground that if specific personal property the subject of the power be referred to in the will, section 24 of the Act applies, because that property may then be said to be comprised in the will, or, to use the interpretative words of Turner, L.J., in *Lady Langdale* v. *Briggs*, 4 W. R. 703, 8 De G. M. & G. 391, at p. 436, "so far as the will comprises dispositions of real and personal estate," or upon the ground that, independently of the Act, if specific personal property the subject of the special power be dealt with by the testator he must be deemed to have intended to exercise the only power enabling him to deal with it, although such power be created subsequently to the will. I am not certain of the precise view taken by Lord St. Leonards in Sugden on Powers (8th ed.), p. 307, s. 49, where he deals with *Stillman* v. *Weedon*. Be this as it may, having regard to the opinion of Stirling, J., and of the Master of Rolls in Ireland in the cases I have mentioned, I do not think that I ought to deal with the present case (there being no specific description of or reference to the property in question) upon the footing that, not being within section 27, section 24 of the Wills Act applies. The difference in the result is that I cannot start with any presumption in favour of an exercise of the power by reason of the general words of disposition, looking only to see if there be a contrary intention expressed, but that I must approach the consideration of the terms of the will as though the Wills Act had never been passed.

Acting on this view, and bearing in mind that the subject-matter is personal estate and that such personal estate is not specifically mentioned or described in the will, bearing in mind also that the decisions in *In re Wells* and *Doyle* v. *Coyle* show that I should have regard to the date of the will, I will refer again to the case of *Foulkes* v. *Williams*, a case dealing with the exercise of a special power over real estate, where Lindley, L.J., says (42 Ch. D., at p. 97): "We must bear two things in mind. First, that section 27 only applies to a general power of appointment as to which a general devise operates as an exercise of the power unless there is some indication in the will of a contrary intention. Secondly, that as regards special powers the old law applies, which is that you must find some indication either by reference to the power or by reference to the property of an intention to exercise the special power. Anything which showed that the testator had the power in his mind would be enough. But if you cannot find anything to show that the testator had the special power in his mind it would be straining language to say that the devise would be an exercise of that power." The subject-matter in the present case is personal estate, and having regard to the old law before the Wills Act in reference to personal estate, I am unable to say that the property is so referred to as to show an intention to exercise a specific special power afterwards to be created.

Then I have to consider whether there is any sufficient reference to the power. It is at least doubtful whether I am at liberty to have regard to the fact that the only power that the testator could exercise in favour of his wife was the power in question. Even if I am, I find no reference to any specific limited power either existing or to be afterwards created, although I do find an intention expressed to dispose of all property over which the testator shall have at the time of his death a disposing power in favour of his wife to the extent of giving her a life interest. Notwithstanding the expression of an intention to dispose of all that the testator should at his death have power to dispose of, and notwithstanding the decisions bearing upon the effectuality of some similar expressions as showing a contrary intention in the cases of wills operated upon by the 24th and 27th sections of the Wills Act, I think, balancing as best I may the various considerations one way and the other, that the power has not in this instance been well executed. There are legacies given to the executors, who are no objects of the power, there is a trust for sale and conversion, and there is the use of the expressions "my estate" and "my trust estate," the latter being repeated several times over. I find a general intention shown to execute all powers of appointment and to benefit the widow, but upon the whole will I cannot find sufficient ground to enable me to hold her entitled as under an exercise of the subsequently created special power. I should like

to mention that in some of the text-books the actual discussion and decision in *Stillman* v. *Weedon* has been treated as though it were only in reference to a general power. It is, however, clear to my mind that, rightly or wrongly, the Vice-Chancellor considered both sections 24 and 27 to relate to special powers, and that he was actually dealing with a case of a special power. I must therefore hold that the power was not well exercised.

Solicitors, *Bell, Brodrick, & Gray*, for *Buchanan & Sons*, Whitby.

Chan. Div. Farwell, J. June 20, 1900.

In re BORN.
CURNOCK *v.* BORN. (*a.*)

Solicitor—Lien—Charging order on fund in court—Client a company—Application after winding-up order—Delay—Discretion—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163.

In an application for a charging order under the Solicitors Act, 1860, *s.* 28, *delay by the applicant is no ground for refusing the order unless other rights in respect of the property have arisen in the meantime.*

An order made under this section on the interest of a company in a fund in court is not such an execution on the assets of the company as would be void under section 163 *of the Companies Act*, 1862.

Summons by solicitors formerly employed by a limited company in an action for administration, brought against the estate of a deceased person.

The summons asked that the solicitors' costs should be charged upon the company's share of the funds in court to the credit of the administration.

The claim of the company was made in the administration action in January, 1897, and was duly admitted. In the following June the managing director of the company closed the office and departed to South Africa, so that the company's business ceased to be carried on and its name was consequently struck off the register by the Registrar of Joint-Stock Companies on the 28th of July, 1899.

In March of the present year a winding-up order was made against the company at the suit of a creditor. The present summons was issued a few days after by permission of the winding-up court.

Maugham, for the applicants, claimed that the charging order was the proper method of enforcing the solicitors' common law lien.

Cozens-Hardy, for the official receiver.—The solicitors have no real lien. They were not employed as the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28, requires, to "prosecute or defend any suit," for the company, their client, was not a party to this action. There is a discretion not to make the order, and the present is a case in which it ought to be exercised: *Greer* v. *Young*, 31 W. R. 930, 24 Ch. D. 545, at p. 557; *In re Humphreys*, 46 W. R. 322, [1898] 1 Q. B. 520, at p. 526. A period of more than two years has elapsed since the claim was brought in and the order made, and during that period the solicitors have done nothing. The property of the company is in equity the property of the creditors, and the two objections to the solicitors' mode of proceeding are (1) the delay, and (2) the winding-up order: *Roche* v. *Roche*, 29 L. R. Ir. 339. The charging order is in the nature of a lien for salvage; hence the principles of civil salvage apply: *The Europa*, B. & L. 89. The common law lien has been replaced by the statutory one; it is not applicable in a winding up, like the solicitor's lien on documents in his hands. If a creditor had issued execution the lien would be gone *pro tanto*. The result of this order would be that the official receiver would not be able to distribute any funds of a company in liquidation without taxing the costs of every solicitor whom the company had ever employed. The lien is a "disposition of the property" within sections 85 and 163 of the Companies Act, 1862 (25 & 26 Vict. c. 89).

Maugham, in reply, referred to *Haymes* v. *Cooper*, 12 W. R. 539, 33 Beav. 431, and *In re Capital Fire Insurance Association*, 32 W. R. 260, 24 Ch. D. 408.

FARWELL, J., after stating the facts, continued as follows: Jurisdiction is given by the Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 28. It is said that this is a discretionary jurisdiction; I agree. Two reasons are given why I should not make the order. There is, first, the delay. The delay of two and a-half years appears to me immaterial in a case where the company ceased to do business in 1897 and then the director left the country, so that no new rights can have accrued. The delay without the interposition of new rights must be immaterial. It is also said that the statute has abrogated the common law lien. That this is not so is decided by *Haymes* v. *Cooper*. I agree that this is an application under the Act to give effect to the statutory right; but it appears to me material to consider whether I am doing more than give effect to the common law right, which it is plain that the applicant possesses. This case is something like that of debenture-holders who have to allow the costs of the liquidator when they take the benefit of his exertions. All I am asked to do here is to give effect to the statutory right in aid of this common law right, and I see no reason why I should not make this order. It has been suggested that the operation of the lien was overridden by the winding up, and also that the statutory charging order is equivalent to an execution and therefore ought not to be made, having regard to section 163 of the Companies Act, 1862. I do not think there is any substance in either of these suggestions. The common law lien is a mere common law way of giving what the party himself might give. The order will be made as asked; costs of obtaining it to be added to the charge.

Solicitors, *Edwin Andrew & Co.*; *J. W. Browne.*

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

Q. B. Div. (Grantham and Phillimore, JJ.) June 26, 1900.

PETER WALKER & SON (LIMITED) *v.* BRISLEY (SURVEYOR OF TAXES).
GRINTER *v.* FLEMING (SURVEYOR OF TAXES). (*a.*)

Inland revenue—Inhabited house duty—Assessment—"Full and just yearly rent"—Poor rate—Licensed house—Competition of brewers—"Tied" houses—43 *Geo.* 3, *c.* 161, *s.* 10—48 *Geo.* 3, *c.* 55, *Sched. B, r.* 8—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *ss.* 1, 2.

In assessing premises, situated outside the metropolitan area, for inhabited house duty, regard need not be had to the poor rate assessments where such assessments are not based upon the full rental value of the premises.

In assessing a public-house for inhabited house duty, a covenant entered into by the tenant to deal exclusively

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

with his landlords, who were a firm of brewers, for exciseable and other articles, and covenants by the tenant to pay additional rent in any year in which he should deal for those articles with persons other than the landlords, and also in any year in which his indebtedness to the landlords should exceed a certain sum, should be taken into consideration.

PETER WALKER & SON *v.* BRISLEY.

Case stated by Commissioners of Inland Revenue.

The appellants appealed from an assessment on them for inhabited house duty as occupiers of premises fully licensed as a public-house, in Oswald-street, West Derby, Lancashire, on an annual value of £200.

The appellants were owners as well as occupiers of the premises. The gross annual value of the premises in the poor rate made before the time of making the assessment was £135.

It was contended before the commissioners by the appellants that the assessment was too high because (*a*) the full and just yearly rent which the premises were really *bonâ fide* worth to be let by the year was £120, and the assessment ought to be reduced to that amount; (*b*) as a matter of law the premises might not in any case be assessed on a greater annual value than the amount of the gross annual value stated in the poor rate, and that therefore the assessment ought to be reduced to that amount although the commissioners should decide that the actual annual value was far greater.

The commissioners held that they were not bound to observe the gross annual value of the premises in the poor rate as the maximum annual value on which the premises could be assessed to the inhabited house duty, and being satisfied that the annual value of £200 stated in the assessment in inhabited house duty was the full and just yearly rent which the premises were really and *bonâ fide* worth to be let, confirmed the assessment subject to this case.

Section 10 of 43 Geo. 3, c. 161, provided that every dwelling-house of the annual rent of £5 or upwards should be brought into charge in respect of the duties set forth in the schedule of the Act, "according to the full and just yearly rent at which the same is really and *bonâ fide* worth to be let."

Section 2 of 48 Geo. 3, c. 55, repealed the duties granted by 43 Geo. 3, c. 161, but saving the provisions for ascertaining, assessing, collecting, levying, paying, and accounting for the duties, and provided for the payment of other duties in respect of inhabited dwelling-houses.

By Schedule B of the Act rules are laid down for charging these duties.

Rule 7 is as follows: "No dwelling-house or other such premises as aforesaid shall be estimated or rated at any less annual value than that of the rent or value at which the same premises shall stand charged in the last rate made on or before the time of making the assessment for the relief of the poor in the same parish or place."

Rule 8 provides that "in case the said poor rate shall have been made throughout by a pound rate on the full annual value of all the dwelling-houses in the same parish or place then such assessment shall be made according to the said rate; and the assessors appointed or to be appointed for the said duties shall, in making their assessments on different dwelling-houses in the same parish or place in all such cases as aforesaid, observe the same rule of proportion between the assessment of the duties granted by this Act thereon as shall have been observed in making such poor rate as to all the premises aforesaid rated in such poor rate."

Rule 9 provides that "in case the said poor rate shall have been made on any proportionate part of such value then such assessors shall assess the same at the same sums respectively as they would have been assessed at by virtue of this Act if the same had been respectively estimated in such poor rate at the full value thereof respectively."

Rule 10 provides that "in case the poor rate in any parish or place shall not be made on the full annual value of the different dwelling-houses charged, nor according to any proportionate part of such annual value, but nevertheless the said dwelling-houses shall be rated in due proportion to each other, it shall be lawful for the assessors, by all lawful ways and means authorized by this Act, to inquire into and, to the best of their information and judgment, to ascertain the actual rent of the said houses and other premises aforesaid in different occupations within their limits which shall have been let within the period of three years preceding the time for making the assessment, or so many of them as they shall be able to ascertain the rent of, and shall make an assessment on the actual rent on such of the said houses and premises therewith occupied which shall appear to them to have been so let at a just and full value thereof, and shall afterwards proceed to assess the several other houses with the premises aforesaid occupied therewith in sums respectively bearing the same proportion, as far as the same can be computed, to the amount of such first assessment as the sums charged on the said poor rate on such other premises respectively bear to the sum charged in the said poor rate on the said houses and premises so first assessed."

Rule 11 provides that "in case any house . . . shall not be rated in such poor rate or shall be rated therein together with other property not chargeable to the duties hereby granted, or there shall be no poor in the parish or place where such house is situate, and in every case where the rules before mentioned are not applicable, the said assessors shall make their assessment from the best information they can obtain of the annual value thereof, which in all cases shall be the actual amount of the rent at which the said houses and premises aforesaid respectively are let, or if not let, the rent which they respectively are worth to be let by the year."

The House Tax Act, 1851, repealed the duties granted by 48 Geo. 3, c. 55, and, by section 1 provided that in lieu of the duties which are repealed "there shall be assessed . . . upon inhabited dwelling-houses the duties set forth in the schedule payable according to the annual value of such dwelling-houses." By section 2 it is provided that all the powers, provisions, rules, &c., as set forth in Schedule B of 48 Geo. 3, c. 55, shall be in force with respect to the duties granted therein, so far as the same are applicable and shall not be repealed or superseded, and are consistent with the provisions of the Act, as fully and effectually, to all intents and purposes as if the same powers, provisions, rules, &c., were particularly repealed and re-enacted in the Act with reference to the duties thereby granted.

Cripps, Q.C., and *Horridge*, for the appellants.—The rules in Schedule B of 48 Geo. 3, c. 55, have never been repealed, and they are therefore in force at the present time. The premises in question are within rule 8, and the assessment to inhabited house duty ought accordingly to be made according to the last poor rate. In *Dobbs* v. *Grand Junction Waterworks Co.*, 32 W. R. 433, 9 App. Cas. 49, it was held that the words "annual value" used in a special Act of 1852 meant net annual value as defined in the Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96). The words "full and just yearly rent" ought to be similarly interpreted, "yearly rent" being synonymous with "annual value." In the metropolis, by virtue of

section 45 of the Valuation of Property (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), the valuation list made under that Act is conclusive evidence of the gross and rateable values of the hereditaments included therein as well for the purpose of the inhabited house duty as for the poor and other rates. It could not have been intended that a different principle of rating should apply in the metropolis and in the country generally. [PHILLIMORE, J.—The Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 48-52, seems to support your view.]

Sir E. Carson, S.G. (*Danckwerts, Q.C.*, with him), for the Crown.—The rules in Schedule B of 48 Geo. 3, c. 55, are inapplicable to the state of things in 1851. There was no such thing at that time as a "pound rate on the full annual value" as is referred to in rule 8, or as a poor rate made on "a proportionate part of such value" as is referred to in rule 9. The rules were obsolete, and the commissioners had to resort to section 10 of 43 Geo. 3, c. 161, and had to ascertain the value of the premises according to the full yearly rent at which the same is really and *bonâ fide* worth to be let.

GRINTER *v.* FLEMING.

Case stated by the Commissioners of Inland Revenue.

In this case the appellant, a licensed victualler, appealed against an assessment on him for inhabited house duty as occupier of the "Bull" Hotel at Ilchester on an annual value of £60.

The appellant held the premises of Messrs. Ord, Battiscombe, & Elwes, brewers, on a yearly tenancy, determinable by three months notice on either side, at a rental of £14 per annum, under an agreement dated the 17th of March, 1898, whereby he covenanted (*inter alia*) to deal exclusively with the landlords for exciseable articles and aerated waters to be sold or consumed in the appellant's business.

The agreement further provided that a further rent of £10 should be payable by the appellant in any and every year in which he should (contrary to his agreement) directly or indirectly deal with persons other than the landlords for exciseable articles or aerated waters, which should be demandable at the option of the landlords, and accepted by them (so long as it was duly paid) in lieu of the remedy they might otherwise have by way of injunction to restrain the appellant's breach of his agreement. The agreement also provided that a further rent of £10 should be payable by the appellant in any and every year in which he should at any time during the tenancy be indebted to the landlords in a sum exceeding £30 for liquors or any such articles supplied to him by the landlords, or for money advanced by them to him, and should fail to pay and discharge such debt within twenty-four hours after notice in writing by the landlords so to do had been given.

Messrs. Ord, Battiscombe, & Elwes held the premises of the freeholder on a lease dated the 6th of May, 1893, for a term of ten years from the 6th of May, 1893, at a rental of £60 per annum, and they were bound to do all repairs.

For the last poor rate, which was made before the time of making the assessment to the inhabited house duty in the parish in which the premises were situated, the premises were assessed at the sum of £23 as the rateable value. The commissioners found that the rent of £14 per annum paid by the appellant was less than the full and just yearly rent at which the premises were worth to be let by the year as a free house to the occupier thereof, inasmuch as the appellant gave additional consideration for the tenancy of the premises—namely, the covenant to purchase all his beer, &c., of Messrs. Ord, Battiscombe, & Elwes.

The house was assessed for income tax under Schedule A at the annual value of £60.

It was contended on behalf of the appellant (1) that the assessment of the premises to the inhabited house duty should be the same as the rateable (or, in the alternative, the gross) assessment of the premises for the poor rate; (2) that in the alternative the assessment of the premises to the inhabited house duty ought to be the full and just yearly rent at which the premises were worth to be let by the year as a free house to the appellant as the occupier thereof, and not upon the rent which the landlords might pay for the premises on considerations personal to themselves in view of the competition among brewers to secure licensed premises for the purpose of letting them as "tied houses"; (3) that the commissioners ought to receive evidence which the appellant offered to adduce as to the annual value of the premises—that is to say, the rent at which they were worth to let by the year as a free house, or to take steps under 5 & 6 Vict. c. 35, ss. 81 and 82, 16 & 17 Vict. c. 34, s. 47, and 43 & 44 Vict. c. 19, or otherwise to ascertain such annual value; and (4) that by reason of this competition the rent of £60 per annum paid by Messrs. Ord, Battiscombe, & Elwes was more than the full and just yearly rent at which the premises were worth to be let by the year as a free house to the occupier thereof.

The commissioners declined to hear the evidence which the appellant offered to adduce and upheld the assessment.

Asquith, Q.C., and *Lochnis*, for the appellant.—This case comes under rule 8 of Schedule B of the Act 48 Geo. 3, c. 55. If it does not come under that rule then it comes under rule 11. In that case £14 is the proper assessment, for that is the actual amount of rent paid by the occupier. In the Act of 1851 it is clear that the words "annual value" are the governing words, and they are taken to be synonymous with "yearly rent" in the old Act. The very essence of rent is that it is what land or houses are worth to the landlord—that is to say, gross rent with the deduction necessary to secure it. The commissioners were wrong in refusing to admit the evidence tendered by the appellant. *Bradford-on-Avon Assessment Committee* v. *White*, [1898] 2 Q. B. 631, 47 W. R. Dig. 148, is an authority in point.

Sir E. Carson, S.G. (*Danckwerts* with him), for the Crown.—£14 is not the actual rent paid for the premises, because you have to add to that the liability the occupier is under by virtue of the covenant not to buy beer except from his landlord.

GRANTHAM, J.—Dealing first with the case of *Walker* v. *Brisley*, the difficulty of this case arises from the fact that the Acts of 45 Geo. 3, c. 161 and 48 Geo. 3, c. 55 were passed at a time when there was no settled basis by which the poor rate was assessed throughout the country. One can understand how this state of things arose when one refers to the statute of Elizabeth which provides that people are to be rated according to their ability. It is a matter of history that in the time of George III. the various parishes adopted various principles of rating, and so long as money was raised by each parish for the relief and maintenance of its poor it was allowed to do pretty much as it liked. But when it came to raising a tax for what we now call imperial purposes it became necessary to have some uniform system of rating. With this object rules 7, 8, 9, 10 and 11 in Schedule B of 48 Geo. 3, c. 55 were framed. A number of imaginary cases are taken in each of which it is prescribed what the assessors are to do, and then it is prescribed what is to be done if the case falls within none of the examples given.

Now although it is true that this schedule has been referred to, and given vitality to, by subsequent Acts of Parliament, yet in my opinion it is very difficult to apply it at the present time because the circumstances of rating are so entirely different to what they were. For that reason I do not think we ought to apply the principle of *Dobbs' case*. That case is an authority wherever it applies, but Lord Watson, while agreeing with the judgment in that particular case, said that it was not to be considered as an authority under any other Act of Parliament.

That being so, can it be said in construing rule 8 in Schedule B, following *Dobbs' case*, that "full annual value" is equivalent to what we may term rateable value? It seems to me, looking at the other rules, that that is not the meaning the words were intended to bear. Rule 7 says that premises are never to be rated at less than their rateable value. If rule 8 means what is the same thing, that the full annual value is the rateable value, what is the use of having rule 7? It seems to me, therefore, that the two rules must refer to different states of circumstances. Where the property has been rated at something less than its full value then rule 7 is to apply, and where no reduction has been made—as in some parishes was the case—from the rack-rent then in that case the rack-rent is to be taken as the basis. Rule 9 was put in to meet yet another set of cases—namely, where, as was done in some parishes, the property was rated at a proportionate part of its value—50 per cent. or 75 per cent., as the case might be. Rule 10 is very difficult to understand, and it is not necessary to go into the meaning of rule 11.

Passing now to the House Tax Act, 1851, that Act certainly does refer to Schedule B, but it does not say that under all circumstances the rules therein laid down are to be treated as rules which must necessarily apply, because in section 2 it says that the rules shall apply so far as the same shall be applicable. It remains to see, then, whether they are applicable or not.

There can be no doubt that the Taxes Management Act, 1880, was passed on the assumption that the inhabited house duty was not a duty which was assessed on the principle of poor rate assessment in the various parishes of this country. If that were so I cannot understand why provisions were inserted giving persons the right to adduce evidence on oath as to the value. The question would have been, simply, What is the poor rate? For these reasons it seems to me that all the Acts passed after 48 Geo. 3, c. 55, were passed upon the assumption that the principles of taxation in the case of the poor rate and in the case of the inhabited house duty were entirely different—that in the one case the taxation was for local purposes, and in the other for imperial purposes. In the one case it did not make much difference how the money was raised so long as there was enough raised to maintain the poor. In the other case, what the Legislature wanted was to get as large an amount as they could fairly from the whole country, treating the whole country fairly and equally by adopting a uniform principle with regard to taxation, so that when they used the word "rent" and "full value" they intended to adopt words which had a different meaning from annual value as interpreted in the Parochial Assessments Act, 1836. For these reasons I think our judgment in this case ought to be for the Crown.

In reference to the second case, *Grinter* v. *Fleming*, what I have now been saying will apply to the main principle that was in dispute in that case, and I do not propose to add to what I have already said. I will only say a word or two with regard to the other question in dispute—namely, whether the assessors were entitled to take the £60, the rent given by the real landlords, the brewers, as the basis of their assessment. In my opinion they are not necessarily bound by that figure, and it was their duty to take evidence and find out what was the value of the premises, and although I do not think we ought to bind them absolutely to the principle involved in *Bradford-on-Avon Assessment Committee* v. *White*, yet I think that that principle would, as far as I can see, apply in the present case. But I do not want to lay it down as law that it would, because as yet no evidence has been taken. I do not think that the contention made by counsel that £14 should be taken as the basis of assessment can be upheld. That would not be a fair basis, because it is not the rent which the occupier pays. By his agreement he agrees to pay an extra rent of £10 if he buys beer elsewhere. That makes the rent, or might make the rent, £24. Then there is another provision by which he is to pay another £10 if his beer bill is increased to £30. Then above and overriding all these provisions with regard to increased rental there is the liability to an action for breach of his covenant to buy his beer exclusively from the brewers; and beyond that again there is the power of the brewers to turn him out at three months' notice if they wish to do so. All these liabilities must be taken into account in determining what is the fair rent of the property. At the same time it seems to me that the £60 a year paid by the brewer is not necessarily the annual value of the premises. Without laying down a hard-and-fast rule the assessors are to determine on the best evidence that they can what is the fair rent of the premises as a house to be let in the particular position in which it stands without the tenant being under the obligation to buy beer from the owner.

For these reasons our judgment will be against the appellant on the first point, but with regard to the the point I have just dealt with the case must go back to the commissioners, who were wrong in refusing to hear the evidence tendered by the appellants.

PHILLIMORE, J.—I agree. Our judgment must be for the Crown in the case of *Peter Walker & Son* v. *Brisley*, but I base my judgment on somewhat narrow grounds. I think the Valuation of Property (Metropolis) Act, 1869, is a double-edged weapon. I do not think on consideration that any argument can be drawn from the Taxes Management Act, 1880. I think that every one of the sections of that Act to which reference has been made can be satisfied either by the income tax, or the land tax or the house duty in certain cases where obviously there can be room for dispute, such, for instance, as under rule 11 and rule 14, and I agree that the Crown is driven to the Act of 43 Geo. 3 for its taxing powers. I further agree that wherever rule 8 could apply, the Crown would have to apply it and be bound by it. But I have come to the conclusion that, at anyrate in this case—and probably now in every case—rule 8 cannot apply, and that the state of things contemplated by rule 8 does not now exist. I agree with my learned brother that probably the key to this matter lies in the fact that the system of rating at the time the Acts of 43 and 48 Geo. 3 were passed was by no means a uniform system, and it is not only possible but probable that at that time in several cases the assessment was actually upon the rental value of the property assessed; and when one calls to mind the original statute of Elizabeth it seems quite possible that that might have been the case. The inhabitant under that statute was to be rated according to his ability. The property which he occupied was really the measure of his ability. It would be quite fair and

safe to say that he was a man of such-and-such wealth because he lived in a house for which he paid such-and-such a rent; and it would be immaterial between him and the others in the same parish whether the rent of the house or the net value of the house was taken.

That being the state of things, as I think we are driven from many considerations to conclude that it was, the rules under 48 Geo. 3, c. 55, admit of cases where the rating will be upon the rental of the premises, or what has sometimes been called the gross or full annual value, and where it is so assessed I think the Crown would be concluded. If the poor rate purported to be a third of the gross annual value or such a proportionate part of the gross annual value as would enable one by a simple sum in proportion to arrive at the gross annual value, then, too, I think the Crown would be concluded and rules 8 and 9 would apply. But I think rules 8 and 9 are not in operation in this case, and probably never will be in operation again, because poor rates are never now assessed on the full annual value.

That leads us to the question which has been most strenuously debated in this case. I agree that for the purposes of the Waterworks Act, the Church Rate Act, and very likely for the purposes of most Acts, the term "full annual value" means the net value after all proper deductions, but I am satisfied that this Act of Geo. 3 has made its own dictionary, and that the words "full value" in that Act mean the rent to be got from the premises. I think that the initial words of the schedule help us. They are: "A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain according to the value. For every inhabited house which (with certain things) shall be worth the rent hereinafter mentioned." I think these words show that when the statute says "value" or "full value"—certainly when it says "full value"—it means rent. There are other portions of the statute which seem to me to point the same way. Therefore I think that rule 8 only applies where poor rate is assessed on what we now call the gross value. Rule 9 would apply where the rating for some odd reason is a proportionate value of the property—two-thirds, three-quarters, nine-tenths, and so forth. Rule 10 may apply to cases where the rate is not on its face a proportion, but where the value has been arrived at by actually assessing the property at a proportion of its value, or it may apply to cases where the assessment is fair—not because the full rate has been taken, nor because a proportion has been deducted, but because in each case the proper deductions can be made, those deductions varying in proportion in respect of the different houses or premises rated. If that is so, that helps us to see that rule 8 refers to the gross annual value. There remains rule 11, which enables us to understand the meaning of the words "worth the rent." That being so, there is nothing to exclude the assessors from making the inquiry they have made, and as upon the basis of that inquiry it is not disputed that this assessment should stand, in my opinion our judgment should be for the Crown.

In the case of *Grinter* v. *Fleming*, so far as the points are the same our judgment is, of course, the same. Then the appellant turns the Crown's argument against it and says: "Very well, let it be the rent—that is, £14 a year. You are bound by that, and that must be the value on which I am to pay the tax." I think the answer to that is that £14 is not the rent. Rents constantly in old days—not infrequently at the time when this Act was passed, and sometimes even now—were payable partly in money and partly in kind. I know of many, and I should have no hesitation in saying that that part of the rent which is payable in kind would have to be valued in order to arrive at the rent. So also if there are other considerations for the letting, such as a covenant to purchase beer from the landlord, such considerations are a part of the rent. And here I come to the little shadow of distinction between my learned brother and myself in the actual working out of the valuation in this case. I do not know whether it is important. I think that strictly speaking there ought not to be an inquiry as to what these premises are worth because I think they have been let, and I think the inquiry ought to be, What is this rent? and that the proper way to arrive at that is to estimate the value in money of the rent plus the covenants. The value is certainly more than £24, because if the tenant buys beer from elsewhere the landlords at their own option may impose an additional rent of £10, and possibly they may choose to exercise other remedies which would bring in the other £10. The latter remedy does not seem to me to be rent at all. But certainly the rent of the premises is more than £24. Of course if the inquiry is to be at large—if, that is to say, the inquiry is to be what the premises are worth to be let, then the canon in *Bradford-on-Avon Assessment Committee* v. *White* ought to be applied. Strictly, however, I think that that is not the canon to be applied here, but that the question is, what actually is the value of the rent and covenants—in other words, what is the value of the premises to let? Otherwise I quite agree with my learned brother.

Appeal in Peter Walker & Sons *v.* Brisley *dismissed.*

In Grinter *v.* Fleming, *case remitted to the Commissioners.*

Solicitors for the appellants in Peter Walker & Co. *v.* Brisley, *Field, Roscoe, & Co.*

Solicitors for the appellants in Grinter *v.* Fleming, *Godden, Son, & Holme,* for *Reed & Co.*, Taunton.

Solicitor for the respondents, *Solicitor of Inland Revenue.*

Q. B. Div.
(Grantham and Channell, JJ.) June 13, 1900.

LANGLEY *v.* BOMBAY TEA CO. (*a.*)

Merchandize Marks Act, 1887 (50 & 51 *Vict. c.* 28) *ss.* 2, *sub-section* (2); 3, *sub-section* (1)—*False trade description* — "*Application*" *to goods* — *Description implied from conduct.*

A purchaser asked at a shop for two half-pounds of tea. The salesman, without making any verbal statement, handed him two packets of tea, for which he paid. Each packet was stamped in ink, "The weight of this package, including the wrapper, is ½ lb." There was slightly less than ½ lb. of tea in each packet, but the weight of the tea and the wrapper combined was more than ½ lb.

Held, that the salesman had not by his conduct applied to the tea a false trade description of its weight within the meaning of the Merchandize Marks Act, 1887.

Case stated by justices of Newcastle-upon-Tyne.

An information was laid by the appellant, charging that the respondents did on the 2nd of December, 1899, unlawfully sell certain goods—to wit, two half-pounds weight of tea, to which a false trade description—namely, a false trade description or statement as to the weight of the said goods, was applied, contrary to the provisions of section 2, sub-section 2, of the Merchandize Marks Act, 1887.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

At the hearing of the information the following facts were proved or admitted:

On the 2nd of December, 1899, the appellant asked at the respondents' shop for two half-pounds of tea. The tea was lying in packets on the counter. One of respondents' salesmen took two packets, wrapped them in paper, and handed them to the appellant, who paid 2s. 6d. for them. Nothing was said by the salesman, who simply handed over the parcel to the appellant, who took it to William Taylor Denton, an inspector of weights and measures. The parcel was then opened and it was found that each packet containing the tea was stamped in ink as follows: "The weight of this package, including the wrapper is ½ lb." There was no evidence that this was specifically brought to the knowledge of the appellant at the time of sale. Denton weighed the packets and their contents, with the result that one packet was found to contain 144½ grains less than half a pound, and the other 132 grains less than half a pound. In each case the weight including the paper wrapper was in excess of half a pound, twenty-four grains in the one case and thirty-five grains in the other.

It was contended on behalf of the appellant that the mere handing over of the packets of tea in the manner above described to the appellant, who had asked for two half-pounds of tea, was a tacit representation by the respondents' salesman that each packet contained half a pound of tea, and that as the packets in fact contained less, a false trade description had been applied to the goods within the meaning of the statute.

The justices were of opinion that the "trade description" contemplated by the statute was something written, printed, or stamped, that a verbal description alone would not be sufficient, and *a fortiori* not a mere inference from conduct, as in the case before them. They accordingly dismissed the information, subject to a case for the opinion of the court.

The Merchandize Marks Act, 1887, provides as follows: Section 2 (2), "Every person who sells . . . any goods . . . to which any . . . false trade description is applied shall" (unless he establishes his innocence as therein mentioned) "be guilty of an offence against this Act." Section 3 (1), "The expression 'trade description' means any descriptive statement or other indication, direct or indirect, as to (*inter alia*) the quantity or weight of any goods."

Robson, Q.C., and *Jacobs*, for the appellant.—The salesman impliedly represented that each packet contained half a pound of tea, and by so doing he applied a false trade description. To "apply" a description does not necessarily denote a physical application: thus in *Budd* v. *Lucas*, [1891] 1 Q. B. 408, it was held that a description contained in an invoice which was not physically attached to the goods was a description applied to the goods. That decision was approved by the court in *Coppen* v. *Moore*, 46 W. R. 620, [1898] 2 Q. B. 300, at p. 311, and its logical consequence is that a trade description may be applied by a verbal statement or even by conduct. The *dictum* of Wright, J., in *Coppen* v. *Moore*, [1898] 2 Q. B., at p. 304, to the contrary, was *obiter* only.

Sir E. Clarke, Q.C., Joseph Walton, Q.C., T. Willes Chitty, and *Clarke Williams*, for the respondents, were not called on.

GRANTHAM, J.—I am of opinion that the decision of the magistrates was right. To my mind it would be a straining of the language of the Act to hold that the conduct of the respondents' salesman was an application to the goods of a trade description of their weight. The only statement of their weight which was applied to them was that printed on the wrapper, and that statement was true.

CHANNELL, J.—I am of the same opinion. I agree with the opinion of Wright, J., in *Coppen* v. *Moore*. It is true that that expression of opinion was unnecessary to the decision, but it was deliberately expressed, for it appears from the report that the learned judge had at first taken the opposite view, and in the course of argument had suggested that a verbal use of a false trade description might be sufficient, and the expression of opinion in his judgment was evidently inserted with the direct object of correcting the earlier suggestion. Under those circumstances I think that we ought to follow his view. But, independently of that, I agree with it, though at the same time I do not dispute that the point was very arguable. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Rowe & Maw.*

Solicitors for the respondents, *Crowders, Vizard, & Oldham.*

Q. B. Div.
(Darling and Bucknill, JJ.) May 31, 1900.

MASON (*Appellant*) *v.* COWDRAY (*Respondent*). (*a.*)

Adulteration—Food and drugs—Purchase of several bottles for analysis—Division of samples—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.

An inspector purchased at the same time and place, for analysis, six bottles of camphorated oil, and divided the bottles into three lots of two bottles each without opening any of them. One lot he handed back to the vendor, one lot to the analyst, and one lot he retained himself.

Held, that the inspector had not complied with section 14 *of the Sale of Food and Drugs Act*, 1875, *as each bottle was a separate "article" within that section, and should itself be divided into three parts.*

Case stated.

This was a case stated on an appeal from the justices of Bedfordshire, who dismissed an information under section 6 of the Sale of Food and Drugs Act, 1875, preferred by the appellant, an inspector under the Act, charging the respondent with selling, to the prejudice of the appellant, a drug—to wit, camphorated oil—which was not of the nature, substance, and quality of the drug demanded.

In November, 1899, the appellant purchased from the respondent six twopenny bottles of camphorated oil.

The bottles had affixed to them the name of a chemist in a neighbouring town.

There was no evidence that the name on each bottle was the same, or that the bottles were identical in character.

The six bottles were all purchased at the same time.

Having notified his intention to have the contents of the bottles analyzed, the appellant divided the bottles into three lots of two bottles each and sealed each lot in a separate bag.

One lot he handed back to the respondent and the other two lots he took away, one of which he sent to the public analyst, who found, on analysis, that the bottles did not contain 20 per cent. of camphor, as at least they should, but only 17·5 per cent.

The appellant did not open the bottles or mix the contents.

The justices dismissed the information on the ground that there had not been a compliance with

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

section 14 of the Sale of Food and Drugs Act, 1875, which provides that "The person purchasing the article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed . . . offer to divide the article into three parts to be then and there separated and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall deliver one of the parts to the seller or his agent."

Bonsey, for the appellant.—Section 14 has been sufficiently complied with. A single bottle could not have been properly divided as it was too small to hold sufficient of the oil for analysis. The appellant adopted the only practical way and the fairest method in this particular case. Nor would the mixture of several such small bottles of drugs be practical because so many drugs are volatile and lose their character on exposure to the air, and the making of such a division would require great care and could not be always properly carried out by a purchaser.

R. D. Muir, for the respondent, was not called upon.

DARLING, J., after reading section 14 and stating the facts of the case, said: I am of opinion that this appeal should be dismissed. The point we have to decide arises under section 14 of the Sale of Food and Drugs Act, 1875, which very clearly states what steps a person must take who purchases an article with the intention of having it analysed by a public analyst. He must divide the article purchased into three parts then and there separated and must mark and seal up each part. In this case the appellant purchased six bottles of camphorated oil, which bottles he divided into three separate lots of two bottles each, and sealed each lot in a separate bag, returning one to the vendor, and retaining one for himself and one for the analyst. He did not mix the contents of the six bottles and then divide the lot into three parts. He did not, in my opinion, comply with the requirements of the section. Suppose he went into the shop and bought one bottle, he would then be purchasing one article; if he bought six bottles, he bought six articles. It does not matter whether they be large or small, each bottle is an article in itself, and, as he did not divide any of them, he did not comply with the requirements of the Act.

BUCKNILL, J.—I agree.

Appeal dismissed.

Solicitors for appellant, *F. Venn & Co.*, for *W. W. Marks*, Bedford.

Solicitors for respondent, *Wetherfield, Son, & Baines.*

Q. B. Div.
(Darling and Bucknill, JJ.) } May 25, 29, 30, 1900.

In re AN ARBITRATION BETWEEN MASTERS AND THE GREAT WESTERN RAILWAY CO. (*a.*)

Lands Clauses Acts—Minerals demised apart from the surface—Right reserved to lessee to sink pits on surface subject to reasonable approval of lessor—Sale by lessor of surface to railway company—Interest in land—Compensation—Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 68.

The owner of the freehold of certain lands, demised the minerals thereunder to M. for a term of years. Contained in the lease was a proviso that M. and his assigns should have the right to sink new pits on the surface, subject to the reasonable approval of the said lessor as to the site thereof. The lessor afterwards agreed to sell part of the surface to the Great Western Railway Co., and the company gave notice to M. to treat in respect of any rights he might possess in such portion. Immediately after, on the same day, M. served upon the lessor notice of his intention to sink a pit on this particular portion of land, and claimed compensation under the Lands Clauses Consolidation Acts for the injury sustained by his "interest in the land" by reason of the exercise of the company's compulsory powers.

Held, that M., under the proviso contained in the lease, obtained an interest in the land, which interest was injuriously affected within section 68 *of the Lands Clauses Consolidation Act,* 1845; *and that he was therefore entitled to compensation.*

Special case stated in an arbitration under the Lands Clauses Consolidation Act, 1845.

By a lease dated the 24th of June, 1891, one A. V. H. Vaughan Lee demised to Thomas James Masters (the claimant) "All that piece of land situate in the parish of Llanharan, in the county of Glamorgan, coloured yellow on the plan annexed to the said lease and all the buildings and erections thereon and the pits and shafts now open thereon, and known as the Lanelay Colliery and works, and also all the seams and veins of coal which are intersected by and can be won and worked from the existing pit and such blackband, ironstone, and fireclay as may be associated therewith now lying in or under those several field closes or parcels of land part of the Lanelay estate and the Great Western Railway running through the same land situate in the said parish of Llanharan and containing by estimation 335 acres or thereabouts and surrounded with the colour pink on the map or plan; and all other seams or veins of coal, blackband, ironstone, and fireclay below the said seams or veins of coal hereinbefore described and also all railways, tramways, wayleaves, easements, and conveniences belonging to or used in common with the said colliery and works, together also with the rights and privileges to be exercised in connection with the said mines and minerals which are hereinafter particularly mentioned. To hold the same . . . for the term of sixty years subject to the provisions hereinafter contained. The lessee may at all times during the said term but subject to the restrictions hereinafter expressed deepen the said pits and shafts and sink, search for, win, work by long wall or otherwise, and so as not to let down the surface or otherwise, paying compensation as hereinafter mentioned, and may raise, get, stock, connect, and carry away the mines and minerals hereby demised, but without entering upon the surface of any of the said lands except the land coloured yellow on the said plan . . . and the lessee shall from time to time during the said term have all other privileges, easements, and advantages in and over the said land coloured yellow; and in but not over the said land surrounded by a pink colour which shall be necessary or proper for finding, obtaining, working, raising, landing, connecting, disposing, and carrying away the said coal, ironstone, blackband and fireclay, coke, bricks, and manufactured articles respectively, and also shall have full and free liberty, license, and authority to carry, convey, and bring out, through, and along any tram rail or other road or roads or air or water way or other workings under the said lands, or to make thereunder any other roads or ways for the purpose of carrying, conveying, and bringing out through or under or over the said land coloured yellow

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and through or under but not over the said land surrounded by a pink colour or any part or parts thereof all coal, ironstone, blackband, fireclay, and all other minerals that can, shall, or may be gotten or brought from any part of the said lands, and also from any other lands which may be worked in conjunction therewith, and for the conveying of which any such roads or ways shall or may be applicable. . . . Provided always and it is hereby agreed by and between the said parties hereto that if at any time during the said term hereby granted the said lessee, his executors, administrators, or assigns, shall think it necessary or desirable to sink a pit or pits on any part of the said land surrounded by a pink line other than the said land coloured yellow and other than the land surrounded with the colour purple (on or upon which no colliery operations of any sort may be carried on) and shall give notice thereof in writing to the said lessor, his heirs or assigns, then the rights of sinking pits and working minerals as well the demised minerals as other minerals with the necessary spoil and rubbish, and all other rights, easements, and privileges hereby conferred upon the said lessee, shall extend to and become applicable to sinking such other pit or pits on the lands other than those coloured yellow, and the working of such minerals with the necessary spoil and rubbish as fully and freely to all intents and purposes as if such rights, easements, and privileges had been originally extended to the whole of the lands surrounded by a pink colour, but so that the position of such pit or pits be subject to the reasonable approval of the said lessor, his heirs or assigns, or his or their agent for the time being."

On the 25th of May, 1898, the Great Western Railway Co., in pursuance of the Great Western Railway (Additional Powers) Act, 1897, and of the Acts incorporated therewith, gave notice in writing to Thomas James Masters that they required to purchase and take the lands and hereditaments delineated on the plan annexed to the said notice, the particulars of which were given in the schedule thereto, and which included part of the lands surrounded by a pink line other than the land coloured yellow, and other than the land surrounded with the purple colour demised under the lease dated the 24th of June, 1891 (*supra*), and that they the said company were willing to treat for the purchase of the said lands and hereditaments and as to the compensation to be made to the said Thomas James Masters.

On the 25th of May, 1898, Thomas James Masters gave notice under the lease to the agent of A. V. H. Vaughan Lee of his intention to sink a new pit upon part of the land specified in the railway company's notice to treat of the same date. The railway company entered upon the said lands, and it was alleged by Thomas James Masters that they had injuriously affected other lands wherein he had an interest in respect of which he claimed to be entitled to compen-sation.

An arbitrator was appointed under the Lands Clauses Consolidation Act, 1845, and he awarded that the sum of £100 ought to be paid by the railway company to Thomas James Masters in respect of the lands and hereditaments entered into and taken by the company. And that the further sum of £8,900 ought to be paid by the railway company to Thomas James Masters in respect of the damage sustained by him by reason of the severing of the lands taken from the other lands of Thomas James Masters, or otherwise injuriously affecting such other lands by the exercise of the powers of the Great Western Railway (Additional Powers) Act, 1897, and the Acts incorporated therewith.

The following facts were admitted between the parties, and with the documents constituted the special case.

1. That the only interest claimed by Thomas James Masters in the land taken by the railway company is as follows:

(1) A yearly tenancy of the surface of the said land.

(2) Such interest, if any, as is vested in the said Thomas James Masters under and by virtue of a clause in an indenture of lease dated the 24th of June, 1891, and made between A. V. H. Vaughan Lee of the one part and the said Thomas James Masters of the other part.

2. That the compensation to be paid to the said Thomas James Masters in respect of interest No. 1 was agreed in the course of the arbitration at £100 and that sum was accordingly awarded in respect of that interest by the arbitrator.

3. That the sum of £8,900 also awarded by the arbitrator was awarded solely in respect of interest No. 2.

4. That the sum of £8,900 was awarded by the arbitrator as compensation, and such amount was calculated on the basis of compensating the said Thomas James Masters for the additional expense which would or might hereafter have to be incurred by him, because the railway company, by taking part of the land referred to in the said clause in the said lease, had made it impossible for him hereafter to sink a new pit if and when required upon the part of the land so taken.

5. That on the 15th of March, 1898, the railway company agreed in writing to purchase from the said A. V. H. Vaughan Lee the freehold reversion in the land so taken from them as aforesaid.

6. That the land which has been taken by the railway company, and which was the subject of the arbitration, is that included in the notice to treat dated the 25th of May, 1898, referred to in the award, and which is shown on the plan attached to such notice.

7. That down to the date of the award no application had been made to the railway company by the said Thomas James Masters to approve any site proposed by him for sinking a new pit, and the only application made to the agent of Mr. A. V. H. Vaughan Lee was that contained in a letter dated the 25th of May, 1898.

8. That down to the date aforesaid the said Thomas James Masters had never commenced sinking any new pit.

By the Lands Clauses Consolidation Act, 1845, s. 68: "If any party shall be entitled to any compensation in respect of any lands or of any interest therein, which shall have been taken for or injuriously affected by the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case shall exceed the sum of fifty pounds, such party may have the same settled either by arbitration or by the verdict of a jury, as he shall think fit; . . ."

Lawson Walton, Q.C., Page, Q.C., and *Howard Wright,* for the railway company.—The claimant had, undoubtedly, a right to sink a pit on this particular piece of land, but this right was subject to the approval of the lessor, and did not amount to an "interest in land" so as to entitle him to claim compensation under the Lands Clauses Consolidation Acts. The lessor was not in a position to give his consent to the sinking of this pit as he had already agreed to sell his interest in the land to the company when the claimant gave notice of his intention to sink a pit there. His refusal was therefore reasonable: *Treloar* v. *Bigge*, 22 W. R. 843, L. R. 9 Ex. 151. The

notice given by the claimant was not a *bonâ fide* notice, but was given with the view of increasing the amount of compensation that might be awarded him. The claimant had no right to come to the surface at this particular spot, and he did not acquire an indefeasible right to do so by giving notice, even if the notice were *bonâ fide* and this particular spot were the most convenient. The clause in the lease is merely a personal clause and does not give the lessee any "interest" in the land. It is an affirmative covenant to give consent, and this, even with notice, does not run with the land: *Haywood* v. *Brunswick Permanent Benefit Building Society*, 30 W. R. 299, 8 Q. B. D. 403.

They also cited *Bird* v. *Great Eastern Railway Co.*, 13 W. R. 989, 34 L. J. C. P. 366.

Cripps, Q.C., James Fox, and *MacSwinney*, for the claimant.—The agreement between Vaughan Lee and the company was merely an agreement to purchase the surface of the land free from incumbrances. The company by acquiring the lessor's land could not thereby put the lessee in a worse position than that he would otherwise have been in. The lessee had a right to sink a pit at any time and it is immaterial when he gives notice of his intention so to do. [DARLING, J.—The lessee has an absolute right to sink a pit, but the lessor has a right to say where it may reasonably be placed.] The lessor would not have the right to refuse consent because the spot selected interfered with his enjoyment of the surface: *Metropolitan Board of Works* v. *McCarthy*, 23 W. R. 115, L. R. 7 H. L. 243. The basis of compensation is laid down in *Whitehouse and Another* v. *Wolverhampton and Walsall Railway Co.*, 18 W. R. 147, L. R. 5 Ex. 6, which was approved of by Lord Watson in *Holliday* v. *Mayor of Wakefield*, 40 W. R. 129, [1891] A. C. 81. The question raised in *Bates* v. *Donaldson*, 44 W. R. 659, [1896] 2 Q. B. 241, does not arise here. The right of the lessee to sink a pit on this ground is a vested and personal right; it is not a right given by a covenant: *Solway Railway Co.* v. *Jackson and Others*, 1 Ct. Sess. Cas. (4th series) 831; *Fleming* v. *Newport Railway Co.*, 8 App. Cas. 265, in which case Lord Watson says, at p. 281, "The compulsory taking of part of the superior's estate cannot, in my opinion, be regarded as equivalent, either in fact or law, to an exercise of the power reserved by the superior himself."

Lawson Walton, Q.C., in reply.—No right to penetrate the surface at this particular spot is possessed by the mineral owner, and therefore the occupation by the railway company of this spot does not affect him. His right is a qualified right by a covenant, and it must be exercised at a spot within the reasonable approval of the lessor. The right of the mineral owner cannot be exercised to the detriment of the surface owner. To obtain compensation the claimant must prove that he had a right to come to the surface at this particular spot. This he has not done: *Hayles* v. *Pease and Partners (Limited)*, 47 W. R. 370, [1899] 1 Ch. 567; *Love and Another* v. *Bell and Another*, 32 W. R. 725, 9 App. Cas. 286.

Cur. adv. vult.

May 30.—DARLING, J., after reading the demise of the minerals and the first part of the proviso as to opening pits in the land coloured pink, proceeded as follows: That proviso gives Mr. Masters the right, if he wishes, to work those minerals, and there being no pit upon the pink portion, and only upon the yellow portion, to sink a pit upon the pink portion in order to conveniently get and work the minerals demised to him on the pink portion of the plan. Now, to stop there: that would be an absolute right to sink such a pit upon any part of the pink ground. But this proviso goes on: " . . . but so that the position of such pit or pits be subject to the reasonable approval of the said lessor, his heirs or assigns, or his or their agent for the time being." That being so, although Mr. Masters had a right to sink a pit upon that pink land in order to work the minerals demised to him underneath it, yet he could not do so without some sort of control by Colonel Vaughan Lee, the lessor, and his assigns, and that control was to be so that the position of such pit was to be subject to the reasonable approval of Colonel Vaughan Lee. One of the questions which arise here, and the most important, is, Does that give Mr. Masters an interest in the land, a property in the pink portion of the land under which he has the minerals?

The lease having been granted in 1891, what happened was this: Colonel Vaughan Lee entered into an agreement with the Great Western Railway Co., on the 15th of March, 1898, to sell them a piece of land out of the land coloured pink, and he was going to sell them all the rights he had. He would sell them the property, but he would have to sell it subject to the right which was in Mr. Masters for sixty years to work the minerals lying under that piece of pink land which Colonel Vaughan Lee, by that agreement, agreed to sell to the Great Western Railway Co. Further than that, the surface was burdened with this: that, in order to work those minerals, Mr. Masters might have a right to sink a shaft upon that very bit of the pink portion which Colonel Vaughan Lee agreed to sell to the Great Western Railway Co. He might wish to do so, and if he did, or if Colonel Vaughan Lee had sold to the railway company—supposing this agreement, I mean, had been carried into effect and the land had actually passed, and all Colonel Vaughan Lee's interest had vested in the railway company—then it seems to me that he would have to get the approval of the railway company, which would stand in the same position to him as Colonel Vaughan Lee had stood, and which therefore must exercise their right of approval reasonably. Then, to my mind, it is plain that Mr. Masters has an interest, a property, in that bit of land which the railway company are going to take by virtue of the agreement of the 15th of March, 1898. On the 25th of May, 1898, the Great Western Railway Co. gave Mr. Masters a notice to treat. At that time he had not said to them a word about desiring to sink a shaft upon the land; and, of course, it is remarkable, and open to obvious comment, that whereas he had never until then said that he wished to sink a shaft upon this bit of land, he did on the 25th of May, 1898, give such notice. Of course it has been suggested to us that that was not *bonâ fide*, that it was only a means of making a railway company pay what they often have to pay, blackmail. However that may be, I do not think it is a matter which we can go into, nor does it matter, supposing he had a right to sink a pit at this particular place. Though I say it is not necessary to go into it, it is perfectly easy to allege a prejudicial motive on the part of Mr. Masters which in fact does not exist, and one cannot know anything about collieries without knowing that it may very well be that this particular spot may of all places be the most convenient and most advantageous place upon which Mr. Masters could have sunk a pit for the working of that colliery. Apparently, too, the arbitrator came to that conclusion. However, it seems to me that Mr. Masters had a right to select that particular portion, and to say, "I want to sink my pit there." It is true that Colonel Vaughan Lee would have a right to say, "I do not approve of your sinking it there"; and if he could reasonably say so—if upon all the facts it were reasonable that he should say so—then Mr. Masters would have to sink a pit somewhere else.

It seems to me that if the land passes to the railway company they take it with the same burden as Colonel Vaughan Lee is subject to, and they take it with the right of Mr. Masters to come to the surface at that particular spot unless they can show that it is not reasonable that he should come to the surface at that place. It seems to me that he comes within this definition which Mr. Cripps read to us from the case of *Metropolitan Board of Works* v. *McCarthy*, of the damage which will give a claim to compensation under the Land Clauses Consolidation Act, 1845. Lord Cairns there says (adopting Mr. Thesiger's contention): "Mr. Thesiger stated that the test which he would submit as one which he thought would explain and reconcile the various cases upon this subject was this; that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if by reason of such interference the property as a property is lessened in value." Now, the railway company are going to take some property, and it seems to me that they do in the exercise of their powers interfere with this right of the claimant, which is a right to come to the surface and bring his minerals to the surface at that particular place unless he comes within the exception that it is not reasonable that he should do so. Upon that it is said, Colonel Vaughan Lee having agreed to sell this particular part of the land to the railway company for a purpose which could not be carried out if Mr. Masters were permitted to sink a pit there, it is not unreasonable that approval of a pit so situated should be refused. In other words, it is contended that we ought to hold, as I understand it, as a matter of law—I think it might be a question of fact, because everything would have to be taken into consideration in order to see what was reasonable in the approval or disapproval of Colonel Vaughan Lee—that because he has said "I will sell this to the railway company" it cannot be reasonable that Mr. Masters should ask to exercise his right to come to the surface at the particular spot. Now, it appears to me that that argument is a bad one for this reason: if it is true of a small piece of ground, it is true of a large piece. Where could you limit it? How could you say it is true if five acres are sold, and not true if only five acres are retained? As I have pointed out, the mere question of area will not settle it. It is no answer if Mr. Masters wished to come up in the five acres sold to say, "There are 345 acres left: come to the surface at one of these," because it may be that the one little bit taken, if it were only fifty yards square, might be of more value to the lessee for this purpose than all the rest of the surface put together. Now, that being so, test the argument in this way. I say if it is true of the small piece it is true of it all. If it is good to say "You cannot reasonably call upon me to approve because I have entered into a contract to sell five acres of the land," then it would be true, it seems to me, to say that even if the answer were, "You cannot call upon me to allow you to come to the surface anywhere with your pit, because I have sold the whole of the land." That, however, reduces the thing to an absurdity, because if that is so, Colonel Vaughan Lee the day after making this lease to Mr. Masters might have agreed to sell the whole land, and could then have said to Mr. Masters, "I have agreed to sell the whole of this land and the vendees are going to build all over it. If you have a right to come to the surface with your pit my contract becomes an impossible one. You cannot call on me reasonably to approve of your coming up with your pit, therefore, and so your right to do so is gone." The consequence of holding this would be that there would be coal demised to Mr. Masters which he might be unable to work at all, and which at any rate he could work only through pits in the part of the surface coloured yellow. His right to come to the surface at any other part would be defeated. But he has a right to come to the surface anywhere he pleases—not an absolute right to come at any particular place, but as good a right to come to the surface upon one part as upon another, and no worse on this piece of land which is being sold than upon any other part which is being retained. It seems to me that the Great Western Railway Co. by exercising their compulsory powers (which they exercise by their notice to treat) have injuriously affected this right. It seems to me this right is, within the definition given by Mr. Thesiger and accepted by the Lord Chancellor, something which gives an additional market value to his property and that therefore the interference with it by the Great Western Railway Co. gives him a title to compensation. If all the Great Western Railway Co. have done is to purchase what Colonel Vaughan Lee had, then they purchased subject to the disabilities which Colonel Vaughan Lee had laid on himself. If Colonel Vaughan Lee had said to Mr. Masters, "I am under an obligation to allow you to sink a pit upon this bit of ground, but for reasons of my own I will not do it," and if the question had been litigated whether his approval was reasonably or unreasonably withheld, then if it were unreasonably withheld there would be a right of damages in Mr. Masters as against Colonel Vaughan Lee. If the railway company have taken by agreement what Colonel Vaughan Lee had, they are now under the same disability as Colonel Vaughan Lee, and if they refuse for purposes of their own to allow Mr. Masters to come to the surface at this spot, it then seems to me that they would be liable to an action just as Colonel Vaughan Lee was. If on the other hand they are taking by means of statutory powers—taking without any kind of question of option or refusal or anything of the kind—then they are taking from him the right to work his minerals at that spot, which is as good a right as his right to work them at any other spot upon the pink ground; and as the right would have to be valued if it were taken over the whole pink ground, so in principle it appears to me to be just the same if only a portion is taken and not the whole. They do, by so much as they take, affect his right; they do, by so much as they take, diminish the value of his property. Therefore I think our decision here must be in favour of Mr. Masters and against the Great Western Railway Co.

BUCKNILL, J.—I have only a few observations to add. I begin by saying that this case has given us a great deal of difficulty and I was very much puzzled during the arguments as to the view I ought to take. Now, the first question of law really arises upon the proper construction of the indenture of the 24th of June, 1891—that is to say, what is the nature of the interest which Mr. Masters, the lessee, took under that lease to him from Colonel Vaughan Lee? As we know, it is beyond a doubt that in the first place he took a demise for sixty years of the piece of land coloured yellow and also of the seams or veins of coal under an acreage of about 355 acres of ground, and also he took this, the rights and privileges—and I consider this a very important part of the matter—"to be exercised in connection with the said mines and minerals which are hereinafter particularly mentioned." Now, the clause about which so much has been said is this:

"That if at any time during the said term hereby granted the said lessee, his executors, administrators, or assigns, shall think it necessary or desirable to sink a pit or pits on any part of the said land surrounded by a pink line," &c., and shall give notice thereof to the said lessor, his heirs or assigns, then the rights of sinking pits and working minerals, as well the demised minerals as other minerals, with the necessary spoil," &c., "shall extend to and become applicable to sinking such other pit or pits on the lands other than those coloured yellow . . . but so that the position of such pit or pits be subject to the reasonable approval of the lessor," &c. Now, one thing is clear, that the lessor, Colonel Vaughan Lee, never refused his approval or gave it.

Now, as I understand the contention on the part of the railway company, it is this: In the first place they say that the clause in the lease was a mere personal covenant, and did not create any interest in the land; and secondly, that as the Great Western Railway Co. have purchased Colonel Vaughan Lee's reversion in fee in this land, the lessee, Mr. Masters, was bound to give to the railway company the same notice under the lease that he would have been bound to give to Colonel Vaughan Lee, and not having done so, he cannot get anything. On the other hand it is contended that this is not so, and cannot be so, because there has been created by this demise an interest in the land attaching to it affecting the mode and value of its occupation by Mr. Masters, and therefore an interest in the land which, if injuriously affected by the railway company's taking it under their compulsory powers, must be paid for, because it gives to the person whose interest has been so injuriously affected a right to compensation under the Act of Parliament. Now, I agree with my learned brother that although whilst there has been no demise of the whole surface of the 355 acres that there has been a demise of something which perhaps it is difficult in language exactly to define, but which in fact is and was at the material time a right and privilege to be exercised in connection with the said mines and minerals which were mentioned in the lease.

Now, if that is so, the matter is clear and in my opinion there is nothing more to be said, because the moment you get the interest in land created, you have as a fact the finding of the arbitrator that the interest has been injuriously affected, and he has found or must be taken to have found that this was a reasonable place to sink the shaft, and that if it had been a question between Colonel Vaughan Lee and Mr. Masters. Mr. Masters would have been entitled to say to Mr. Vaughan Lee, "You ought to allow me to put a pit upon that particular site." I think it is no answer by the railway company to say that because they have purchased voluntarily from Colonel Vaughan Lee therefore the lessee, Mr. Masters, is bound to give the same notice to them as he would have been bound to give to Colonel Vaughan Lee. I think the position is this: What was the interest of Mr. Masters, the exact legal interest which existed in him at the time when the Great Western Railway Co. gave him the notice to treat on the 25th of May? It was this, that he had on the very same day given notice to his lessor, Mr. Vaughan Lee, who had not sold, but who had entered into an agreement to sell, that Mr. Masters should be entitled to put a pit upon that particular spot. That it was a reasonable place to put it and that it was a proper place to put it has been found in fact by the arbitrator, for it appears that this was a matter on which he was in fact asked to find, and although he has not found it in terms, it must be taken that he has in fact found it. He has then found that £8,900 is the compensation which ought to be paid to Mr. Masters for the injuriously affecting of this interest, which I hold to exist in law, in consequence of the railway company having taken his land under compulsory powers. Therefore I think that he is entitled to the amount of £8,900 which has been awarded to him in that respect.

I should like to say that I have read carefully the cases which have been cited to us during the argument on one side and on the other. With regard to those cases which were cited on the point of covenants running with the land, I do not decide that this was a covenant running with the land in the way in which it is generally spoken of. It created an interest which affected the reversion. It could not be destroyed by Colonel Vaughan Lee unless he could succeed in showing as between himself and Mr. Masters that Mr. Masters' application to him was unreasonable with regard to the site of the pit. With regard to the other cases I wish to say that I do not think any of them are quite in point. No exact case has been cited to us which can be called a direct authority on the point. I am astonished that that is so, because one would have thought that these questions must very often have occurred. My decision, which I am trying to put as shortly as I possibly can, is this: This lease did create an interest in favour of the lessee which attached to the land demised to him with regard to the minerals and a right with regard to the surface of such a nature that it was an interest attachable to the land which the Great Western Railway Co. have taken. It could not be destroyed by Mr. Vaughan Lee, it cannot be destroyed by the Great Western Railway Co., and they, having taken it compulsorily under their statutory powers, must pay for the interest of Mr. Masters which they have injuriously affected in that respect.

Solicitors for Masters, *Bell, Brodrick, & Gray*, for *Linton & Son*, Cardiff.

Solicitor for the Great Western Railway Co., *R. R. Nelson*.

Privy Council.

(*From the Supreme Court of New South Wales.*)

June 19, 1900.

Williams v. Scott. (a.)

Vendor and purchaser—Trustee—Specific performance—Trustee purchasing from cestui que trusts—*Onus on trustee—Taking over contract.*

Where a trustee for sale seeks to justify a sale as a purchase by him from his cestui que trusts, *the burden of proof that the transaction was a proper one rests upon the trustee, and he is bound to produce clear affirmative proof that the parties were at arm's length, that the* cestui que trusts *had the fullest information upon all material facts, and that, having this information, they agreed to and adopted what was done. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the* cestui que trusts *were informed of all necessary matters.*

A title to property depending on such a sale will not be forced on a purchaser.

Appeal from the Supreme Court of New South Wales.

The facts are given in their lordships' judgment.

Warrington, Q.C., and *W. B. Lindley*, for the appellant.

(a.) Reported by C. H. Grafton, Esq., Barrister-at-Law.

Swinfen Eady, Q.C., and *E. Morten*, for the respondent.

The judgment of their lordships (Lord DAVEY, Lord ROBERTSON, Lord LINDLEY, Sir HENRY DE VILLIERS, Sir FORD NORTH) was delivered by

Sir FORD NORTH.—On the 2nd of December, 1898, the respondent, a mortgagee with power of sale, agreed to sell to the appellant a piece of land at Sydney, in New South Wales, for £550. The purchaser paid a deposit of 25 per cent., or £137 10s. So far as regards the title, the contract was an open one.

The title disclosed by the abstract, so far as material was as follows: By her will dated the 12th of April, 1887, Mrs. Catherine Austin appointed her son David Austin and her daughter Catherine Neilan her trustees and executors, and devised the property in question and other property to them upon trust to sell the same; and after payment of her debts, funeral and testamentary expenses, and the costs of sale to divide the residue of the proceeds among her eight children named in her will.

Catherine Austin died in 1888, and by a deed dated the 28th of June, 1889, and made between the said David Austin and Catherine Neilan, described as trustees and executors of Catherine Austin, of the first part, William Neilan (the husband of Catherine Neilan) of the second part, the said David Austin as administrator *de bonis non* of the deceased husband of Catherine Austin, of the third part, Sydney John Bull of the fourth part, and the said David Austin, as purchaser, of the fifth part; after reciting (*inter alia*) the will and death of Catherine Austin and that the said David Austin and Catherine Neilan had contracted with the same David Austin for the sale to him as purchaser of the land in question, it was witnessed that in consideration of £550 paid by the purchaser to the trustees, the parties of the first three parts conveyed the property by the purchaser's direction to S. J. Bull to such uses as the purchaser should by deed or will appoint and in default of appointment to the use of the purchaser in fee. By a receipt indorsed upon that deed it appears that on the day of its date the trustees received the whole purchase-money of £550 from David Austin.

The abstract also showed that by deed dated the 30th of September, 1897, David Austin mortgaged the property to the respondent for £500.

The purchaser's solicitors objected to the title upon the ground that David Austin was incapable of purchasing from himself and his co-trustee, and that the title therefore was not a marketable one. The vendors solicitors insisted that the title was good, and produced a copy of what they described as an absolute release to the trustees from all the beneficiaries under the will of Catherine Austin, such release being dated the 15th of June, 1889. The purchaser's solicitors pointed out that the release was insufficient, as it did not show that the beneficiaries were aware, or knew the effect, of the transaction in question: to which the vendor's solicitors replied that the transaction was well known to and acquiesced in by all the beneficiaries: and that in fact it was because the sale was made in the form set out in the conveyance of the 28th of June, 1889, that the release of the 15th of June was executed. The purchaser's solicitors still insisting on a deed of confirmation, the vendor's solicitors wrote on the 9th of January that they declined to procure such a deed, as they did not consider it necessary: not suggesting, however, that there could be any difficulty in procuring the execution of such a deed by all parties. In the same letter the vendor's solicitors also wrote: "Since writing you previously we have discovered that the sale was not made to David Austin, but to John Austin; who was not a trustee, but was one of the beneficiaries under the will of Catherine Austin. We have obtained a copy of the contract for sale, which may be inspected here. We send, herewith, a copy of the advertisement. This property was put up for sale by Messrs. Richardson & Wrench on the 16th of November 1888, and was knocked down to John Austin for the sum of £550 subject to Messrs. Richardson & Wrench's usual printed conditions. Subsequently to the date of the contract John Austin agreed with David Austin that the latter should take the land purchased by John Austin, and relieve him of the contract. This was done, and the land was conveyed to Mr. S. J. Bull as trustee for David Austin. The property was not therefore purchased by D. Austin from the trustees, but from John Austin."

This disclosure did not induce the purchaser's advisers to dispense with confirmation by the beneficiaries; and as such confirmation was refused they claimed to have the deposit returned; saying, however, that they were willing purchasers, and if their objections were met in a fair way within the next week or ten days their client would still be prepared to purchase the land; to which the only reply of the vendors' solicitors was, on the 16th of January, that they had answered all the requisitions; and that, under a power in the contract, the vendor would re-sell unless the purchase was completed during the week, and hold the purchaser liable for any loss on such re-sale. They did accordingly advertise the property for sale; but this was stayed by an injunction in the present suit, commenced by the purchaser against the vendor for rescission of the contract, upon the ground that the vendor had failed to make out a good title to the property, and for a return of the deposit and other consequential relief.

On the 3rd of March, 1899, the suit came on to be heard before the chief judge in equity, who agreed by the wish of both parties to decide the one point as to the title raised by the requisition above quoted, and to leave it open to either party to ask for a reference to the master as to the title on all other points. On the same day he made a decree declaring that the defendant had failed to make out a good title to the land and that the contract must be rescinded; directing that the deposit should be repaid to the purchaser with interest, and that the plaintiff's costs of the suit should be paid by the defendant; declaring that the plaintiff was entitled to a lien on the defendant's interest in the land for such deposit and interest; and restraining the defendant from dealing with the land to the prejudice of that lien.

The vendor—the defendant in the action and present respondent—appealed from that decree; and the appeal was heard before the Chief Justice, Sir Frederick Matthew Darley, and Mr. Justice Owen and Mr. Justice Walker. The two former agreed that the title was one which could be forced upon a purchaser, and that the decision of the court below was wrong. The latter was of opinion that the appeal should be dismissed.

Their decree was dated the 25th of May, 1899, and declared in effect that the decree of the 3rd of March should be reversed; and that the agreement of the 2nd of December, 1898, ought to be specifically performed and carried into execution in case a good title could be made to the land in question; and directed inquiries as to the title. It also directed that the costs of that appeal should be paid by the plaintiff (the present appellant) to the defendant; and

that the other costs of the suit should be reserved until further consideration.

It is clear undisputed law that a trustee for the sale of property cannot himself be the purchaser of it—no person can at the same time fill the two opposite characters of vendor and purchaser. But the purchase by David Austin is attempted to be supported upon two grounds not quite consistent with one another—viz., first, that he was the purchaser of the property from all the beneficiaries, who agreed in the sale to him with full knowledge of all the circumstances; and second, that he and his co-trustee sold the property to John Austin, one of the beneficiaries, who not being a trustee was under no incapacity to purchase; and that David Austin subsequently purchased it from John Austin.

As regards the first point, their lordships are unable to agree with the view taken by the majority of the full court. No sufficient evidence is forthcoming that any of the beneficiaries knew of the circumstances under which David Austin acquired and took the conveyance of the property. The only document relied upon is the release already mentioned—but this is not specifically directed to the defect in question, and is quite insufficient for the purpose of curing it. It is unskilfully framed and inaccurate, and instead of being precise is extremely vague and general. It is impossible to treat this release as finally bringing the trust to an end: the property now in question still remained vested in the trustees; and the purchase-money remained unpaid. Although the release states that the property had been sold, the fact that the sale had been to David Austin, a trustee for sale, and was therefore impeachable as not being a sale at all, is not disclosed: and the explanation that this release of the 15th of June was executed because of the form of the conveyance executed thirteen days afterwards is not intelligible. The accounts referred to in the release, which would probably have thrown some light upon the matter, are not produced. The only other evidence bearing upon this point is the affidavit of Mr. White, who appears to have been in 1889 an articled clerk of Mr. Bull, the solicitor of the trustees of Catherine Austin; and who is now a member of the firm acting as the vendor's solicitors. He says in the third paragraph of his affidavit, that all the beneficiaries under the will knew that the land was purchased by John Austin, acquiesced in the sale, and ultimately received the purchase money and executed the release. It is remarkable that in the letters written by this gentleman's firm as the vendor's solicitors, the knowledge asserted and the acquiescence relied upon are knowledge of and acquiescence in a sale not to John Austin at all, but to David Austin the trustee—a totally different matter—the alleged sale to John Austin not having been discovered till a later period. Moreover, a general statement that persons knew and acquiesced is in itself of little weight; it is a statement not of facts, but of results; a mere allegation by one party of the condition of mind of others. It may be that the deponent's statement that the parties knew and acquiesced is merely an inference drawn by him from the fact that they have not taken any steps to re-open the matter. To give such a statement any value as evidence it should also show what knowledge of the material facts the parties had, and how they had obtained such knowledge, and by what acts of theirs their acquiescence was shown—but this is wholly wanting. It is difficult to understand, on the perusal of Mr. White's affidavit, what are the "foregoing facts" which he says he knows of his own knowledge. It cannot be that he refers to all that has previously been stated. This would make different parts of the affidavit inconsistent with one another; and would treat the deponent as swearing to facts irreconcileable with existing documents. This affidavit of the defendant's solicitor is not supported by any other evidence. David Austin, the trustee who has been ever since 1888 in possession of and is now residing upon the property, and has mortgaged it to the vendor, and who must know all the facts, is not called as a witness; nor is Mrs. Neilan, the other trustee; nor are any of the beneficiaries to whom knowledge and acquiescence are imputed; and no reason is given for their absence. Under these circumstances it is clear that, if David Austin did himself purchase from the trustees, as stated in the conveyance of the 28th of June, there is not before their lordships any evidence of such acquiescence with full knowledge on the part of the beneficiaries as would prevent them from now coming forward to challenge the validity of the sale. They are not parties to this action, or bound by any of the proceedings in it.

The other point relied upon is that the sale by the trustees was really made not to David Austin the trustee, but to John Austin, one of the beneficiaries, who was not a trustee, and was therefore capable of being the purchaser. This is absolutely inconsistent with the terms of the conveyance itself, which recites that the contract was by the trustees with David Austin, and shows that the whole purchase money was paid by him. The abstract of title was made out upon the footing that David Austin, and not John Austin, was the purchaser from the trustees, and the title is not traced through John Austin at all. The alleged sale to John Austin was apparently not even known to Mr. White until after the abstract had been delivered. He does in his affidavit state that on the 16th of November, 1888, this property was sold by auction by Messrs. Richardson & Wrench to John Austin for £550, and puts in a copy of the contract then entered into. Where this document comes from is not stated, nor is there any proof that it is a correct correct copy, nor is the absence of the original accounted for. It purports to be a copy of the conditions of sale at the auction, and to bear at its foot the signatures "J. Austin" and "Richardson & Wrench for vendor." The original with John Austin's signature would in ordinary course have remained in the possession of Messrs. Richardson & Wrench, the vendor's agents; but although an affidavit is made by a Mr. Gregg (who describes himself as one of the managing directors of Richardson & Wrench (Limited)) which states that the land was sold to John Austin, the highest bidder, for £550, he does not state that he was concerned in the matter, or was a member of or in the employ of that firm in 1889, nor disclose his means of information upon the subject, or refer to either original or copy of any contract bearing John Austin's signature. Neither Mr. Gregg's evidence, nor the copy contract put in by Mr. White, refers to any deposit having been paid by John Austin; and this bears out the statement on the conveyance that the whole £550 was paid by D. Austin on the 28th of June. Mr. White states in his affidavit that John Austin purchased this land *bonâ fide* for his own use and paid a deposit on account of the same; that he subsequently agreed to sell it to David Austin, and it was arranged that instead of the land being conveyed to John Austin, and by him to D. Austin, it should be conveyed direct to Mr. S. J. Bull as trustee for D. Austin. It is not stated when or how or by whom this alleged arrangement was made, or how Mr. White was informed of it. If the arrrangement had been such as he states, John Austin should have been joined as a party to the conveyance; which should have recited the contract by the trustees to sell to John, and the contract by John to sell to David; and

the conveyance by the trustees to David, or to Mr. Bull, should have been under John's direction. Although John was not a party to this deed he was a party to and executed the release of the 15th of June, in which he is described as "of Sydney, freeholder." If the conveyance had been thus framed the truth would have been fairly stated, whatever else might be said about the transaction. Upon what conceivable ground can it be supposed that the parties should have ignored the real facts, and have invented a false account of the transaction, and that, too, one which introduced a palpable blot upon the face of the title? Here also evidence is absent which might have been available if the transaction had been such as is suggested. But D. Austin and Mrs. Neilan, the trustees, are silent. Mr. S. J. Bull, the solicitor of the trustees, who as trustee for David Austin himself was a party to the conveyance of the 28th of June, and is at present practising as a solicitor at Sydney, is silent also. John Austin makes no affidavit; but it does not appear what has become of him.

It may be that the true account of the transaction is that suggested in the letter of the 9th of January, 1899—viz., that after John Austin had contracted to buy he desired to get rid of his purchase, and David Austin agreed to take the land off John's hands, and stand in his place and relieve him of his contract. This might account for the form of the conveyance. But this, it will be observed, is quite a different thing from an affirmance of John's contract to purchase, and a subsequent resale by John as owner to David, the state of facts to which Mr. White deposes. If these were the true facts, the transaction would be invalid upon a different ground—viz., that so long as the contract with John was executory only, and John had neither paid his purchase-money nor taken up his conveyance, and the trustees who were vendors had power either to enforce or rescind or alter the contract, it was not competent for David Austin to step into John Austin's place, or take over John Austin's contract for his own benefit: see *Parker* v. *McKenna*, 23 W. R. 271, L. R. 10 Ch. App. 96. In any case the result would be the same.

It was strongly contended by the purchaser's counsel that Mr. White's statements must be accepted as unchallenged, because no attempt was made to shake them by cross-examination. This is a point deserving serious consideration. But Mr. White's evidence is by no means satisfactory as it stands. The proposition seems to have found some favour in the full court that if the documents are capable of an innocent interpretation in favour of the title, and the court can say that the parties have not infringed any principle of law and were not guilty of misconduct, it will rather put that interpretation upon it than assume that the parties had been guilty of some wrongdoing, or breach of law; and that in the absence of evidence to the contrary the court must assume that the release was a proper one, and that the *cestui que trusts* were informed of all necessary matters. Their lordships are unable to agree in this view. The conveyance itself is incapable of any interpretation but one, and that is unfavourable to the title. A trustee for sale of trust property cannot sell to himself. If notwithstanding the form of the conveyance the trustee (or any person claiming under him) seeks to justify the transaction as being really a purchase from the *cestui que trusts* it is important to remember upon whom the onus of proof falls. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui que trusts* were informed of all necessary matters. The burthen of proof that the transaction was a righteous one rests upon the trustee, who is bound to produce clear affirmative proof that the parties were at arm's length; that the *cestui que trusts* had the fullest information upon all material facts; and that, having this information, they agreed to and adopted what was done. Their lordships cannot accept the affidavit of Mr. White as sufficient proof of these matters; especially when other independent evidence which might have been given is not forthcoming.

Under these circumstances it would be inequitable to force such a title as this upon the appellant. It is not merely that the purchaser would be running the risk of proceedings being taken by the *cestui que trusts* to reopen the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it.

Their lordships will humbly advise Her Majesty to discharge the order of the full court, and dismiss with costs the appeal to that court; and to direct that the respondent repay to the appellant the costs which by the decree of the full court the appellant was ordered to pay to the respondent. Their lordships direct the respondent to pay to the appellant her costs of this appeal.

Solicitors for the appellant, *Young, Jones, & Co.*

Solicitors for the respondent, *Clapham, Fitch, & Co.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) } July 16, 1900.

VESTRY OF ST. MARYLEBONE *v.* SHERIFF OF LONDON. (*a.*)

*Sheriff—Seizure—Goods "taken in execution"—Person liable to pay rates—Demand on sheriff—*35 *Geo.* 3, *c.* 73. *s.* 195—*Metropolis Management Act,* 1855 (18 & 19 *Vict. c.* 120), *s.* 161.

By a local Act (35 *Geo.* 3, *c.* 73), *when the goods of any person liable to pay a rate by virtue of the Act are taken in execution by a sheriff before the rate is paid, the sheriff shall, upon demand made by the rate collector, in the first place pay to the collector the sum due in respect of the rate.*

By section 161 *of the Metropolis Management Act,* 1855, *the rate collectors are to have the same powers, remedies, and privileges for levying rates under that Act as for levying money for the relief of the poor.*

Goods were seized by the sheriff under a writ of fi. fa., *in execution of a judgment. The judgment debtor owed to the plaintiffs a sum for rates, consisting of a poor rate payable under the local Act and a general rate under the Metropolis Management Act,* 1855. *The rate collector demanded payment of the rates from the sheriff. Before the goods were removed or sold the judgment debtor paid the sheriff the amount of the judgment debt, and the sheriff handed over the amount to the judgment creditor and withdrew from possession without having paid the rates.*

Held, that the goods had been "taken in execution" within the meaning of the local Act, and the sheriff was liable to pay to the plaintiffs the amount of the rates.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from the judgment of Bigham, J., reported in [1900] 1 Q. B. 111, 48 W. R. Dig. 169.

The action was brought to recover £18 19s. 3d., payable in respect of rates due to the plaintiffs from a ratepayer named Bush, whose goods had been seized under a writ of *fi. fa.* by the defendant as sheriff of London.

On the 17th of November, 1898, the defendant, as sheriff, seized the goods of Bush under a *fi. fa.* in execution of a judgment, and on the 24th of November, the defendant being still in possession, the plaintiffs' rate collector made a demand upon him for the payment of £18 19s. 3d. for rates then due and payable by Bush.

The sum of £18 19s. 3d. comprised a poor rate and a general rate.

The minutes of the vestry, in which was entered the resolution ordering the rates to be made, recited that the poor rate was made under the powers and authorities of, among other Acts, 35 Geo. 3, c. 73.* The amount so demanded from the defendant was less than the value of the goods seized.

On the 25th of November, before the goods seized had been removed from the premises or sold, Bush paid to the defendant the amount of the judgment debt, and the defendant handed over this amount to the execution creditor and withdrew from possession without having paid the rates.

Bigham, J., held that the goods had been "taken in execution" within the meaning of section 195 of 35 Geo. 3, c. 73, and that, though some of the rates were levied under the Metropolis Management Act, 1855, section 161 of that Act expressly incorporated the remedies given by the earlier Act for the recovery of the rates. He accordingly held that the defendant was liable, and gave judgment for the plaintiffs.

The defendant appealed.

A. T. Lawrence, Q.C., and *P. Rose-Innes*, for the defendant.—The goods were not "taken in execution" within the meaning of section 195 of 35 Geo. 3, c. 73. Those words mean realized by sale or removed from the premises. Similar words in 8 Anne, c. 14, s. 1, have been held to mean a removal of the goods: *Riseley* v. *Ryle*, 11 M. & W. 16; *In re McCarthy*, 7 L. R. Ir. 473. Secondly, the rates which were demanded from the defendant were not rates which the execution debtor was liable to pay "by virtue of" the Act of George III. The plaintiffs are a body created by the Metropolis Management Act, 1855, and all the rates, except the poor rate, are levied under that Act, and not by virtue of the earlier Act. As regards the poor rate, section 161 of the Act of 1855 only confers upon the new vestries the general powers of the overseers as to the collection of the poor rate, and not the special powers conferred by a local Act, which only applies to a portion of the metropolis. The defendant is therefore not liable.

Reg. v. *Great Western Railway Co.*, 6 W. R. 774, 28 L. J. M. C. 59, and *Vaughan* v. *Imray*, 7 W. R. 240, 28 L. J. M. C. 78, were referred to.

English Harrison, Q.C., and *Herbert Nield*, for the plaintiffs.—The plaintiffs have, by section 161 of the Metropolis Management Act, 1855, the same powers, remedies, and privileges in regard to rates under that Act as were given by the Act of George III. in respect of the poor rate.

A. T. Lawrence, Q.C., replied.

A. L. SMITH, L.J.—This is an appeal from Bigham, J., and raises two points, one being reasonably clear and the other one of some complication. The first question is whether these goods were "taken in execution" within the meaning of section 195 of 35 Geo. 3, c. 73. I do not think that decisions upon other statutes can give us any assistance in arriving at the meaning of the above words. In my opinion the words "taken in execution" in section 195 of the Act of George III. are satisfied when the sheriff has seized the goods under a writ of *fi. fa.* The next question is, as I have said, one of more difficulty. The plaintiffs' claim is based upon the defendant's alleged breach of duty in not paying to them the amount of the rates due and demanded from him. It was contended on behalf of the defendant that the judgment debtor was not liable to pay the rates "by virtue of" the Act of George III. It appears from a document before us that the rates due were made up of a poor rate and a general rate. The poor rate was collected under the Act of George III. Where has that Act been repealed? I cannot find that it has been repealed either expressly or by necessary implication. Turning to the Metropolis Management Act, 1855, that Act, in my opinion, does not deal with the poor rate at all. It deals with a new rate which has taken the place of the old rates. But no mention is made of the poor rate. Therefore the execution debtor was liable to pay the poor rate "by virtue of" the Act of George III., and to that extent the plaintiffs' claim is well founded. Then as regards the excess which is made up of the other rates—namely, the general rate, in my opinion that rate was leviable under the Metropolitan Management Act, 1855. But section 161 of that Act gives the plaintiffs for the purpose of levying such rate the same powers, remedies, and privileges as for levying money for relief of the poor. One of the privileges which they have under the Act of George III. is the privilege of demanding from the sheriff when he seizes goods in execution the sum due for rates from the execution debtor. To my mind that is the true reading of section 161. For these reasons I agree with Bigham, J., and I think that the appeal should be dismissed.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Clarkson, Greenwells, & Co.*

Solicitors for the defendant, *W. & T. Burchell.*

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* 35 Geo. 3, c. 73, s. 195.—"When and as often as the goods, chattels, and effects of any person or persons liable to pay any rate or assessment by virtue of this Act shall be taken in execution within the limits aforesaid by any sheriff or other officer, before such rate or rates, assessment or assessments, shall have been paid, then the said sheriff or other officer, upon demand made by the collector or collectors for the time being to the said vestrymen, shall and he is hereby directed and required in the first place to pay to such collector or collectors such rate or rates, assessment or assessments, so made as aforesaid, and which shall not have been paid by such person or persons and all arrears due thereon. Provided always that nothing herein contained shall extend or be construed to extend so as to charge such sheriff or other officer with the payment of more than one year's rate, or of a larger sum of money than the value of the goods, chattels, and effects so taken in execution."

Section 179 authorized the levying of five distinct rates, one being a poor rate.

the conveyance by the trustees to David, or to Mr. Bull, should have been under John's direction. Although John was not a party to this deed he was a party to and executed the release of the 15th of June, in which he is described as "of Sydney, freeholder." If the conveyance had been thus framed the truth would have been fairly stated, whatever else might be said about the transaction. Upon what conceivable ground can it be supposed that the parties should have ignored the real facts, and have invented a false account of the transaction, and that, too, one which introduced a palpable blot upon the face of the title? Here also evidence is absent which might have been available if the transaction had been such as is suggested. But D. Austin and Mrs. Neilan, the trustees, are silent. Mr. S. J. Bull, the solicitor of the trustees, who as trustee for David Austin himself was a party to the conveyance of the 28th of June, and is at present practising as a solicitor at Sydney, is silent also. John Austin makes no affidavit; but it does not appear what has become of him.

It may be that the true account of the transaction is that suggested in the letter of the 9th of January, 1899—viz., that after John Austin had contracted to buy he desired to get rid of his purchase, and David Austin agreed to take the land off John's hands, and stand in his place and relieve him of his contract. This might account for the form of the conveyance. But this, it will be observed, is quite a different thing from an affirmance of John's contract to purchase, and a subsequent resale by John as owner to David, the state of facts to which Mr. White deposes. If these were the true facts, the transaction would be invalid upon a different ground—viz., that so long as the contract with John was executory only, and John had neither paid his purchase-money nor taken up his conveyance, and the trustees who were vendors had power either to enforce or rescind or alter the contract, it was not competent for David Austin to step into John Austin's place, or take over John Austin's contract for his own benefit: see *Parker* v. *McKenna*, 23 W. R. 271, L. R. 10 Ch. App. 96. In any case the result would be the same.

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Under these circumstances it would be inequitable to force such a title as this upon the appellant. It is not merely that the purchaser would be running the risk of proceedings being taken by the *cestui que trusts* to reopen the transaction. The purchaser would be saddled with a property which he would be unable for many years to put upon the market, unless recourse was had to some special restrictive condition which might seriously reduce the price a purchaser would be willing to pay for it.

Their lordships will humbly advise Her Majesty to discharge the order of the full court, and dismiss with costs the appeal to that court; and to direct that the respondent repay to the appellant the costs which by the decree of the full court the appellant was ordered to pay to the respondent. Their lordships direct the respondent to pay to the appellant her costs of this appeal.

Solicitors for the appellant, *Young, Jones, & Co.*

Solicitors for the respondent, *Clapham, Fitch, & Co.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — July 16, 1900.

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Held, that the goods had been "taken in execution" within the meaning of the local Act, and the sheriff was liable to pay to the plaintiffs the amount of the rates.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Appeal from the judgment of Bigham, J., reported in [1900] 1 Q. B. 111, 48 W. R. Dig. 169.

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The defendant appealed.

A. T. Lawrence, Q.C., and *P. Rose-Innes*, for the defendant.—The goods were not "taken in execution" within the meaning of section 195 of 35 Geo. 3, c. 73. Those words mean realized by sale or removed from the premises. Similar words in 8 Anne, c. 14, s. 1, have been held to mean a removal of the goods: *Riseley* v. *Ryle*, 11 M. & W. 16; *In re McCarthy*, 7 L. R. Ir. 473. Secondly, the rates which were demanded from the defendant were not rates which the execution debtor was liable to pay "by virtue of" the Act of George III. The plaintiffs are a body created by the Metropolis Management Act, 1855, and all the rates, except the poor rate, are levied under that Act, and not by virtue of the earlier Act. As regards the poor rate, section 161 of the Act of 1855 only confers upon the new vestries the general powers of the overseers as to the collection of the poor rate, and not the special powers conferred by a local Act, which only applies to a portion of the metropolis. The defendant is therefore not liable.

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VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Clarkson, Greenwells, & Co.*

Solicitors for the defendant, *W. & T. Burchell.*

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* 35 Geo. 3, c. 73, s. 195.—"When and as often as the goods, chattels, and effects of any person or persons liable to pay any rate or assessment by virtue of this Act shall be taken in execution within the limits aforesaid by any sheriff or other officer, before such rate or rates, assessment or assessments, shall have been paid, then the said sheriff or other officer, upon demand made by the collector or collectors for the time being to the said vestrymen, shall and he is hereby directed and required in the first place to pay to such collector or collectors such rate or rates, assessment or assessments, so made as aforesaid, and which shall not have been paid by such person or persons and all arrears due thereon. Provided always that nothing herein contained shall extend or be construed to extend so as to charge such sheriff or other officer with the payment of more than one year's rate, or of a larger sum of money than the value of the goods, chattels, and effects so taken in execution."

Section 179 authorized the levying of five distinct rates, one being a poor rate.

From Palatine Court of Lancaster. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 6, 10, 1900.

In re TRAVIS.
FROST *v.* GREATOREX. (*a.*)

Will—Trust for accumulation beyond the period allowed by the Thellusson Act (39 & 40 *Geo.* 3, *c.* 98)—*Intestacy as to surplus income after expiration of permitted period—"Trust estate" and "income of trust estate"—Construction.*

A testator, after directing the payment of a certain annuity to A., directed that the surplus "income" of his "trust estate" should accumulate till the annuitant's death, and that his "trust estate" was then "to be held upon trust" for such children of A., living at his decease or born afterwards, as should attain the age of twenty-one years, or should die under that age leaving issue, and, in case there should be no such children, then to certain other beneficiaries.

Held, that, having reference to the nature of the ultimate limitation to the children of A. or the other beneficiaries, there was an intestacy as to the income of the trust estate between the expiration of the period of twenty-one years from the testator's death allowed for accumulation by the Thellusson Act and the death of the annuitant.

Weatherall *v.* **Thornburgh,** 26 *W. R.* 593, 8 *Ch. D.* 261, *followed.*

Harbin *v.* **Masterman,** [1894] 2 *Ch.* 184 (**Wharton** *v.* **Masterman,** 43 *W. R.* 449, [1895] *A. C.* 186), *distinguished.*

Held, also, that, on the true construction of the will, the testator intended to give the accumulated "income" of the "trust estate" for the period permitted by the Thellusson Act, as well as the corpus *of the "trust estate" itself, to the persons ultimately entitled to the* corpus.

Appeal from a decision of the Vice-Chancellor of the Palatine Court of Lancaster, given on the 21st of April, 1899.

By his will, dated the 5th of November, 1877, Joseph Travis, after appointing his executors, and after making certain pecuniary bequests, gave, devised, and bequeathed all and every his estate and effects whatsoever and wheresoever unto and to the use of his trustees upon trust to pay out of the clear rents and income of his trust estate unto his housekeeper, Nanny Lees (in recognition of her long services), during her natural life the weekly sum of £1 10s., and, subject thereto, upon trust to pay the clear rents and income of his trust estate unto his brother, Edmund Cocker Travis, during the term of his natural life. And from and after the decease of his said brother, the testator directed that his trustees should hold his trust estate upon trust to pay out of the clear rents and income thereof an annuity of £200 to his niece, Kate Greatorex, during the term of her natural life for her sole and separate use. And the testator directed that the surplus of the income of his "trust estate" should accumulate and be invested until the death of his said niece. And subject and without prejudice to the trust and provisions aforesaid, his "trust estate" was to be held upon trust for the children of his said niece living at his decease, or born afterwards, who should attain the age of twenty-one years, or who should die under that age leaving issue, if more than one, in equal shares as tenants in common. And in case there should be no such children, then subject and without prejudice to the trusts and provisions aforesaid, the testator directed that his trust estate should, after the death of the survivor of them, his said brother and niece, and the failure of issue of his said niece as aforesaid, be held upon trust, as to one third part or share thereof, for certain cousins of the testator in equal shares as tenants in common; and as to the remaining two one-third parts or shares thereof, upon trust for the trustees for the time being of the Oldham Blue Coat School.

The testator died on the 10th of December, 1877; and at the time of his death his brother, E. C. Travis, was his heir-at-law and sole next-of-kin.

The surplus income of the trust estate was accumulated after the death of the testator's brother, E. C. Travis, until the 10th of December, 1898, when the period of twenty-one years from the date of the testator's death allowed for accumulation by the Thellusson Act came to an end.

The testator's niece, Kate Greatorex, was, at the time of the present action, fifty-four years of age, and, though married, had never had any children.

Two questions having arisen, (1) as to who was entitled to the surplus income from the 10th of December, 1898, till the death of Kate Greatorex, which had not yet occurred, and (2) as to who was entitled on the true construction of the will to the accumulated income from the date of the testator's death till the 10th of December, 1898, Hall, V.C., decided (1) that there was an intestacy as to the surplus from the 10th of December, and that it must be paid to the legal personal representative of E. C. Travis, who had died since the death of the testator; and (2) that the accumulated income prior to the 10th of December belonged to the persons who would ultimately be entitled to the *corpus* of the trust estate.

From the first part of this decision the trustees of the Oldham Blue Coat School now appealed; and there was a cross-appeal against the second part by the legal personal representatives of the late E. C. Travis.

The two appeals now came on to be heard together.

Levett, Q.C., and *T. Clarkson*, for the appellants.—(1) Mrs. Greatorex is of an age when the court will assume that she is past child-bearing (*In re Lowman, Devenish* v. *Tester*, [1895] 2 Ch. 348, 43 W. R. Dig. 195; *In re Hocking, Michell* v. *Loe*, 47 W. R. 114 (per Lindley, M.R., at p. 115), [1898] 2 Ch. 567, at p. 571), and the appellants, accordingly, are now entitled to "absolute, indefeasible interests." That being so, the rule in *Saunders* v. *Vautier*, 4 Beav. 115, Cr. & Ph. 240, applies, and the gift to the cousins and the charity is accelerated. This principle was recognized in *Harbin* v. *Masterman*, [1894] 2 Ch. 184, and *Wharton* v. *Masterman*, 43 W. R. 449, [1895] A. C. 186. *Weatherall* v. *Thornburgh*, 26 W. R. 593, 8 Ch. D. 261, and *Talbot* v. *Jevers*, 23 W. R. 741, L. R. 20 Eq. 255, are inconsistent with the decision of the House of Lords in *Wharton* v. *Masterman*, and must now be looked on as overruled. (2) The testator clearly intended, on the true construction of his will, to give the accumulated income to the persons who should ultimately be entitled to the *corpus*.

Warrington, Q.C., and *A. C. Maberley*, for the personal representatives of E. C. Travis.—(1) There is no legal rule against the presumption of child-bearing in the case of a woman of any age. It is, accordingly, untrue to say that the appellants have "absolute, indefeasible interests." But, anyhow, there is no gift to the cousins or the charity, having regard to the language of the will, till the death of Mrs. Greatorex. The case is therefore governed by *Weatherall* v. *Thornburgh* and *Talbot* v. *Jevers*, which,

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

so far from being overruled by *Wharton* v. *Masterman*, are clearly distinguishable from it. [They also referred to *Eyre* v. *Marsden*, 2 Keen 564, at p. 574.] (2) As to the cross-appeal, it is clear that the testator intends to draw a distinction between his "trust estate" (*i.e.*, the *corpus*) and the "income" of his "trust estate." The "income" is to be accumulated till the death of Mrs. Greatorex, but the "trust estate" (*i.e.*, the *corpus*) is only to be divided among certain beneficiaries on that lady's death. There is therefore an intestacy as to the whole of the accumulations.

Astbury, Q.C., and *G. H. Norris*, for Mrs. Greatorex.—There is no legal presumption that Mrs. Greatorex is past child-bearing (*In re Dawson, Johnston* v. *Hill*, 37 W. R. 51, 39 Ch. D. 155, at p. 164; *In re Hocking, Michell* v. *Loe*, 47 W. R. 114, *per* Chitty, L.J., at p. 115), and therefore it is impossible to say that the appellants have anything more than contingent interests. Contingent interests have never been accelerated: *M'Donald* v. *Bryce*, 2 Keen, 276.

They referred also to *Countess of Bective* v. *Hodgson*, 12 W. R. 625, 10 H. L. Cas. 656.

A. Grant, for the testator's cousins.

J. A. Tweedale, for the trustees of the will.

Levett, Q.C., replied.

Cur. adv. vult.

July 10.—Lord ALVERSTONE, M.R.—This is an appeal from the judgment of the Vice-Chancellor of the Palatine Court of Lancaster, and the appeal raises two questions: the first—rather an important one—as to the application of the general principle; and the second, one of the construction of the will itself. Now, it is argued in the case that Kate Greatorex has reached the age when the court would assume that there is no possibility of issue. Under those circumstances the question arises as to who are the persons entitled to the income during the life of Kate Greatorex. Now, it is not denied that the Act against accumulations applies, so that the direction to accumulate beyond the period of twenty-one years cannot operate. The first point that arises is concerned, accordingly, with the accumulations of the income between the expiration of the twenty-one years, which expired in December, 1898, and the death of Kate Greatorex, which has not yet occurred; and the second question, raised by the cross-appeal, relates to the accumulations prior to the twenty-one years. In my opinion the judgment of the Vice-Chancellor is right upon both points. He has decided that the charity is entitled to the accumulations up to the end of the twenty-one years. He has decided that there is an intestacy, and that the next-of-kin are accordingly entitled to the surplus income, from the time of the expiration of the twenty-one years, during the life of Mrs. Greatorex. Now, the question may be stated, to my mind, in this way, has there been a gift to the charity or the cousins or the niece's children of all the accumulated income, or is there a period during which there has been no gift of that income? Has there been a gap in the time between the expiration of the twenty-one years and the death of the annuitant, Mrs. Greatorex, during which the intention to give the income to the persons ultimately entitled does not take effect?

I think the case is practically governed upon this point by the decision of this court in *Weatherall Thornburgh*, 8 Ch. D. 261. The facts, of course, in that case were not exactly the same as here; but the principle is expressed in a way better than I can express it by James, L.J. There was there a direction to accumulate for too long a period, and the question was whether the person ultimately entitled was to be treated as being entitled to the accumulations between the end of the period of twenty-one years and the subsequent date, and James, L.J., at p. 269, said this: "He directs that the capital and the accumulations shall not be divided till the death of his wife. . . . Who, then, would be entitled to that income? I am opinion that Thomas Messiter"—the person who was in the position of the charity here—"is not the residuary legatee under the will; he is only residuary *cestui que trust* in remainder after the death of the wife of the particular fund, and there is nothing in the Thellusson Act to give the accumulations to him. There is no gift of the surplus income to any person whatever until the death of the wife. The testator has divided the enjoyment of his property into two parts, something to be enjoyed before and something to be enjoyed after the death of his wife. Accumulations which fail under the Thellusson Act must be treated in the same way as a gift which fails under the Mortmain Act. It has never been held that property that is set free by the operation of the Mortmain Act will accrue for the benefit of the persons entitled in remainder. It is the same as if the testator had only directed accumulation for twenty-one years, and had said nothing as to the income after that time till the death of his wife." It is obvious from the reading of that passage that it exactly represents the question raised in this case, and answers it in a way which, as it seems to me, will be binding upon this court, if nothing has subsequently happened to overrule that decision. It was contended, however, by Mr. Levett that the view that I am suggesting, and which is founded upon that judgment, was inconsistent with a case in the House of Lords which is reported under various names. It is reported in [1895] A. C. 186 under the name of *Wharton* v. *Masterman*. In the first place, I would point out that Lord Davey and the other lords who addressed the House undoubtedly had not the least intention of overruling *Weatherall* v. *Thornburgh*. Lord Davey cites it, indeed, at the end of his judgment, and distinguishes it from the case which was then before their lordships' House. But I think the real answer was probably given by Mr. Warrington in the course of his argument—*i.e.*, that in *Wharton* v. *Masterman*, [1895] A. C. 186—or as it is called in the report in the court below, [1894] 2 Ch. 154, *Harbin* v. *Masterman*—the persons who were there entitled to the annuities had no interest whatever in the surplus income, and that therefore there was no direction (so to speak) to accumulate, except for the benefit of the person who was to become ultimately entitled, and that therefore the principle of *Saunders* v. *Vautier* applied. There being no interest of the annuitants in the surplus, the persons entitled in remainder became entitled to the surplus, and, therefore, the accumulation for them being directed for too long a period, they were entitled to come to the court and say "It ought to be ours at the end of the twenty-one years." I do not think *Wharton* v. *Masterman* in any way intended to overrule, or did in fact overrule, the case of *Weatherall* v. *Thornburgh*; and that, just as in *Weatherall* v. *Thornburgh* the court came to the conclusion that there was no direction on the face of the will as to what was to be done with the income between the end of the twenty-one years and the death of the tenant for life—in other words, just as they came in that case to the conclusion that the beneficiary was not intended to be given the income until after the death of the wife, so also in this case we are bound to hold that, with regard to the accumulated income between the expiration of twenty-one years and the death of Mrs. Greatorex, the cousins and the charity are not entitled to that accumulation.

The second point which was involved in Mr. Warrington's cross-appeal turned upon the words of the will. It appears that in several parts of the will the testator spoke of his trust estate; and in the clause by which he directed the accumulation he used the words "the surplus income of my trust estate shall accumulate and be invested." Then he went back to the expression "my trust estate"; and Mr. Warrington asked us to come to the conclusion that there was intended to be drawn a distinction between the "trust estate" and the "income of the trust estate," and that, therefore, the destination of the accumulations of that income during the lawful period was unprovided for. It did not, it is argued, form part of the gradually growing trust estate, but it must be taken that the cousins and the charity were only entitled to have the original trust estate without the accumulation. I think that is going too far. I do not say such a thing might not be expressed in the will, but I think it would require very clear language indeed to express it; and I think that when we look at this will the language does not enable us to draw that distinction. I think the testator was intending to direct the accumulation of the income for the period which he contemplated by the will—viz., the lifetime of Mrs. Greatorex, and that the accumulations after payment of the annuities were intended to form part of the trust estate. I think the Vice-Chancellor was quite right in giving to the cousins and the trustees of the charity the accumulations up to the period when the accumulations are lawful by the statute. For these reasons I am of opinion that both the appeals should be dismissed.

RIGBY, L.J.—I am of the same opinion. As to the point raised on the main appeal, the moment it was stated to the court I was of opinion, subject, of course, to anything that might be shown to the contrary, that it had been already decided by this court in *Weatherall* v. *Thornburgh*, and I am still of that opinion after hearing everything that can be urged against it. Unless, therefore, the case of *Weatherall* v. *Thornburgh* can be treated as overruled, it seems to me that it binds us completely. The case of *Harbin* v. *Masterman*, or, as it is called in the House of Lords, *Wharton* v. *Masterman*, has been cited as inconsistent with the decision in *Weatherall* v. *Thornburgh*. In my opinion there is not the slightest inconsistency; and there is nothing in the case of *Harbin* v. *Masterman* even to raise the question that was raised and decided in *Weatherall* v. *Thornburgh*. And even if there had been some expression of disapproval of that decision, yet I do not think it would have been right to treat such expressions, which would have been mere *obiter dicta*, as overruling the decision of the Court of Appeal in *Weatherall* v. *Thornburgh*. But in fact there is no such thing as any such expression of disapproval. There there were vested interests in the claimants—vested interests postponed only for the sake of the enjoyment of other interests, but absolutely vested—and a direction that the income should accumulate. As Lord Davey put it, there was no effective direction for accumulation at all; and the Thellusson Act accordingly did not come in in any way, because, after the period that would have been lawful under the Thellusson Act, the gift was of the income to persons who had a vested interest—that is to say, there was no breach of the Thellusson Act at all; and the persons being absolutely entitled to the income, there was no rule of law which would take it from them. Now, I think that is enough for the first point.

As to the second point, let us see how it stands. Here we have a direction for the accumulation of the surplus income of the trust estate during the life of an annuitant—there is no vested interest in anyone—all the interests are contingent interests, which may, or may not, take effect. In law we have to treat them as contingent to this day, because there is no *rule* of law which says that you must assume that a lady of a certain age will never have children, although the courts in administering estates have sometimes taken that proposition as a practical guide. These interests, then, whichever of them take effect, are merely contingent interests—the one set of interests being contingent on there being objects—*i.e.*, children of Mrs. Greatorex; and the other set of interests, on there being a total failure of the first set. Now I must ask myself, What did the testator mean by directing accumulation, and by not considering the Thellusson Act at all? Did he intend to die intestate as to that accumulation? I quite agree with the Master of the Rolls that such a thing may be proved by the will, but it is not by a nice examination of the particular phrases that the testator has made use of in one part or another that you can arrive at it. Here is a strong presumption that he intended to dispose of the accumulated surplus of income in the same manner as he disposed of the capital; and looking carefully through the will I find nothing at all that would induce me to differ from that *primâ facie* conclusion. It follows, therefore, that when we have applied—as we are bound to apply—the Thellusson Act to prevent the accumulation after the twenty-one years allowed by the statute, we are driven to the conclusion that the next-of-kin take these accumulations because the testator was endeavouring to form a fund in a way that was illegal, and failed in that attempt. The income, however, during the twenty-one years will go to the persons who ultimately take the capital of the estate. I shrink from saying that the charity or the cousins are entitled to this limited amount of income, because, though in the course of nature, they very probably will be, yet at law we have to wait until the event takes place on which the contingency is to be treated as happening one way or the other. We cannot say they are entitled to anything at present, however much we may be disposed to think that they will be entitled at some future time. The result is that the Vice-Chancellor's judgment on both these points is to be supported, and it will follow that the appeal is dismissed, and that the cross-appeal is also dismissed.

COLLINS, L.J.—I am of the same opinion on the same grounds.

Appeal and cross-appeal both dismissed.

Solicitors, *Busk Mellor, & Norris*, for *Slater, Heelis, & Co.*, Manchester; *Pritchards, Englefield, & Co.*, for *Boote, Edgar, & Co.*, Manchester; *Tweedale, Sons, & Lees*, Manchester.

From Q. B. Div.
(A. L. Smith, Vaughan Williams, and Romer, L.JJ.) July 6, 1900.

MATTHEWS AND OTHERS v. USHER AND OTHERS. (*a*.)

Landlord and tenant—Mortgagor in possession—Breach of covenant by lessee—Ejectment—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 5—*Conveyancing Act*, 1881, *s.* 10.

A mortgagor in possession of land subject to a lease is not entitled, by section 25, *sub-section* 5, *of the Judicature*

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Act, 1873, *to sue for re-entry on breach of covenants by the lessee.*

Appeal by the defendants from the judgment of Ridley, J., at the trial of the action without a jury.

The action was brought to recover possession of certain premises upon the ground that there had been a breach of covenant to repair.

The question raised in this case was whether an equitable owner of the reversion could bring an action to recover possession of premises, the lease having been made prior to the passing of the Conveyancing Act, 1881.

On the 10th of March, 1819, Severn granted a lease of certain premises to one Everard, for eighty-one years, subject to a rental of £36 per annum. In this lease there was a covenant by the lessee, his executors, administrators, and assigns, to repair the premises and keep them in repair, and there was also a proviso that on breach of any of the covenants contained in the lease, the lessor, his heirs and assigns, should have power to re-enter.

On the 8th of November, 1878, Severn's heir and successor, J. P. Severn, conveyed the premises to Eastman and his heirs subject to the said lease, and on the same date Eastman mortgaged in fee simple the reversion expectant on the determination of the lease to the said J. P. Severn.

On the 9th of November, 1878, Eastman assigned his equity of redemption in the said reversion to one Sheffield.

In August, 1886, Sheffield mortgaged his equity of redemption in the said reversion to Gaitskell, and in July, 1887, he gave a third mortgage to the plaintiffs, who, since such date, received the rents and profits.

In January, 1891, an order of foreclosure was made in respect of Sheffield's interest in the said premises; and ultimately the plaintiffs became the mortgagors in possession and received the rents and profits of the premises. In July, 1898, the plaintiffs served notice under section 14 of the Conveyancing Act, 1881, and brought an action to recover possession of the premises, on the ground of forfeiture for breach of the covenant to repair contained in the lease. At the trial the mortgagee was added as a plaintiff. The defendants contended that only the legal owner of the reversion had a right to sue.

Ridley, J., gave judgment for the plaintiffs on the ground that they were entitled to sue by virtue of section 25, sub-section 5, of the Judicature Act, 1873, which provides that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person."

R. M. Bray, Q.C., and *Brook Little*, for the appellants.—The original plaintiffs (the mortgagors) are not entitled to possession. Before the Judicature Act, 1873, the mortgagor in possession could not bring an action for ejectment, and section 25, sub-section 5, of that Act did not confer aright on him to do so. The lease being subsisting, only the lessor or his heirs or assigns are entitled to sue for re-entry. By assigns is meant legal assigns. The owner of the legal estate had made no election to forfeit. It is true that the Conveyancing Act, 1881 (section 10), does in certain cases give the mortgagor in possession power to exercise the rights of a mortgagee, but that section does not extend to leases made before that Act came into force. [Counsel cited *Municipal Permanent Investment Building Society* v. *Smith*, 37 W. R. 42, 22 Q. B. D. 70; and *Gentle* v. *Faulkner*, [1900] 2 Q. B. 267, 48 W. R. Dig. 89.] The fact that the mortgagee was added at the trial as a plaintiff does not assist them because no notice had been given by him under the Conveyancing Act.

Dickens, Q.C. (*H. Tindal Atkinson* and *W. M. Spence* with him), for the respondents.—In equity a mortgagor is now looked upon as a legal owner. By section 25, sub-section 5, of the Judicature Act new remedies were intended to be given. The mortgagor was thereby put in the position of the mortgagee as long as he was allowed to remain in possession. He may sue for the rents and profits, and, therefore, he is entitled to sue for possession if the lessee is in default: *Heath* v. *Pugh*, 29 W. R. 904, 6 Q. B. D. 345; *Fairclough* v. *Marshall*, 27 W. R. 145, 4 Ex. D. 37; *Trent* v. *Hunt*, 1 W. R. 481, 9 Ex. D. 14.

Bray, Q.C., replied.

A. L. SMITH, L.J.—The point we have to decide in this case is a short one—namely, whether or not when the equity of redemption of leasehold premises is in a mortgagor he can re-enter for breach of the covenants of the lease. In this lease is a proviso that the lessor, his heirs and assigns, may re-enter on breach of any of the covenants, and the first question that arises is whether the mortgagor is an assign of the lessor. I think it is clear that he is not an assign of the lessor. Such an assign means a legal assign, and a mortgagor who merely owns an equity of redemption clearly does not come within that description. It is argued that section 25, sub-section 5, of the Judicature Act, 1873, gives the mortgagor the right to bring ejectment for forfeiture on breach of covenant. In my opinion that section does not cover this case. Before the passing of that Act, it is conceded, a mortgagor could not have brought this action. Section 25, sub-section 5, enacts that a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits. Here the plaintiffs are not entitled to possession of the land because the lease had not been forfeited at the time when the action was brought. It is said that they stand in the shoes of the mortgagee. Supposing that is so, still they do not come within the section because the mortgagee had not given notice at the time the action was brought and therefore he could not have entered into possession What the sub-section means is that a mortgagor who is entitled to possession may sue for possession, and that a mortgagor who is entitled to the receipt of the rents and profits may sue for such rents or profits. As far as I know there are no authorities on this sub-section. It is further said that as the mortgagee was added as a plaintiff at the trial the action should succeed. but that does not help the plaintiffs, because, as I have already stated, the mortgagee had given no notice under the Conveyancing Act, 1881. In my opinion judgment should be entered for the defendants.

VAUGHAN WILLIAMS, L.J.—I agree. The words at the beginning of section 25, sub-section 5, deal with the mortgagor's rights which he could not have enforced in an action in his own name as the law stood at the time this Act was passed. That section now enables him to enforce such rights, but it was not intended

that if he had no such rights he should enforce them. In this case he has no right. It has been argued before us that not only is he entitled to enforce his own rights, but that he may stand in the shoes of the mortgagee and enforce the latter's rights. Even if that be so, the mortgagee, at the time the action was brought, not having elected to treat the breach of covenant as a forfeiture and not having given notice under the Conveyancing Act, had no right to claim a forfeiture; therefore the mortgagor had no such right either in himself or as standing in the shoes of the mortgagee.

ROMER, L.J.—I agree. Before recent legislation a mortgagor in possession of land held by a tenant on a lease created before the mortgage had certain equitable rights and certain legal rights, such as regards restraining the tenant from doing injury to the land, and such as the right to receive the rents payable by the tenant. He was not then, however, entitled to say that he had the right to sue for possession on the ground that he had the legal reversion; he had no implied authority to act on behalf of the mortgagee. His legal rights were extremely limited and the courts would not have recognized his right to act as agent for the mortgagee in determining leases. In this respect it must have been shown that the mortgagor had special statutory rights so to act. The Judicature Act, 1873, has been referred to as giving the plaintiffs the rights claimed in this case. Section 24, sub-section 4, only requires that the equitable rights of the mortgagor should be enforced; it does not give him any legal rights. Section 25, sub-section 5, does give him legal rights which he did not possess before, and, if the plaintiffs are to succeed here, they must show that they have rights under that sub-section. That section does not give to a mortgagor any right of re-entry or of forfeiture which he did not have before. The mortgagee alone could elect to re-enter for a forfeiture. The mortgagee here, however, never has elected to do so or to forfeit the lease. There had been no forfeiture, the lease was a subsisting one. The mortgagor, therefore, is estopped from saying that he is entitled to possession of the land or to sue for possession.

Appeal allowed.

Solicitors, *Peacock & Goddard; G. F. Hudson, Matthews, & Co.*

From Chan. Div. (Webster, M.R., and Rigby and Collins, L.JJ.) — May 30, 1900.

CORNWALL *v.* HENSON. (*a.*)

Vendor and purchaser — Payment by instalments — Repudiation of contract—Damages.

The plaintiff was the purchaser and the defendant the vendor, under a written agreement, of certain land for £150, payable by quarterly instalments of £9 4s. 3d. The plaintiff paid all the instalments except the last, but made default in paying this, and left the neighbourhood. The defendant then took possession of the land and let it to a tenant. More than two years after the last instalment had become due, the plaintiff wrote to the defendant that he was prepared to make the final instalment and settlement of the ground purchased.

Held, that, though the plaintiff could not, by reason of his delay, obtain specific performance, his conduct did not amount to an abandonment or repudiation on his part; and that the defendant, having dealt with the property in a way he was not entitled to, was liable in damages.

Decision of Cozens-Hardy, J. (48 *W. R.* 42), *reversed.*

This was an appeal from a decision of Cozens-Hardy, J. (reported 48 W. R. 42).

The facts may be shortly stated as follow:

By an agreement in writing dated the 11th of August, 1892, the plaintiff agreed to buy from the defendant 5¼ acres of land at Pitsea, Essex, for £150.

Clause 2 was as follows: "The purchaser has already paid to the vendor the sum of £40 on account of the said purchase-money of £150, and will pay the balance by equal quarterly instalments of £9 3s. 4d. each on the 29th day of September, the 25th day of December, the 25th day of March, and the 24th day of June in every year, the first of such quarterly payments to be made on the 25th day of December, 1892. The purchaser will also pay to the vendor with each such quarterly payment on account of principal such a further sum as shall be equivalent to interest at the rate of 3 per cent. per annum on the amount of principal remaining unpaid for the quarter then past, but if the purchaser shall make default in payment of any such instalments of principal or interest or any part thereof for thirty days after the same shall have become due the whole of the unpaid instalments of the said purchase-money with the interest thereon shall become immediately due and payable." The following words were added to this clause: "I agree to grant a further extension on application of the purchaser at an increase of interest as shall be determined by both parties."

By clause 6 the purchaser was to make and maintain certain boundary fences and also to complete and repair a certain part of a road abutting on the land.

By clause 8 the vendor, in the event of default being made for thirty days in payment of the whole of the unpaid instalment with interest, was to be at liberty to resell and retain out of the proceeds of sale unpaid instalments with interest, and the net balance of the proceeds was to be paid by the vendor to the purchaser.

The plaintiff took possession of the land and paid the instalments of purchase-money with interest down to and including the instalment due on the 24th of June, 1895, which was paid with interest on the 27th of August, 1895. This left only one instalment due from the plaintiff to the defendant.

About October, 1896, the plaintiff, who had been called on several times to pay the remaining instalment, disappeared, and inquiries at his former addresses and from his relations led to no result.

Letters addressed by the defendant to him were returned through the Dead Letter Office.

The land became derelict and rates and tithe were unpaid. The land was not worth the amount actually paid by the plaintiff.

The defendant under these circumstances took possession of the property and advertised it for sale.

Not being able to effect a sale he let the property to a Mr. Burns with an option to purchase at any time during his lease.

Burns erected a house on the land and was in possession at the time of the trial.

On the 13th of June, 1898, the plaintiff wrote to the defendant that he was prepared to "make the final instalment and settlement of the ground purchased."

Correspondence took place, and on the 13th of July, 1898, the plaintiff commenced the present action, claiming specific performance of the agreement of August, 1892, and damages instead of or in addition to specific performance.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Cozens-Hardy, J., held that the plaintiff had in fact abandoned the land and repudiated the contract; and, further, that the plaintiff having made such a default as precluded him from demanding the transfer of the property, the defendant was justified in treating this as an abandonment, and in acting thenceforward as the true owner, both at law and in equity, of the property; and the plaintiff having himself repudiated the contract after having possession of the property under the contract, and there being no circumstances from which the court could imply a promise by the defendant to repay the money paid by the plaintiff, neither the claim for damages nor that for repayment could be sustained. He accordingly dismissed the action.

The plaintiff appealed.

Astbury, Q.C., and *H. Greenwood*, for the appellant, referred to *Howe* v. *Smith*, 32 W. R. 802, 27 Ch. D. 89; *Whincup* v. *Hughes*, 19 W. R. 439, L. R. 6 C. P. 78; *Dinn* v. *Grant*, 5 De G. & Sm. 451; *Morgan* v. *Shaw*, 2 Mer. 138; *Palmer* v. *Temple*, 9 A. & E. 508; *Rose* v. *Watson*, 12 W. R. 585, 10 H. L. Cas. 672.

Frederick Thompson, for the respondent, referred to *Hunt* v. *Silk*, 5 East 449; *Ex parte Barrell, In re Parnell*, 23 W. R. 846, L. R. 10 Ch. App. 512; *Howe* v. *Smith*.

Astbury, Q.C., replied.

WEBSTER, M.R.—Cozens-Hardy, J., has arrived at the conclusion of fact that in October, 1896, the plaintiff had shown by his conduct that he had repudiated the contract, and that the defendant was justified in treating this as an abandonment by the plaintiff of his rights under the contract and in acting thenceforward as the true owner of the property both at law and in equity. If I could concur in that conclusion of fact, I should think that the learned judge was right in dismissing the action. But with the greatest respect to him I cannot arrive at that conclusion. [His lordship stated the provisions of the contract, and continued:]

It is said on behalf of the respondent that the remedy provided by clause 8 of the contract is an entirely optional one in favour of the vendor, and that he retained all the rights which a vendor usually has independently of that clause. It is not, I think, necessary to decide whether that contention is well founded, for in the view which I take of the facts the vendor was not justified in treating the purchaser as having abandoned his contract. I think it is plain that the vendor never brought to the mind of the purchaser, so long as they were in communication with each other, that if he did not pay the last instalment the vendor would treat the contract as abandoned. [His lordship referred to the correspondence, and continued:]

I cannot find any intention on the part of the plaintiff to abandon the contract, or that any sufficient notice was given to him by the vendor that, if the last instalment was not paid within a specified time, the contract must be considered as at an end. I will not say that if the contract had been thus determined the vendor's only remedy would have been under clause 8, though I think that clause 8 was intended to operate in such a state of circumstances.

It is not necessary to deal with the question whether the plaintiff is entitled to a return of the instalments which he has paid, because he has not insisted upon that relief; but I feel very great doubt whether the doctrine of *Howe* v. *Smith* would apply to a case in which the purchase-money was to be paid in instalments. In my opinion the defendant has dealt with the property in a way in which he was not justified in doing, and he is liable to the plaintiff in damages. We have been asked to assess the damages, and I think substantial justice will be done by awarding £125 to the plaintiff.

RIGBY, L.J.—I agree with the Master of the Rolls as to the amount of the damages. Considering that the contract was for the payment of the purchase-money in a number of instalments spread over a long period, that all the instalments but one were paid, and that the purchaser had possession of the property and was treated as the owner, I think that he had reasonable ground for believing that, notwithstanding the non-payment of the last instalment, he was still to be treated as the owner of the property. Then, it is true, the plaintiff left the neighbourhood and was not to be found; but I do not think he intended to abandon this piece of land. He may have intended to take more than a reasonable time in paying the last instalment, and he did in fact take so long a time as to disentitle him to specific performance of the contract. There are, no doubt, cases in which, whatever the intention of a purchaser may have been, the law will treat his contract as put an end to by reason of his delay. But I do not think that is so in the present case. And I think it is clear that the vendor had no idea of treating the contract as having been repudiated by the purchaser. Whether clause 8 of the contract merely gave an option to the vendor, or whether it pointed out his only remedy in case of the purchaser's default, it is unnecessary to decide, but I am not satisfied that both parties or either of them intended to repudiate the contract.

COLLINS, L.J.—I am of the same opinion. It seems to me that the defendant's case must rest wholly on this foundation—that he was entitled to treat the acts of the plaintiff as amounting to a complete repudiation of all his rights and obligations under the contract. If the defendant cannot establish that, he must fail in his defence to the action. The law is clear that the breach of one stipulation in a contract does not of itself amount to an entire repudiation of the contract. Whatever doubt as to this may have arisen from a comparison of such cases as *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Hoare* v. *Rennie*, 8 W. R. 80, 5 H. & N. 19; and *Honck* v. *Muller*, 29 W. R. 830, 7 Q. B. D. 92, with *Simpson* v. *Crippin*, 21 W. R. 141, L. R. 8 Q. B. 14, and *Franklin* v. *Miller*, 4 A. & E. 599, has been set at rest by *Mersey Steel and Iron Co.* v. *Naylor, Benzon, & Co.*, 32 W. R. 989, 9 App. Cas. 434. The question was fully considered by the House of Lords in the latter case, and the law is now clear that the breach of one stipulation does not necessarily carry with it even an implication of an intention to repudiate the whole contract. It may do so if the circumstances lead to such an inference; but the further the parties have proceeded in the performance of the contract the less easy is it from a breach of one stipulation by one party to infer an intention to declare his incapacity to perform the contract, or not to carry it out. In the present case the contract was performed by the purchaser with the exception of the payment of the last instalment of the purchase-money. There was no express declaration of his incapacity to make that payment, and the correspondence shows it was not likely the defendant would insist on immediate payment. The inference that under those circumstances the non-payment of an instalment of £9 3s. 4d. amounted to a repudiation by the purchaser of the whole contract would be so extravagant that I decline to draw it. Indeed, if the contract had contained an express stipulation that, on the non-payment of any instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the court would have regarded that provision as a penalty, and would have relieved him

from it, as was done in *In re Dagenham (Thames) Dock Co.*, L. R. 8 Ch. App. 1022, 22 W. R. Dig. 76. Indeed, the present case would have been a much stronger one, the instalment being only a twelfth part of the purchase-money. The defendant's case would have been subtantially the same if only a shilling of the purchase-money had been left unpaid by the plaintiff. In my opinion the defendant is not entitled to say that the plaintiff has repudiated the contract, and it follows that the plaintiff is not debarred from suing the defendant for the non-performance of his stipulations, and he can obtain damages for the breach of them. I cannot agree with the learned judge that, because the plaintiff did not pay the last instalment of the purchase-money, he must be treated as having abandoned his contract. It is not necessary, therefore, to consider whether, even if the appellant could be said to have declared an intention not to pay the last instalment, the vendor's reciprocal claim thereon being nothing short of what he would have got upon a complete rescission *ab initio* —namely, resumption of the land which formed the whole consideration arising from him under the contract, he is nevertheless entitled to retain the purchase-money; or whether in such a case the rights of the parties must not be adjusted upon the footing of a *restitutio ad integrum*: see *Clough* v. *London and North-Western Railway Co.*, 20 W. R. 189, L. R. 7 Ex. 26.

Solicitors, *Edwin, Son, & Edgley; Field, Roscoe, & Co.*, for *J. H. Mitchell*, Worthing.

High Court of Justice.

Chan. Div. Kekewich, J. } Aug. 8, 1900.

In re SEARLE. (*a.*)

Settled Land—Tenant for life—Remaindermen—Trust for sale—Power to postpone—Interim rents and profits —Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 63.

Where real estate is settled upon trust for sale, and to pay the income of the proceeds to a person for life, that person is "for the time being beneficially entitled to the income of the land until sale" within the meaning of the Settled Land Act, 1882, *s.* 63, *and is therefore tenant for life under the Act.*

The principle laid down in In re Chesterfield's Trusts, 32 *W. R.* 361, 24 *Ch. D.* 643, *does not apply to real estate.*

The testator in this matter by his will dated the 27th of July, 1874, devised and bequeathed all his residuary estate upon trust to sell and convert the same and invest the proceeds thereof, and to stand possessed of the said residue and investments in trust to pay the income thereof to his wife during her life, and from and after her decease in trust to pay and divide the same equally between his daughters; and he declared that his trustees might postpone the sale and conversion of his real and personal estate for so long as they should think fit during his wife's life.

The testator died in October, 1895.

This was a summons taken out by the widow under the Settled Land Act, 1882, s. 7, asking that she might be authorized to exercise the powers of leasing given to her by section 63 over the testator's unsold real estate.

Warmington, Q.C., and *Marcy*, for the applicant.

Rolt, for the remaindermen.

KEKEWICH, J., said it was satisfactory to have this case threshed out. The question was whether the applicant was entitled under the will to the rents and profits of the unsold real estate. If she was so entitled she was tenant for life within the meaning of the Settled Land Act, and could exercise the powers given by the Act. It was argued that unless there was a distinct gift until conversion, the tenant for life was not entitled to the rents, and that there was no distinction in this respect between real and personal estate; but his lordship thought this argument unsound, as the distinction runs through many cases, and real and personal property must for many purposes be considered as entirely different. The authorities were clear that where there is a trust for conversion, and the sale is not improperly postponed, the person entitled to the income is entitled to the rents until sale. The Master of the Rolls, in *Yates* v. *Yates*, 28 Beav. 637, 9 W. R. Ch. Dig. 111, did not apparently distinguish between real and personal estate, but if so, that decision was at variance with the other cases, and ought not to be followed. The case of *Fitzgerald* v. *Jervoise*, 5 Madd. 25, was unsatisfactory, and the head-note inaccurate, but there the plaintiff was held to be entitled as tenant for life. In *In re Laing*, 14 W. R. 328, L. R. 1 Eq. 416, there was no argument against the conclusion arrived at, but the Vice-Chancellor would not have decided as he did without consideration. The case of *Casamajor* v. *Strode*, 19 Ves. 390*n*, was a decision on the very point, for although there is no more than a statement of what the decree was, yet the tenants for life could only have been entitled because they were tenants for life of the proceeds of sale. His lordship passed lightly over the cases before himself—namely, *Hope* v. *D'Hédouville*, 41 W. R. 330, [1893] 2 Ch. 361, and *In re Carter*, 41 W. R. 140, but he did not think he could state the rule better than he had stated it in *In re Carter*. Further, Lewin on Trusts, p. 1161, and Jarman on Wills, p. 569, are in accord with the authorities cited. If it had been necessary to imply an intention in the testator that the tenant for life should have the rents there was some evidence of such intention, but his lordship based his judgment, not upon the wording of the will, but on the general principle that where there is a trust for sale with a power to postpone which has been exercised, or where the sale has without impropriety been postponed the rents and profits of the real estate until sale are payable to the person who would be entitled to the income of the proceeds of sale. His lordship therefore gave the power to lease asked for by the summons.

Solicitors, *Meredith, Roberts, & Mills*, for *Baker & Co.*, Weston-super-Mare.

Chan. Div. Cozens-Hardy, J. } July 18, 1900.

In re MONEY KYRLE.

MONEY KYRLE *v.* MONEY KYRLE. (*a.*)

Will—Settled estate—Tenant for life—Term of years—Right of tenant for life to possession — Conditions —Order.

The plaintiff was tenant for life of certain landed property. In 1868 *a part of the property had been devised to trustees for a term of* 500 *years, with directions to manage and receive the rents and profits and apply the surplus rent in paying off two mortgages of* £16,000 *and*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

£14,000 *respectively. The mortgages had now been reduced to* £9,000 *and* £8,000 *respectively, and the plaintiff applied to be let into immediate possession of the estates, and that such of the title-deeds relating thereto as were in the possession of the trustees might be delivered up to him.*

Ordered, that the plaintiff, upon giving security to the satisfaction of the judge in chambers for the due performance of the undertaking to account for the rents and pay the surplus rents to the trustees, be let into possession of the settled estate, and that the trustees deliver up to him any deeds which were in their possession.

In re Richardson, *W. N.*, 1900, *p.* 3, *approved.*

By his will made on the 17th of March, 1868, William Money Kyrle devised and bequeathed all his real estate in the counties of Wilts, Hereford, Northampton, or elsewhere, chargeable as to certain parts as therein mentioned to the uses and upon the trusts therein declared, that was to say as to his real estate in Wilts, and as to certain other estates in the counties of Hereford and Northampton, to the use of his brother, the defendant Charles Septimus Money Kyrle and the Rev. George Prothero, their executors and administrators, for the term of five hundred years from the day of his death, but upon and for the trusts and purposes thereinafter declared; and as to all his hereditaments and real estate thereinbefore devised (subject to the term of five hundred years) the testator devised the same to the use of his brother John Ernle Money Kyrle for his life, and after his death to the use of Audley Walter Washbourne Money Kyrle (the plaintiff) for life, with remainder to the use of the first and other sons of the plaintiff successively in tail male. The testator then directed the trustees to devote a portion of the rents of the property to the payment of interest on two mortgages of £14,000 and £16,000 respectively, and the surplus was to be devoted to paying off and discharging the two mortgages. As soon as the mortgages had been paid the testator's will was that the term of five hundred years should cease and determine.

The testator died on the 27th of August, 1868, and J. E. Money Kyrle became tenant for life. He died in October, 1894, whereupon the plaintiff, A. W. W. Money Kyrle, entered into possession of such parts of the estate as were not included in the term of five hundred years.

The mortgages had been reduced by £7,000 and £6,000 respectively.

The plaintiff in his originating summons asked for, first, a declaration that he was tenant for life, or a person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, over the estates settled by the will; secondly, a declaration that he was not precluded from exercising the powers of a tenant for life by reason of the term for five hundred years or by reason of the trusts of such term; thirdly, a declaration that the proceeds of sale of any land or houses sold by the plaintiff under the powers conferred by the Acts might be applied in paying off the incumbrances upon the estates, and that when the two mortgages of £16,000 and £14,000 should have been fully discharged the term of 500 years would cease and determine; fourthly, that the applicant might be let into immediate possession of the estates, and that such of the title deeds relating thereto as were in possession of the trustees might be delivered up to him.

The defendants did not oppose the first three declarations.

Northcote, for the tenant for life.—It was to the interest of the estate that the tenant for life should be in possession. The order as in *In re Richardson*, W. N., 1900, p. 3, might be made. The tenant for life was willing to give security to the trustees and pay an occupation rent.

Counsel referred to the cases of *In re Wythes*, 41 W. R. 375, [1893] 2 Ch. 369; *In re Bagot's Settlement*, 42 W. R. 170, [1894] 1 Ch. 177.

Eve, Q.C., and *Cartmell*, for the trustees of the term.—The trustees must be properly protected: *In re Newen*, 43 W. R. 58, [1894] 2 Ch. 297.

Ashworth James, for the tenant in tail in remainder

COZENS-HARDY, J.—A very important question is raised in this case, but the case of *In re Richardson*, decided by Stirling, J., commends itself in this connection entirely to my judgment. The applicant is tenant for life but he is postponed by means of the trusts of this term, and under these trusts he does not come into possession of a penny of the rents and profits until these two mortgage debts have been paid out of the surplus rents. Under these circumstances he says: "I am the person who by law can sell this property; I have the powers of a tenant for life; it cannot be sold by the trustees without my consent; and as I am the person who by legislative powers can alone deal with the estate, therefore I am the proper person to have possession of it, and it is right that I should be put into actual receipt of the rents and profits of this estate, provided only that the persons interested in the trusts of the term do not suffer any loss." I think there is great common sense in that view. I propose to follow the order made by Stirling, J., in *In re Richardson* with one exception. The exception is that I shall require the tenant for life to give security that he will account to the trustees properly for the surplus rents which they have to expend according to the trusts of the term. With this addition I propose to follow that order, and to adopt the form set out in *In re Wythes* and *In re Bagot's Settlement*.

Solicitors, *Trower, Still, Freeling, & Parken; Routh, Stacey, & Castle*, for *F. H. Phillips*, Chippenham.

Chan. Div.
Cozens-Hardy, J. } July 7, 1900.

In re OVEY.
OVEY *v.* OVEY. (*a.*)

Trustee — Investment — Will — Administration — Trust funds—Prohibited investments—Lord St. Leonards' Act, 1860 (23 *&* 24 *Vict. c.* 38), *s.* 10.

A testator directed that the income of a portion of his estate was to be invested in Consols (and in no other securities).

The court refused to order the sale of the Consols and the reinvestment of the proceeds in securities authorized by section 11 *of Lord St. Leonards' Act,* 1860.

In re Wedderburn's Trusts, 27 *W. R.* 53, 9 *Ch. D.* 112, *not followed.*

A testator gave all his real and personal estate to trustees and directed "that after all the annuities, legacies, and bequests are paid and satisfied that all the rest and remainder of all the rents from farms, dividends, and profits of all the rest of my property whatsoever shall be invested in the 3 per cent Consolidated Bank Annuities (and in no other securities), and become part of the *corpus* of my property."

In 1874 an action for the administration of the testator's estate was commenced. A petition was now presented asking for the sale of the Consols, and the

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

reinvestment of the proceeds in other securities authorized by Lord St. Leonards' Act, 1860.

Brinton, for the petition, relied upon the decision in *In re Wedderburn's Trusts*, 27 W. R. 53, 9 Ch. D. 112.

COZENS-HARDY, J., refused the application and declined to follow the decision in *In re Wedderburn's Trusts*.

Solicitors, *Whitehead, Marshall, & Co.*

Q. B. Div.
(Grantham and Channell, JJ.) June 14, 1900.

CHRISTIE, MANSON, & WOODS (*Appellants*) *v.* COOPER (*Respondent*). (*a.*)

Trade-mark — Selling goods with forged trade-mark applied to them—Reason to suspect genuineness of trade-mark — "Acting innocently" — Merchandize Marks Act, 1887 (50 *&* 51 *Vict. c.* 28), *s.* 2, *sub-section* 2.

By section 2, *sub-section* 2, *of the Merchandize Marks Act,* 1887, *every person who sells any goods to which any forged trade-mark or false trade description is applied shall be guilty of an offence against the Act, unless he proves that, having taken all reasonable precautions against committing an offence against the Act, he had no reason to suspect the genuineness of the trade-mark or trade description, or—clause* (c)—"*that otherwise he had acted innocently.*"

Held, that a person who sells goods to which a forged trade-mark or false trade description is applied may show that he "acted innocently," and be exonerated under clause (c), *although at the time of the sale he had reason to suspect the genuineness of the trade-mark or trade description.*

Case stated by the Metropolitan police magistrate at Marlborough-street police-court.

A complaint and information was preferred by the respondent against the appellants, Messrs. Christie, Manson, & Woods, for that they did on the 11th of January, 1900, at 8, King-street, St. James', unlawfully sell certain goods—to wit, china—to which forged trade-marks were applied—namely, those of the Royal Porcelain Factory of Saxony, within the meaning of the Merchandize Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2, sub-section 2.

The magistrate convicted the appellants under section 2 (2) of an offence against the Act, and imposed a fine of £10 and ten guineas costs, subject to this case. The facts were as follow:

The King of Saxony, of the Royal Manufactory of Porcelain of Saxony, at Meissen, in Saxony, is entered on the register of trade-marks as proprietor of a certain trade-mark No. 1,137, in class 16, "in respect of china, porcelain, statuary, porcelain plaques or tiles and bisque china," and such registration is now in force. The London agents of the Royal Factory at Dresden are Messrs. Oppenheim.

On the 9th of January, 1900, and the following day, Messrs. Christie, the appellants, exposed to public view at their auction rooms in King-street, for the purpose of sale, certain goods then advertised to be sold by them on the 11th of January following. The goods which were the subject of the information were lot 71, and were described in the catalogues circulated by the appellants as Dresden china, and were in the white Dresden style, and had affixed to them marks resembling and being good imitations of the trade-mark No. 1,137 above-mentioned; but the magistrate found as a fact that the goods were not genuine Dresden china, and that the marks on them were forged trade-marks within the meaning of the Merchandize Marks Act, 1887.

On the morning of the sale on the 11th of January a telegram was despatched by the solicitors of Messrs. Oppenheim, the agents of the Dresden Royal Factory, at about 9.30 a.m., and was received by Messrs. Christie in time to admit of a full examination of the goods. The telegram was as follows: "Referring your letter 12 July, 1898, lot 71 to-day's sale believed not genuine. Writing. HALSE, TRUSTRAM."

This letter of the 12th of July, 1898, was part of a correspondence which had previously taken place between Messrs. Oppenheim's solicitors and the appellant's firm. It was written by the appellants to the respondent's solicitors, Messrs. Halse & Co., and contained the following passage:

"All things sold by us are placed on view for two days preceding the sale and our rooms are open to all, so that the Dresden Factory's agents are at liberty to inspect every piece of china. Though we are quite ready to assist in stopping forgeries, we cannot undertake to be responsible in any way for the various articles that pass through our hands.—Yours faithfully, "CHRISTIE, MANSON, & WOODS."

After the receipt of the telegram the goods were examined by a member of the appellants' firm specially conversant with china, and he informed Mr. Anderson (the member of the firm who was about to conduct the sale) that he would advise the lot in question being sold "for what it is," as the goods had to be sold without reserve.

Mr. Anderson thereupon made a memorandum on his own sale catalogue by putting his pen through the word Dresden, and on lot 71 being reached he said to the assembled bidders: "Our attention has been drawn to this lot, and we sell it for what it is. You see what there is, what shall we say for it?" Bidding thereupon proceeded, and the lot was knocked down to the prosecutor, Mr. Cooper, for £4 10s.

In his evidence before the magistrate, Mr. Anderson stated that the expression "We sell this for what it is" would naturally raise suspicions in the minds of intending purchasers, and make them think again before bidding for it; and that the expression would be so taken and understood by all dealers and persons in the habit of buying at auctions.

The articles comprised in lot 71 were lotted and described in the catalogue by a person employed by the appellants as an expert in china, who at the time he so described them believed them to be Dresden, and the marks upon them to be genuine; but no attempt was made at the hearing to establish on behalf of the appellants that the goods in question were genuine Dresden china, or that the mark was not in fact a forged trade-mark.

By the fifth of the conditions of sale, which were made part of the case, it was provided: "The lots to be taken away and paid for, whether genuine and authentic or not, with all faults and errors of description, at the buyer's expense and risk, within two days from the sale; Messrs. Christie, Manson, & Woods not being responsible for the correct description, genuineness, or authenticity of, or any fault or defect in, any lot, and making no warranty whatever."

The magistrate found that the appellants had sold goods to which a forged trade-mark had been applied; and that they had not proved to his satisfaction that, having taken all reasonable precautions against committing an offence against the Act, they had no reason to suspect the genuineness of the trade-mark. He accordingly held that they had not "acted innocently" under clause (c), although they had not been guilty of any intention to mislead, or to induce

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

persons to purchase that which they would not otherwise have purchased.

It was then submitted on behalf of the appellants that they were protected by the proviso in clause (*c*) if they had been innocent of any intention to induce a buyer to purchase something which he would not otherwise have purchased.

The magistrate was of opinion that (the object of section 2, sub-section 2, of the Act being to prevent the sale of goods to which any forged trade-mark is applied) the appellants could not rely on clause (*c*) as a defence, unless they had been innocent of any knowledge or reasonable ground of suspicion at the time of sale that the trade-mark was in fact forged, and that their state of mind towards the purchaser was immaterial in a prosecution for this offence.

He accordingly convicted the appellants of an offence under the Act.

The question for the opinion of the court was whether, upon the above facts, the decision of the magistrate was correct in law, and if not, what should be done in the premises,

The Merchandize Marks Act, 1887 (50 & 51 Vict. c. 28) provides: Section 2—"(2) Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade-mark or false trade description is applied, or to which any trade-mark or mark so nearly resembling a trade-mark as to be calculated to deceive, is falsely applied, as the case may be, shall, unless he proves—(*a*) That, having taken all reasonable precautions against committing an offence against this Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade-mark, mark, or trade description; and (*b*) that on demand made by or on behalf of the prosecutor he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or (*c*) that otherwise he had acted innocently, be guilty of an offence against this Act."

Moulton, Q.C. (*Avory* with him), for the appellants.—The appellants come within clause (*c*) and are exonerated under that clause. If a person gives a false trade description and at the time of giving it is not aware that it is a false description or a forged trade-mark, as the case may be, then he is acting innocently within the meaning of clause (*c*). The appellants in this case "acted innocently." They employed an expert to lot these articles, and they had employed him for many years, and he applied to the goods the description in question. The only warning the defendants had was the receipt of the telegram "believed not genuine." At the sale the appellants did all any reasonable persons could do, and they did not sell the articles as genuine. They had been warned themselves as to the genuineness, and in the same way they warned their intending purchasers. They therefore "acted innocently" with the meaning of clause (*c*) and are protected.

Israel Davis, for the respondent.—The magistrate was right in his finding. He found as a fact that the goods were not genuine Dresden, and that the marks on them were forged trade-marks; he also found that the appellants had not proved that they had no reason to suspect the genuineness of the trade-mark. He was therefore right in holding that clause (*c*) did not apply as a defence. Under the Merchandize Marks Act, 1862, it was necessary for the prosecutor to prove that the seller had acted fraudulently; under the present Act it is not so, and it is not necessary for the prosecutor to prove that the seller acted fraudulently in selling goods with a forged trade-mark applied to them. If it be proved that the goods were sold with a forged trade-mark or false trade description applied to them, then the onus is shifted to the defendant (the seller) and it is upon him to prove that he acted innocently. Under the present Act the onus is not on the prosecution in such cases, but is on the defendant. The question was considered by the full court in *Coppen* v. *Moore*, 46 W. R. 620, [1898] 2 Q. B. 306, and the court held that the onus was on the defendant, and that clause (*c*) is confined to cases where the false trade description is applied upon the occasion and as part of the terms of sale—which is not this case—but that clauses (*a*) and (*b*) apply in such a case as this, where goods are sold with a forged trade-mark already stamped upon them. Clauses (*a*) and (*b*) are particular cases of innocence or grounds of exoneration, and one of these grounds is that the seller had no reason to suspect the genuineness. In the present case the very thing that is mentioned in clause (*a*) was proved against the appellants, as it was proved that they had reason to suspect the genuineness of the trade-mark. The appellants therefore cannot rely upon that ground under clause (*c*) as showing that they acted innocently. The danger in these cases is that the appellants, by doing what they did, however free from any suspicion of fraud themselves, put it in the power of dishonest traders to commit frauds in selling these articles. The Act is aimed against that: *Wood* v. *Burgess*, 38 W. R. 331, 24 Q. B. D. 162; *Johnston* v. *Orr Ewing*, 30 W. R. 417, 7 App. Cas. 219; *Sykes* v. *Sykes*, 3 B. & C. 541.

Moulton, Q.C., was not called on to reply.

GRANTHAM, J.—We think the learned magistrate came to a wrong decision. He tells us the grounds on which he came to that decision, that in his judgment the words "acted innocently" were only intended to apply to innocence of all doubt as to whether the article was genuine or not. In our judgment he was wrong, and it is only necessary to read the clauses of section 2 to see that he was wrong. Having this reason for exoneration given in clause (*a*), we do not require to have the same reason for exoneration brought forward again in clause (*c*), because, although the words in clause (*c*) are fewer, the scope of the clause is wider than clause (*a*). It is quite clear, therefore, that the words in clause (*c*), "that otherwise he had acted innocently," must mean that he acted innocently in some other way than that he had no reason to suspect the genuineness of the trade-mark. It is said here that it was practically admitted before the magistrate that the trade-mark was not genuine. That seems to have been admitted, as well as the fact that the appellants had been told, and had told intending purchasers at the sale, that there was a doubt as to the genuineness of the articles, and that they did not guarantee them. The appellants then sold them for what they were worth without any guarantee at all. The magistrate held that that is not sufficient, and that the only innocence which could exonerate the appellants is innocence of any suspicion as to the genuineness of the article. It seems to me that the Act is very wisely drawn in wide terms in the first instance for the purpose of stopping false descriptions and false trade-marks. In this Act of 1887 the Legislature have altered the position of the vendor from what it was under the Merchandize Marks Act, 1862, as it puts the vendor in a worse position than he was in under the Act of 1862. But, while it places the vendor in a worse position and does not throw the onus on the prosecutor of proving fraud, it gives the vendor the opportunity of showing that in his action he was innocent. The word used in the clause (*c*) is very wide—that he "acted" inno-

cently. The word "acted" covers either selling, or exposing for sale, or having in his possession for sale, or any other dealing with the goods. All that the vendors here have to show is that in their action with regard to this particular article and the selling of it, they acted innocently and were not guilty of any fraud. They were told that there was a doubt whether this was a genuine trade-mark or not; they acted on that doubt and said that although they were told that the articles were genuine Dresden china, they had their doubts about it, and that they would sell it for what it was worth. Yet because they did all that, if the argument for the respondent be well founded, the appellants could be sent to prison, notwithstanding that they had acted *bonâ fide*. I think we are bound to say that, on the case stated, this conviction was wrong, and must be quashed.

CHANNELL, J.—I agree that the view taken by the learned magistrate is incorrect. The point is, what is the meaning of the word "innocently"? That is the point of law on which this case is stated and upon which the magistrate has given his opinion. The construction of this Act was considered in the case of *Coppen* v. *Moore*, and the interpretation put upon it was this: that whereas in most criminal cases it is necessary for the prosecution to prove a *mens rea*, that is not necessary under this Act. But, on the other hand, this is not one of those cases, where, it being the object of the Legislature to forbid a particular act being done at all, the statute is framed in such a way as to forbid the doing of the act absolutely, independently of there being any *mens rea* or not, and where, consequently, if the forbidden act is done, the person who has done it must be convicted although he had no *mens rea*. Under this Act there must be *mens rea* in fact, but the burden of proving it is shifted and is not in accordance with the ordinary principles of criminal law. The prosecution have not to prove a *mens rea*, but if the defendant is able to prove the absence of *mens rea* then he is to be acquitted. That was the construction put upon this Act by the full court in *Coppen* v. *Moore*, and we have to apply it. It still leaves us to consider what is the meaning of the words in clause (*c*) "acted innocently"; so that the question really is whether the defendant is able to prove such absence of *mens rea* as would, in a case where the burden of proof is upon the prosecution, be for the prosecution to prove affirmatively. In this case the magistrate was of opinion that the appellants could not rely upon this clause as to innocence unless they could show that they had been innocent of any knowledge on reasonable ground of suspicion at the time of the sale that the trade-mark was in fact forged. That cannot be right for the reason pointed out by my brother, that that is the gist of clause (*a*), and that clause (*c*) goes on to say that "otherwise he had acted innocently." That assumes that there must be other cases besides absence of suspicion which may be innocent within the meaning of the Act. The result is that the defendant may always set up, under clause (*c*), any case of absence of *mens rea* which, in an ordinary criminal case, it would be on the prosecution to prove. I think the magistrate was right in holding that the state of mind of the seller towards the purchaser was immaterial in a prosecution for this offence. *Mens rea* must be applied in relation to the particular offence, and I think counsel for the respondent was right in saying that innocence in this clause meant innocence of any intention to infringe the Act of Parliament. That is the point which the magistrate ought to have considered. I think it is quite clear that there may be innocence of an intention to infringe the Act, even though there may be suspicion of the genuineness of the trade-mark; and I think the Act says so by the word "otherwise." Therefore I do not think the magistrate has decided on the right ground, and the only point on which there is some difference between my brother and myself is this: I have some doubt whether we ought simply to quash the conviction or send the case back to the magistrate for him to consider again the question of innocence, applying the right test, as I think he applied the wrong test. However, as my brother thinks it ought to result in the conviction being quashed, I do not dissent, because, having expressed my view, it will be sufficient for future cases. The result is that the conviction will be quashed.

Conviction quashed.

Solicitors for the appellants, *Eardley Holt, Hulbert, & Hubbard.*

Solicitors for the respondent, *Halse, Trustram, & Co.*

Q. B. Div.
(Ridley and Bigham, JJ.) May 14, 1900.

CRAIG *v.* NICHOLAS. (*a.*)

Tolls—Turnpike road—Exemption—Carriage employed in her Majesty's military service—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 143.

A private carriage belonging to an officer in the regular forces is not, when used by him while on duty, exempted by section 143 *of the Army Act,* 1881, *from payment of toll in passing along a turnpike road.*

Case stated by justices for the borough of Plymouth.

An information had been laid by the appellant against the respondent which alleged that the respondent on the 10th of July, 1899, unlawfully demanded and received from the appellant, he being then an officer of her Majesty's regular forces on duty, a toll of 4d. for passing along a turnpike road known as the Embankment-road.

At the hearing the following facts were proved or admitted:

Under a local Act, 43 Geo. 3, c. xv. s. 33, a toll of 4d. is payable at the Modbury-road gate on the Plymouth Embankment-road, being a turnpike road, in respect of every carriage drawn by one horse passing through the same unless such carriage is exempt by statute.

The respondent was a toll-collector at the said toll-gate in the employment of the Plymouth Corporation, in whom the said Embankment-road was vested, and who were entitled to collect tolls payable under the said Act.

The appellant was a major in the Royal Artillery stationed at Fort Bovisand, about six miles from Plymouth, but residing in Plymouth, and his duties frequently necessitated his attendance at the headquarters office, Mount Wise, Devonport.

On the 10th of July, 1899, he proceeded in his own private carriage from his residence in uniform to the headquarters at Devonport, where he transacted official business. He left the headquarters office in the same carriage, accompanied by his soldier servant, who was not in uniform but in plain clothes; he then drove through Plymouth along the Embankment-road and through the Modbury-road toll-gate direct to Fort Bovisand, a distance of about nine

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

miles, in order to discharge official duty at the said fort. On the arrival of the appellant at the toll-gate the respondent demanded and received from him a toll of 4d. in respect of the carriage which the appellant was driving, notwithstanding that the appellant informed him that he was on duty, and claimed to be exempt from the payment of the toll. The carriage was the private property of the appellant, for which he took out an excise licence and was used by him partly for his own private purposes and partly for carrying out his military duties. The appellant was in receipt of allowances from the Government for a horse in connection with his duties as a major in her Majesty's army, but he was not in receipt of or entitled to any allowance from the Government in respect of any private carriage, and he would not have been at liberty to hire a private carriage at the cost of the Government to convey him from Plymouth to Fort Bovisand for the purpose of discharging his duties at the said fort.

It was contended on the part of the appellant that he was on duty while driving in the carriage from Devonport along the turnpike road and through the toll-gate to Fort Bovisand, and that for the time being the carriage was a carriage employed in her Majesty's military service, conveying an officer of her Majesty's regular forces on duty, and as such was exempt from payment of the toll by virtue of section 143 of the Army Act, 1881 (44 & 45 Vict. c. 58).

It was contended on the part of the respondent that inasmuch as the carriage was the private carriage of the appellant, for which he personally paid the excise licence, and received no allowance from the Government, it could not be said to be employed in her Majesty's military service within the meaning of section 143 of the Army Act, 1881.

After hearing the evidence and the solicitors for each of the parties, and having referred to the General Turnpike Act, 1823 (3 Geo. 4, c. 126), s. 32; the Volunteer Act, 1863 (26 & 27 Vict. c. 65), s. 45; the Mutiny Act, 1876 (39 & 40 Vict. c. 8), s. 86 (now repealed); and the Army Act, 1881 (44 & 45 Vict. c. 58), s. 143; and the cases *Humphrey* v. *Bethel*, 14 W. R. 457, L. R. 1 C. P. 215, and *Hinds* v. *Thring*, 41 J. P. 265, 25 W. R. Dig. 291, the justices came to the conclusion that the private carriage of the appellant, while carrying him from Mount Wise to Fort Bovisand was not exempt from payment of toll at the toll-gate, and could not be regarded as being then employed in her Majesty's military service within the meaning of the Army Act, 1881, the carriage not having been requisitioned for military service under the Mutiny Act or otherwise so appropriated for her Majesty's military service as to come within the exemption. They therefore dismissed the information.

The question for the court was whether the justices were right in deciding that under the circumstances the appellant was not exempt from payment of any toll in respect of the said carriage by virtue of section 143 of the Army Act, 1881. That section exempts from tolls "all officers and soldiers of her Majesty's regular forces on duty or on the march, and their horses and baggage . . . and all carriages and horses belonging to her Majesty or employed in her military service when conveying any such persons as above in this section mentioned."

Yarborough Anderson, for the appellant.—"Employed" in section 143 of the Army Act, 1881, merely means used, and does not imply a hiring or employment for pay. The carriage was in fact being used or employed in the manner mentioned in the section, and it was exempt from toll.

Duke, Q.C. (*Bodilly* with him) for the respondent.—If mere use of a carriage by an officer on duty is sufficient to satisfy the section, the words descriptive of the class of carriages to which the exemption applies would be unnecessary. [He was stopped.]

RIDLEY, J.—I think that this case is clear, and that the magistrates were right. The expression "employed" in section 143 of the Army Act, 1881, is not used in a wide sense which would include a carriage merely used in the military service of the Crown. Considering the other words of the section, and the fact that allowances are made to officers of the army for carriages in respect of their military services, I think that the section must mean employed by authority of those in command, and not merely used by an individual officer in the course of his military service. The word was put in because carriages which belong to the army as part of its equipment, and others which are requisitioned under section 112 and cognate sections, ought to be exempt from payment of toll. Besides these there is a third class of carriages and horses employed in military service for which no requisition has been made, but in respect of which an allowance is made by the Government, and which are employed by an officer on duty or on the march, and these also are exempt. But this exemption does not include carriages used merely because it is the pleasure of the officer who is on duty to use them, and in my judgment such an extension of the exemption from toll was not contemplated by the Legislature when the Act was passed.

BIGHAM, J.—I am entirely of the same opinion. I do not think that the facts of the case bring the carriage in question within the exemption in favour of carriages "employed" in the military service of the Crown.

Appeal dismissed.

Solicitor for the appellant, *Solicitor to the Treasury*, for *Watts, Ward, & Anthony*, Plymouth.

Solicitors for the respondent, *Sharpe, Parker, Pritchards, Barham, & Lawford*, for *Ellis*, Town Clerk, Plymouth.

House of Lords.

From C. A. (England). June 26, 1900.

POWELL v. MAIN COLLIERY CO. (*a*.)

Master and servant—Employers' liability—Accident—Compensation—"Claim for compensation"—Initiation of proceedings—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 2 (1).

The claim for compensation required under section 2, *sub-section* 1, *of the Workmen's Compensation Act to be made within six months of the accident causing the injury, refers not to the filing a request for arbitration in the county court, but to the actual claim made by the workman upon his employer.*

Decision of Court of Appeal (48 *W. R.* 534, [1900] 2 *Q. B.* 145) *reversed.*

Appeal from judgment of Court of Appeal (A. L. Smith and Collins, L.JJ., Romer, L.J., dissenting), reported 48 W. R. 534, [1900] 2 Q. B. 145.

The appellant claimed compensation for injury received in the course of his employment, and sent his

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

employers, the respondents, the following notice of claim on the 2nd of May, 1899: "Notice of Claim. —To the Main Colliery Co. (Limited), Skewen.—Take notice that I claim the sum of 15s. per week, from the 4th day of January, 1899, until such date as I shall be able to resume work, as compensation for injuries received by me on the 21st day of December, 1898, at your colliery at Bryncoch.—(Signed) WILLIAM POWELL.—Address, Mount Pleasant, Clydach, R.S.O."

In October, more than six months after the accident, he filed a request for arbitration in the county court, and the county court judge awarded him 13s. 11d. a week. The Court of Appeal overruled this, considering the "claim for compensation," referred to the initiation of proceedings in the county court, and therefore was not made in time.

Section 2, sub-section 1, of the Act is as follows: "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof, and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause."

Sir R. Reid, Q.C., S. T. Evans, and *Redwood Davies*, for the appellant.

C. A. Russell Q.C., and *Anton Bertram* (*Ruegg Q.C.*, with them), for respondents.

The House took time for consideration.

Earl of HALSBURY, L.C.—The question in this case, though it lies within a very narrow compass, is one of very great importance with reference to the administration of the Act. I think that the whole question may be stated very shortly by reading, first, the sub-section upon which this case depends; and, secondly, the "notice of claim" which is alleged to have been given in pursuance of it. [His lordship read the sub-section.] In pursuance, or intended pursuance, of that section the person injured in this case served upon the employer what is alleged to have been a "notice of claim"; and I pause for a moment to say, with all respect to Sir Robert Reid, that nothing very much turns upon the service or upon the person upon whom it was served, although in this case there is no doubt that it was served upon the person alleged to be liable. [His lordship read the "notice of claim."] Now for the moment I will compare what the statute insists upon as a condition precedent to the maintenance of any right to compensation, and the thing that was done in alleged persuance of it. The words are: "Unless the claim for compensation with respect to such accident has been made within six months." The written notice that was served—I call it a "notice," to use a neutral term for the moment—was in these terms: "I claim the sum of 15s. per week, from the 4th day of January, 1899, until such date as I shall be able to resume work." I suppose that no one could reasonably doubt, unless he is forced by some circumstances extrinsic to the actual words under construction, that this was a "claim for compensation"; and it is not denied that it was made within the period limited by the Act. It was also made by the person who was alleged to have suffered, and it was served upon the person who was alleged to be liable; and the "claim" so stated and described in the written paper was made for a definite amount in respect of an accident described by its date; and, as I say, I should think that no person, unless forced to give an artificial meaning to the words of the section which I have read, could doubt that it was a "claim for compensation." It purports on the face of it to be a "claim for compensation" under the Act. Now the sole argument, so far as I can understand it, which is urged before your lordships is that the "claim for compensation" must be a claim in some form of legal procedure. That is the proposition. I think it may be conceded that, dealing with lawyers under the ordinary course of procedure, it would be true to say that "taking proceedings" generally among lawyers would be understood to mean some form of known legal procedure. But what then? This is not the ordinary course of legal procedure. It has been admitted by all the learned judges, I think, who have taken a different view from that which I propose to place before your lordships for acceptance, that the word "proceedings" is used in a sense different from that which would describe legal procedure ordinarily. It is said it is used in this statute in different senses. That is another head of inquiry upon which I will say a word presently, but I pass it by at this initial stage of the proceedings. Indeed, I observe that I have inadvertently used the word "proceedings" myself, in a meaning totally different from the ordinary meaning of the course of legal procedure. The argument of those who insist upon the opposite construction appears to me to involve of necessity two propositions: First, that you must find in the statute something to justify you in using these words in an artificial and non-natural sense; or, secondly, that you must assume that when the Legislature used the phrase "claim for compensation," you must add by construction these words—"in some form of legal procedure." I entirely repudiate the necessity for doing either of those things. I do not find in the rest of the statute anything that can properly describe the expression "claim for compensation" as being technical in its application, and certainly I am not going to add words which I think in my own mind would be inappropriate to the subject-matter; but it is enough to say that there is a necessity to add some words. Now it certainly is a very familiar rule of construction that you have no right to add words to a statute unless the exigency of the rest of the statute which you are construing renders it necessary for you to do so. Upon that ground I am of opinion that the judgment of the court below was wrong, and that the judgment of the dissenting judge was right; and I shall presently move your lordships that the judgment of the county court judge be restored.

But I wish to say something, apart from the mere words, upon the whole of the statute itself. It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge, from the language and the mode in which the statute has been enacted, that it contemplated what would be a horror to the mind of a lawyer—namely, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, "I claim so much," and that then he should go to the county court judge and say, "Now please to hear this case, because my employer will not give me what I have claimed." It appears to me that that is the meaning and construction of the whole statute, that that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one

at once that if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the Legislature was competent and had sufficient knowledge to say what it meant. Why is it that there is no suggestion here of "plaint," "suit," "writ," "bill," or any other proceeding in the form of claim, such as is recognized as a statement of claim? Nothing of the sort is to be found in the whole of the statute, and even as to that which is now pointed out in the pressure of the argument by the learned counsel on the other side—namely, the application to a county court judge for a hearing—what is the meaning of the word "application"? Are the parties at issue or not? Has any litigation arisen? Is there a "dispute," in the language of the statute, which has commenced? If so, there is no technical phraseology by which the initiation of that dispute is pointed to, and it appears to me to be exactly in accordance with what I have suggested to be the real meaning of the statute—that when once the claim for compensation has been made, and made upon the person who is alleged to be liable in respect of it, then the matter is, either by agreement or by the operation of the statute itself, remitted to the arbitrator. Then an argument was suggested to your lordships that there is no mode of procedure here for a defendant who wants to get rid of the question and to have it settled. I entirely differ. If it is meant that there is no mode actually pointed out by the statute, I agree; but it is left to the ordinary law in that respect, and I have never heard yet that a defendant cannot apply to an arbitrator for an appointment to have settled a question which has arisen between himself and his co-litigant. It has happened to me before now, and I daresay to all of your lordships who have sat as arbitrators, that if a plaintiff has been found shilly-shallying and declined to go on, an appointment has been applied for; and I daresay that it has happened to most of your lordships in that event to give a peremptory appointment for such and such a day, and to say that you would go on in the absence of the plaintiff unless he appeared. Why is not that procedure applicable to this matter? I observe that Smith, L.J., points out that such and such a provision was made for the benefit of the man or for the benefit of the employer. I absolutely repudiate any obligation to look at these things at all in that spirit. We are not here considering what is inserted in a contract for the benefit of one party to it or the other, so that that party may get the benefit of it. We are here considering an Act of Parliament which itself prescribes what is to be done, and I absolutely repudiate any notion that you can by agreement or anything else, except so far as the statute itself gives power to agree, qualify the language of the statute itself. The statute says that if you have a claim you shall make that claim within six months, and so on. Under these circumstances, it appears to me, with great respect to both the learned Lords Justices Smith and Collins, that they have allowed themselves to be swayed by considerations which seem to me to be outside the Act of Parliament. I observe that Smith, L.J., speaks of agreeing with two decisions to which reference has been made, one in Scotland and the other in Ireland (*Bennett* v. *Wordie & Co.*, 1 F. Ct. of Sess. Cas., 5th Series, 855; and *Marno* v. *Workman & Co.*, 53 Ir. L. T. Rep. 183). Notwithstanding what has been said, I entirely agree with both those decisions. It appears to me that in neither the one case nor in the other was there any compliance with that which undoubtedly is a condition precedent to the maintenance of a claim for compensation—that a "claim for compensation with respect to such accident" has been "made within six months." But why? Not because there was no legal procedure, not because there was nothing which could technically be called the beginning of an action, but because there was no claim at all. In the Irish case there was absolutely no claim; and in the Scotch case the reason for the decision, and what the court decided, was that in their view there was no "claim for compensation," but not in the least upon the ground that it was not part of a legal proceeding. As I have said, this is a very important case, but undoubtedly it is one which lies in a very narrow compass; and for the reasons which I have given it appears to me that the judgment of the county court judge ought to be restored and this appeal allowed, and I move your lordships accordingly.

Lord MORRIS AND KILLANIN.—I am unable to concur with the motion made by the Lord Chancellor, as in my opinion the judgment of the Court of Appeal should be affirmed; and I concur substantially in the reasons given by Smith and Collins, L.JJ. The question is a narrow one—namely, what is the interpretation of the words "the claim for compensation" in sub-section 1 of section 2 of the Workmen's Compensation Act of 1897. The appellant contends that the words are satisfied by the service of "the claim for compensation" delivered to the respondents on the 2nd of May, 1899. The respondents contend that the words "the claim for compensation" mean the initiation of proceedings by the request for arbitration and claim for compensation filed in the county court of Glamorganshire in October, 1899. While the Employers' Liability Act, 1880, extended the liability of employers, yet the liability was founded on the negligence of the employer, actual or constructive. The liability of the employer under the Workmen's Compensation Act, 1897, becomes that of an insurer against accident to the workman. The Employers' Liability Act made provision for the service of notice of the injury by the workman, and limited the right to bring an action to the period of six months from the time of the injury. It would be indeed strange that the Workmen's Compensation Act, which revolutionized the liability of the employer, should not also impose a limit for taking proceedings, and that it is still open to the injured workman to proceed under the Employers' Liability Act, independently of the Workmen's Compensation Act. Section 1, sub-section 4, enacts, "if within the time hereafter in this Act limited for taking proceedings." The only limitation of time to answer that, is the expression "the claim for compensation" in section 2, sub-section 1, with its limitation of six months. That section enacts (similarly to the Employers' Liability Act), as a condition precedent to the maintenance of proceedings, that notice must be given to the employer of the accident happening, and further enacts that "the claim for compensation" must be made within six months from the occurrence of the accident. There was not to be, and could not be, an action, as the tribunals were only a reference to a somewhat mythical body called a representative committee, or to an agreed arbitrator, or to the county court judge as an arbitrator, which latter was resorted to in the present case by the "request for arbitration with respect to the compensation payable," which was lodged on the 2nd of October, 1899, much beyond the period from the date of the accident. In my opinion that claim for compensation takes the place of an action under the Employers' Liability Act, and there must be some proceedings initiated before the expiration of six months, before the representative committee, if such a body existed, or before an agreed arbitrator, or before the county court judge as an arbitrator. The words "the claim for compensation" are necessarily substituted for

the "action" in the Employers' Liability Act, while section 2, sub-section 1, follows that Act in requiring notice of the accident, though the limitation of time is not necessarily the same. The words used are "the claim," not "a claim" for compensation. Now if these words are satisfied by the workman merely serving a notice on the employer that he claims a certain amount as compensation, and he does not proceed to give seisin to any tribunal of his claim to be disposed of according to law, it follows that it remains open for any period of time; that the claim remains hanging over the employer, with a right of the workman to take proceedings against him to the most remote period of time, not even limited by the Statute of Limitations. That the employer may initiate proceedings against himself appears to me an unmeaning and futile contention. Again, sub-sections 2, 3, 4, and 5 of section 2 give elaborate provisions as to what the notice of the injury is to contain and of the mode of service or delivery of it to the employer. There is no reference whatever to what "the claim for compensation" is to contain or as to the mode of service or delivery of it. That appears to me conclusive that "the claim for compensation" cannot refer to any document to be served on the employer, but must refer to some document appealing to a tribunal. The Legislature intended to place and did place a limit on the initiation of proceedings under this Act before the tribunals, or some or one of them, provided by the Act, and it did so in a way corresponding to the limit under the Employers' Liability Act. I am of opinion that the Court of Appeal rightly interpreted section 2, sub-section 1.

Lord SHAND.—I am of opinion that, as has been moved by the Lord Chancellor, the decision of the Court of Appeal in this case should be reversed, and that the award granted by the arbitrator—that is to say, the county court judge—should receive effect. There is no objection here—as it has been stated that there was in certain cases which were cited in the argument, which affected the judgments in those cases—that the claim is defective owing to a want of necessary specification. In those cases, as has been observed by the Lord Chancellor, there really was no claim; there was an attempt to make a claim, but it failed entirely in not providing the necessary specification to let the person against whom the claim was made know what the claim was. In this case the claim is specific—the parties are mentioned, the sum demanded is mentioned, and the date of the accident is mentioned. It is therefore quite distinguishable from either the Scotch or the Irish case in that respect. That being so, it is clear, I think, that there is a complete and valid statutory claim to begin with. That claim was made within six months of the occurrence of the accident, and I am of opinion that though the case is undoubtedly one of difficulty, as we see from the difference of opinion which has arisen in the courts below, the claim is sustained, and, in my opinion, forms the first step of the "proceedings" mentioned in section 1, sub-section 4. Having been taken within six months of the accident, it follows that the "proceedings" were taken within the time required by the statute. I do not think it necessary to go in detail into the reasons upon which I rest that judgment, but I agree entirely with what has been said by the Lord Chancellor and by Romer, L.J., in his observations on the case in the Court of Appeal. I may say, however, that it appears to me that the argument in favour of holding the claim to be the first step in the "proceedings" is very much fortified by what we find in the second schedule to the Act. In the first clause in that schedule there is a provision that "unless either party objects by notice in writing sent to the other party before the" representative committee having power to deal with questions of this kind has taken it up at all, it must be settled by arbitration. It appears to me that the claim was quite sufficient to enable that committee to take up the matter and settle it, even though no action had been raised. I must further add that the second clause of that schedule to which I have referred seems to me also to fortify the judgment. It is there provided that if either party objects to the committee, or the committee fail to take it up within a certain time, "the matter shall be settled by a single arbitrator agreed on by the parties." What is "the matter" that is to be settled? It appears to me that it is the matter raised by the claim. The schedule does not say that an action is necessary in order to bring this provision of the schedule into operation. I am of opinion, therefore, upon the statute, and taking the statute as a whole—although, as I have said, I think the question certainly very far from being free from difficulty—that the claim is a part of the "proceedings" referred to in the section upon which my noble and learned friend Lord Morris and Killanin has founded his judgment. I am also of opinion, with the Lord Chancellor, that after a claim in valid form has been intimated by the workman to the employer, should the workman delay—it might be for an unreasonable or indefinite time—to initiate arbitration proceedings, the master would be entitled to do so, to the effect of demanding that the claim should be dismissed as being unfounded, although such a case does not seem to have been expressly provided for by the rules.

Lord DAVEY.—I agree in the motion which has been proposed by my noble and learned friend on the woolsack. I find the reasons for my judgment fully and clearly stated in the judgment of the dissentient judge in the Court of Appeal (Romer, L.J.), and I do not find that I can usefully add anything to that judgment. I will therefore take the liberty of adopting as my own the reasons stated by that learned Lord Justice without troubling your lordships by repeating them.

Lord BRAMPTON.—On the 21st of December, 1898, the appellant, in the course of his employment as a workman at the colliery of the respondents, sustained serious bodily injury by an accident, in respect of which he was entitled to compensation under the Workmen's Compensation Act, 1897, which requires by section 1, sub-section 3, that the liability of the employer to pay such compensation, and the amount or duration thereof, should, if not settled by agreement, be determined by arbitration. The second schedule to the Act provides that the arbitration tribunal shall be either a committee, representative of an employer and his workman, or an arbitrator agreed on by the parties, or in the absence of such agreement the county court judge. [His lordship read section 2, sub-section 1, of the Act, and the notice of accident and the notice of claim.] The giving of this notice of the accident entitled the respondents to require the appellant to submit himself for examination to a qualified medical practitioner; and if the appellant refused to do so, proceedings under the Act would be suspended until such examination took place. With the notice of the accident, the claim, and the power to examine the appellant by a medical practitioner, the respondents had every opportunity that could be afforded them of forming an opinion as to the legality and reasonableness of the claim, and offering compensation to the appellant, which offer, if the appellant thought fit to accept it, would at once have terminated the claim by agreement, and obviated the necessity of any arbitration at all. No agreement,

however, was come to, for the respondents repudiated their liability; and thereupon questions arose between the parties which could only be settled by an arbitration under the statute. Accordingly, on the 2nd of October, under rule 8 of the Workmen's Compensation Rules, the appellant filed with the registrar of the county court at Neath a request for arbitration, which, according to the same rule, was entered and numbered as a plaint, and was the initiative act of the proceedings instituted to recover the compensation claimed. Appended to that request were particulars as required by rule 9. A copy of this request with such particulars was duly sent by the registrar of the court to the respondents, with a notice that the judge, as arbitrator, would hear the case on the 27th of that month. Before that day—namely, on the 19th of October—the respondents filed with the registrar their answer, alleging that the appellant's claim for compensation was barred, not having been made within six months from the occurrence of the accident. On the 27th of October, before the judge, this objection was urged as a defence. It was, however, overruled by the judge, who then heard the case on its merits, and made his award in favour of the appellant. An appeal was made to the Court of Appeal against that decision, which was reversed by a majority of the Lords Justices, whose judgment is the subject of this appeal to your lordships' House. I am of opinion that this appeal should be allowed. There is no warrant for even a suggestion that a limit is expressly put by the statute upon the time within which arbitration proceedings must be commenced, unless it be found in section 2, sub-section 1, of the Act, the material words of which I have already quoted. I must assume that the framer of that sub-section intended in it to express in that "ordinary language" which he has in the following sub-section 2 enjoined an injured workman to use in preparing his notice of injury, that which, reading this sub-section alone for his guide, every ordinarily intelligent person would understand from the language employed. And I cannot raise in my own mind a doubt that any such person could from that language come only to one conclusion — namely, that a workman in giving the notice of injury and making his claim for compensation upon his employers within six months, has fulfilled every obligation imposed upon him by that sub-section. If it was intended that it should be interpreted as the respondents contend, I can only say that more misleading language could not have been employed.

But it is said that the opening words of section 1, sub-section 4, "If within the time hereinafter in this Act limited for taking proceedings," point to a limit of time for initiating proceedings for arbitration, and must be read in conjunction with section 2, sub-section 1. Even so reading it, I do not think that they could affect the plain phraseology of that sub-section, which, in my opinion, though it points to arbitration proceedings by the words "proceedings for recovery," by the remaining words points out only the preliminary proceedings, which are made conditions precedent to the right to call in aid the statutory arbitrator. I think that the Legislature in the use of the word "proceedings" in sections 1 and 2 employed it in different senses. In section 1 the expression is "if any question arises in any proceedings under this Act." In section 2 the expression is "proceedings for the recovery under this Act of compensation." Now, bearing in mind that no arbitration proceedings can be claimed or taken unless a "question" has arisen in some proceedings under the Act, and that the proceedings in which such question must arise must therefore of necessity be before the arbitration is initiated, and that the only proceedings pointed to by the Act before arbitration are those consisting of the statutory notice of injury and the claim for compensation, and such requisition as may ensue therefrom until an agreement is hopeless—it must be to such proceedings that section 1, sub-section 3, refers. "Proceedings for the recovery of compensation" are applicable to arbitration proceedings which are taken with the object of obtaining an award under which payment may be enforced, which in its effect and operation is analogous to a judgment recovered, and are inapplicable to preliminary proceedings, which are taken only with a view to bring about an amicable agreement, if possible, or to pave the way to arbitration proceedings, which are in their nature of a judicial and hostile character. One may well interpret these sections to an injured workman in popular language thus: "If you desire compensation, give notice of your injury as speedily as you can—and send in your claim within six months—try to agree with your employer—but if you fail to do so, you may then enforce your right to compensation by arbitration, but you will not be entitled to an arbitration or to insist upon compensation unless you have given your notice and claimed as the statute directs you to do." I have formed this opinion regardless of the observations made in the Court of Appeal and in this House as to the probable intention of the Legislature to fix a limit of time within which arbitration proceedings shall be commenced, analogous to that fixed under the Employers' Liability Act with regard to actions. I am content to say that if such was the intention of the Legislature, it has not been expressed in this Act of Parliament. I equally disregard all the arguments as to alleged hardships which would be inflicted upon employers by admitting the possibility that threatened proceedings may vexatiously be allowed to hang too long over their heads, and I may add that I am not satisfied that employers may not themselves initiate the proceedings by arbitration if they desire to do so; but this House is not called upon to decide that question to-day. I deal only with the matter calling for your lordships' judgment, and regarding that, I have only to express my opinion that the judgment of the Court of Appeal should be reversed, and the award of the county court judge restored with costs.

Lord ROBERTSON. — I am clearly of opinion that the appellant is right. The proceedings contemplated by the Act of 1897 for the settlement of claims are not primarily judicial proceedings; and the error of the respondents arises from overlooking this distinctive characteristic of the Act. Arbitration may be required to decide differences arising in the proceedings; but, if this occurs, it is only incidental to the proceedings, and is not contemplated as a necessary part of them. When once this is realized, it becomes clear that the proper initiation of the proceedings is not an appeal to arbitration, but is exactly such a claim as that which was sent to the respondents. I have only to add that the most plausible argument against the appellant—namely, that on his theory there would be no check on delay—is not supported by the statute. As soon as the claim is sent to the employer he can, if he disputes it, himself take the difference to arbitration and have it settled. The frame of the rules cannot possibly take away this right which arises under the statute.

Judgment of the Court of Appeal reversed; judgment of the county court judge restored.

Solicitors for appellant. *Sharpe, Parker, Pritchards, & Co.*, for *Cuthbertson & Powell*, Neath.

Solicitors for respondents, *H. P. Becher*, for *W. V. Simons*, Pontypridd.

Court of Appeal.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) Nov. 5.

SAFFERY v. MAYER. (a.)

Gaming—Betting—Money paid in respect of gaming contract—Money advanced as partnership capital for purpose of betting—Gaming Act, 1892 (55 & 56 *Vict.* c. 9), *s.* 1.

V. advanced £500 *for the purpose of working a scheme invented by the defendant for making money by backing horses. The working of the scheme was left to the defendant, who undertook to be responsible for half the amount advanced. Profits were to be divided between V. and the defendant. The whole sum having been lost, the defendant gave V. promissory notes for* £250. *An action on the notes was brought by the trustee in V.'s bankruptcy. At the trial the judge found that the sum of* £500 *was in the nature of partnership capital.*

Held, that the sum advanced by V. was money paid "in respect of" a gaming contract, and that, therefore, by reason of the Gaming Act, 1892, *the action was not maintainable.*

Tatam *v.* Reeve, 41 *W. R.* 174, [1893] 1 *Q. B.* 44, *approved.*

Appeal from a judgment of Darling, J., at the trial of an action without a jury.

The action was brought by the trustee in the bankruptcy of one Claude Vautin to recover principal and interest due on promissory notes given to Vautin by the defendant. The defence was that the notes were given in respect of a contract or agreement rendered null and void by 8 & 9 Vict. c. 109, and that, therefore, by reason of the Gaming Act, 1892, the plaintiff was not entitled to recover.

The defendant, having invented a scheme for making money by backing horses, applied to Vautin to advance money for the purpose of working the scheme. Vautin advanced a sum of £500, and the defendant, who had no capital of his own, undertook to be responsible for half that amount. It was arranged that the defendant was to be responsible for the working of the scheme, and that the profits were to be divided between Vautin and the defendant. The whole of the money advanced was lost, and Vautin refused to advance any more until the defendant had paid him £250, the half of the amount already advanced. The defendant thereupon gave Vautin the promissory notes the subject-matter of the action.

By section 1 of the Gaming Act, 1892, "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

At the trial Darling, J., gave judgment for the plaintiff. He found as a fact that the sum of £500 was advanced by Vautin to a fund for the joint benefit of the defendant and himself, and was in the nature of partnership capital, and he came to the conclusion that the money was not paid in respect of a contract or agreement rendered null and void by 8 & 9 Vict. c. 109, and that therefore the promise sued upon was not rendered null and void by the Gaming Act, 1892.

The defendant appealed.

Abinger, for the defendant.—The case is within the Gaming Act, 1892, which was passed in consequence of the decision in *Read* v. *Anderson*, 32 W. R. 950, 13 Q. B. D. 779. The £500 advanced by Vautin was money paid "in respect of" a gaming contract. The words "in respect of" were considered in *Tatam* v. *Reeve*, 41 W. R. 174, [1893] 1 Q. B. 44; and the decision of the Queen's Bench Division in that case ought to be upheld.

Atherley-Jones, Q.C., and *H. Kisch*, for the plaintiff.—The money advanced by Vautin was not paid either under or in respect of a wagering contract. It was paid as Vautin's contribution to a partnership fund. There was an understanding between the parties that the money should be used for making wagering contracts on a joint adventure; but that understanding was not itself a wagering contract.

They referred to *O'Sullivan* v. *Thomas*, 43 W. R. 269, [1895] 1 Q. B. 698; *Burge* v. *Ashley & Smith*, 48 W. R. 438, [1900] 1 Q. B. 744; and *Thwaites* v. *Coulthwaite*, 44 W. R. 295, [1896] 1 Ch. 496.

A. L. SMITH, M.R.—I will deal with this case on the facts found by the learned judge. He found that the sum of £500 was advanced by Vautin to the defendant as a contribution to a fund for backing horses on the defendant's plan. No doubt the understanding between them was that Vautin was to find the money and the defendant was to find the brains. Vautin paid the £500, and the defendant was to go and back horses on their joint account. No part of the sum was a loan to the defendant, it was all partnership capital. This is the finding of the learned judge. The question is whether Vautin can sue on a promise to get back any of that money from the defendant. In my opinion none of the cases which have been cited, except *Tatam* v. *Reeve*, have any bearing on this case. *O'Sullivan* v. *Thomas* and *Burge* v. *Ashley & Smith* dealt with stakeholders and decided that depositing money with a stakeholder was not a payment of money within the meaning of the Gaming Act, 1892. In *Thwaites* v. *Coulthwaite* the Act of 1892 was not referred to. Does the present transaction come within the Act of 1892? I think that *Tatam* v. *Reeve* has a strong bearing on this case and is an authority to show that it does come within the Act, and that this money cannot be recovered back. The Act as applied to the facts of this case reads as follows: "Any promise, express or implied"—that is, any promise by the defendant—"to pay any person"—that is, Vautin—"any sum of money paid by him"—that is, Vautin—"under or in respect of any contract or agreement rendered null and void by the Act of 8 & 9 Vict. c. 109, . . . shall be null and void." The defendant was to bet on joint account with the £500 paid by Vautin. In my opinion that transaction comes within the words of the Act as being a payment "in respect of" a gaming contract. I cannot agree with the judgment of Darling, J., and I think the appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. What the plaintiff seeks to recover is not money advanced by Vautin to the defendant as a share of a common fund. That is clear from the facts as found by the learned judge. Vautin and the defendant were partners on equal terms on a joint adventure, Vautin finding the money and the defendant the skill. The bets that were made were lost, and the whole of the money advanced by Vautin has been expended in payment of the bets. What the plaintiff now seeks

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

to recover is really a half of the losses. I think that the money advanced by Vautin was paid in respect of a contract or agreement null and void by 8 & 9 Vict. c. 109, and that the case therefore comes within the Gaming Act, 1892.

STIRLING, L.J.—I am of the same opinion. Vautin put the sum of £500 into the hands of the defendant for the purpose of betting. The whole sum was lost, and Vautin's trustee in bankruptcy seeks to recover a half of that loss. The learned judge has found, and as it seems to me rightly found, that this was not the case of a loan, but that the sum of £500 was partnership capital. I am of opinion that this case is covered by *Tatam* v. *Reeve*, and that the reasoning of that decision is sound.

Appeal allowed.

Solicitors for the plaintiff, *Beyfus & Beyfus.*

Solicitor for the defendant, *Cecil A. Lumley.*

From Q. B. Div.
(Earl of Halsbury, L.C., A. L. Smith, M.R., and Collins, L.J.) Nov. 1.

SEA INSURANCE CO. (LIMITED) v. CARR. (a.)

Practice — Appeal — Commercial cause — Transferring action to commercial list—Right of appeal.

An appeal lies from an order of the judge at chambers transferring a cause to the list of commercial causes, upon the ground that the cause is not a commercial cause.

Barry v. Peruvian Corporation, 44 *W. R.* 487, [1896] 1 *Q. B.* 208, *followed.*

Appeal from Mathew, J., at chambers directing an action to be transferred to the list of commercial causes.

The plaintiffs had insured certain arms which had been shipped on board the steamship *Baluchistan.* The arms were seized on board the *Baluchistan* in the Persian Gulf by H.M.S. *Lapwing*, of which the defendant was in command. The assured recovered the value of the arms from the plaintiffs under the policy of insurance, and the plaintiffs brought this action against the defendant in the Queen's Bench Division to recover the amount so paid by them.

The defendant justified the seizure under a proclamation of the Sultan of Muscat, giving permission to British ships of war to seize arms found in ships within the territorial waters of Muscat destined for certain ports, and under a decree of the court in Muscat.

Upon the application of the plaintiffs, Mathew, J. directed the action to be transferred to the commercial list.

The defendant appealed.

Sir R. B. Finlay, A.G., and *R. B. D. Acland*, for the defendant.—The cause is not a commercial cause, and therefore the learned judge had no jurisdiction to transfer it to the commercial list. An appeal lies upon that ground: *Barry* v. *Peruvian Corporation*, 44 W. R. 487, [1896] 1 Q. B. 208. The action raises important questions of international law, and not questions of commercial law. It was not a cause arising out of the ordinary transactions of merchants and traders within the meaning of the memorandum of the judges of the Queen's Bench Division relating to commercial causes.

They also referred to *Baerlein* v. *Chartered Mercantile Bank*, 43 W. R. 692, [1895] 2 Ch. 488, and ord. 30, r. 7.

Joseph Walton, Q.C., and *F. W. Hollams*, for the plaintiffs.—No appeal lies from the direction of the judge transferring an action to the commercial list. The memorandum of the judges relating to commercial causes has no statutory validity. It is merely a memorandum relating to the arrangement of business in the Queen's Bench Division. The direction of the learned judge transferring the action was not an "order" of the High Court within section 19 of the Judicature Act, 1873, and is not subject to appeal. It is a mere matter of the arrangement of business in the Queen's Bench Division. The judges in that division can say before which one of them an action is to be tried, and this court has no jurisdiction to interfere. They have absolute jurisdiction to say whether an action is of such a nature that it ought to be placed in the commercial list. *Barry* v. *Peruvian Corporation* is not an authority against this view. Secondly, if an appeal does lie, it can only be upon the ground that the cause is not a commercial cause; and this cause is a commercial cause.

Earl of HALSBURY, L.C.—In my opinion the point raised by the counsel for the plaintiffs, that no appeal lies to this court, is one that is not open to them here. We are bound by the decision of this court in *Barry* v. *Peruvian Corporation*, which said that an order—the learned judges in that case called it an order—transferring a cause to the commercial list was subject to be reviewed in this court if it were established that the cause was not a commercial cause. Therefore it is not necessary for me to deal with the greater part of the argument which has been addressed to us. It is true that this particular question was not directly in issue in the case of *Barry* v. *Peruvian Corporation*, but the course of reasoning of the learned judges in that case rendered it necessary for them to decide the question before deciding the point then directly at issue in that case. While saying this I wish to add that I entirely agree with the law as laid down in that case. The next question is whether or not this is a commercial cause. It is impossible to give a definition of what constitutes a commercial cause. The words "commercial cause" are merely words of description. On the other hand, there are certain causes which a business man can easily say are not commercial causes. This action raises very serious questions of international law—namely, whether the defendant is protected by a proclamation of the Sultan of Muscat, or by a decree of the court in Muscat. The fact that the arms were seized on board a ship cannot of itself make the cause a commercial cause. In my opinion this is not a commercial cause. The appeal must therefore be allowed. I do not wish to be understood as in any way doubting the importance of what is called for the sake of brevity the commercial court. In my opinion it is a court of the greatest value and importance to suitors, and should be maintained in the future as it has been in the past.

A. L. SMITH, M.R., and COLLINS, L.J., concurred.

Appeal allowed.

Solicitor for the plaintiffs, *Hollams, Sons, Coward, & Hawksley.*

Solicitor for the defendant, *Solicitor to the Treasury.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } July 17, 18, 31, 1900.

In re WHITAKER.
WHITAKER *v.* PALMER. (*a.*)

Administration—Voluntary settlement—Insolvent estate—Postponement of voluntary debts—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

A testator made a voluntary settlement in favour of a lunatic son. On the death of the testator it was found that his estate was insolvent. The question was whether the amount due to the son under the settlement ought to be postponed to debts for valuable consideration.

Held, that, in the administration of insolvent estates, voluntary debts rank with other debts precisely as they would in bankruptcy, and that the old rule of the Court of Chancery, by which such debts were postponed, must be regarded as abrogated by section 10 *of the Judicature Act,* 1875.

The testator, William Augustus Whitaker, on the 1st of October, 1889, made a voluntary settlement in favour of his lunatic son, by which he covenanted to pay to trustees the sum of £200 a year during his life for the benefit of his son, and after the testator's death the sum of £5,000 was to be paid out of his estate to the son's trustees, the income of which was to be paid to the son.

The testator died on the 6th of March, 1898.

At the date of his death there was owing to the son's trustees as arrears of the annuity the sum of £86 12s. 5d., together with the principal sum of £5,000. The testator's estate was insolvent, and the question now was whether the amount due to the son's trustees ought to be postponed to debts for valuable consideration.

Vernon Smith, Q.C., and *S. B. L. Druce*, for voluntary creditors, referred to the following cases: *In re Maggi, Winehouse* v. *Winehouse*, 30 W. R. 729, 20 Ch. D. 545; *In re Leng, Tarn* v. *Emmerson*, 43 W. R. 406, [1895] 1 Ch. 652; *Lee* v. *Nuttall*, 27 W. R. 805, 12 Ch. D. 61; *In re Withernsea Brickworks*, 29 W. R. 178, 16 Ch. D. 337; *In re Williams, Jones* v. *Williams*, 36 W. R. 34, 36 Ch. D. 573; *Ex parte the Official Receiver, In re Gould*, 35 W. R. 569, 19 Q. B. D. 92.

Eve, Q.C., and *Edward Ford*, for a creditor for value having liberty to attend proceedings.

Capron, for the executor of the testator.

COZENS-HARDY, J., said: This summons raises the question whether in the administration of an estate which is insufficient for the payment in full of all debts, voluntary debts ought to be postponed to debts for valuable consideration. It is beyond doubt that prior to the Judicature Act the rules applied by the Court of Chancery in administering an insolvent estate differed in many respects from those applied by the Court of Bankruptcy. In particular secured creditors were entitled to a dividend on the full amount of their debts, and voluntary bonds were postponed to other debts, whereas in the Court of Bankruptcy secured creditors only proved for the balance after valuing their securities, and all creditors, including judgment creditors, were paid rateably. [His lordship then read section 10 of the Judicature Act, 1875.] This section altered the law to some extent, and it has given rise to much discussion. It has, however, been finally decided that the section does not in all respects assimilate the administration in the Chancery Division to the administration in bankruptcy. It does not augment or enlarge the assets to be administered. For this purpose the rules of bankruptcy have no application. It has to be considered to what extent the section alters the mode in which the assets are to be divided.

There are observations in some of the earlier cases to the effect that the object of the section was only to put an end to that which is known as the rule in *Mason* v. *Bogg*, 2 My. & Cr. 443, the rule by virtue of which secured creditors proved without valuing their securities. In *In re Maggi* Fry, J., had to consider whether a creditor who had recovered judgment against the executors as such was entitled to be paid in priority to other creditors, and he held that the section did not take away the priority of the judgment creditor. If there had been no subsequent decision, I should, without hesitation, have accepted Fry, J.'s, view, but the true effect of section 10 has since been considered by the Court of Appeal in *In re Leng*. Lindley, M.R., seems to treat *In re Maggi* as an exception to the general rule, and Smith, L.J., seems to me to have expressed in no doubtful language his dissent from *In re Maggi*. The result seems to be that although in a court of first instance the priority of judgment debts may still have to be acknowledged as an exception, the general principle is that the bankruptcy rules ought to apply in dividing the assets of an insolvent estate. In the subsequent case of *In re Heywood*, 46 W. R. 72, [1897] 2 Ch. 593, Stirling, J., held that the priority as to rates and wages conferred by the Preferential Payments in the Bankruptcy Act, 1888, applies to the administration of insolvent estates in the Chancery Division. In this state of the authorities I think that I am bound to hold that voluntary debts must rank with other debts precisely as they would in bankruptcy, and that the old rule of the Court of Chancery, by which such debts were postponed, must be regarded as abrogated by section 10 of the Judicature Act, 1875.

Solicitors, *Gamlin, Burdett, & Gamlin; Ridsdale & Son*, for *Grover & Grover*, Cardiff; *Belfrage & Co.*, for *H. J. Chaldecott*, Dorking.

Chan. Div.
Joyce, J. } Nov. 1.

THURSTAN *v.* NOTTINGHAM PERMANENT BENEFIT BUILDING SOCIETY. (*a.*)

Infant—Mortgage—Mortgagee in possession—Right to recover possession—Infants' Relief Act, 1874 (37 & 38 *Vict. c.* 62)—*Building Societies Act,* 1874 (37 & 38 *Vict. c.* 42), *ss.* 21, 38.

A mortgagor is not entitled to recover possession of land which has been taken by the mortgagee without repaying the advance, even though the mortgage was made by the mortgagor while an infant.

Action with witnesses.

The plaintiff, a married woman, while still an infant, applied through her husband to become a member of the defendant society. She was duly accepted by them as a member while in ignorance of her disability, and it was agreed that a sum of £1,200 should be advanced by them to her in order to enable her to purchase a piece of land in Nottingham, and to build houses upon it, and the loan was to be secured by a mortgage of the land and houses. In

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

pursuance of this agreement the land was duly purchased by the plaintiff and conveyed to her by an indenture dated the 21st of July, 1898, and on the next day she conveyed it to the defendant society by way of mortgage to secure the repayment of £1,200 and interest, to be repaid at the rate of £10 4s. per month. In the following October, by which time the amount advanced was £1,070, it for the first time became known to the defendants that the plaintiff was an infant, and they thereupon entered into possession, and spent £270 in completing the houses begun by the plaintiff. Since then they had remained in possession and had received the rents and profits. Shortly after coming of age the plaintiff brought this action and claimed (1) to have the mortgage deed cancelled, (2) to have the title deeds of the property comprised therein handed over to her, and (3) possession of the property.

The defendants in their defence did not allege any fraud on the part of the plaintiff.

Badcock, Q.C., and *E. Ford*, for the plaintiff.—The mortgage is bad, because the plaintiff is at common law under an absolute disability to make it: *Hearle* v. *Greenbank*, 3 Atk., at p. 712, per Lord Hardwicke. The personal covenant in the mortgage is bad under the Infants' Relief Act, 1874 (37 & 38 Vict. c. 62) s. 1. If the covenant is not void it is at least voidable (*Martin* v. *Gale*, 25 W. R. 406, 4 Ch. D. 428; *Inman* v. *Inman*, L. R. 15 Eq. 260), for a mortgage by an infant is always voidable, even if it is made to secure a contract for necessaries. It is sometimes said that a contract made by an infant is binding if it is for the benefit of the infant; we submit that the true rule is that such a contract may be made binding if the infant is brought before the court during infancy; but if this is not done it may be repudiated upon the infant attaining twenty-one. In any case this contract was not for the benefit of the infant. *Stikeman* v. *Davison*, 1 De G. & Sm. 90, shows that the fact that the defendants believed the person with whom they were contracting to be of full age will not help them. If the defendants had taken proceedings to have the infant declared a ward of court they might have got this contract affirmed: *Clements* v. *London and North-Western Railway Co.*, [1894] 2 Q. B. 482. The infant's carrying on a trade is no evidence that she represented herself to be of full age: *Ex parte Jones*, 18 Ch. D. 109. We are entitled to recover the deeds: *Cooper* v. *Vesey*, 30 W. R. 648, 20 Ch. D. 611; *Manners* v. *Mew*, 29 Ch. D. 725; *In re Ingham, Jones* v. *Ingham*, 41 W. R. 235, [1893] 1 Ch. 352.

Hughes, Q.C., and *G. B. Freeman*, for the defendants.—The honesty of the defendants is beyond question. The attempt in this action is to obtain possession of the land without paying for it. There is no case in which an infant has been permitted to affirm one part of a transaction and repudiate another. If an infant were sued after coming of age for the price of goods which were not necessaries the action would no doubt fail, but there could be no defence on the ground of infancy to an action of detinue for the goods themselves if they were still in the possession of the infant. There are also the cases, for example, of railway shares, in which infants have been held not entitled to keep the shares without paying the calls due upon them. The Building Societies Act, 1874 (37 & 38 Vict. c. 42), ss. 21, 38, contemplates the admission of infants as members of building societies, and these together with the rules of the society, give power to an infant to make a mortgage of property to the society. Sections 13 and 64 give an infant the power to give "all necessary acquittances." In *Dennison* v. *Jeffs*, 44 W. R. 476, [1896] 1 Ch. 611, Kekewich, J., held that an infant member of a building society could consent to a dissolution of the society. As an instrument of dissolution is a deed, it cannot be said that an infant cannot execute the deeds which are necessary to transactions of a building society, of which a mortgage is one. If it were necessary to go into the intentions of the Legislature in passing this Act, it might, perhaps, be said that building societies exist largely for the benefit of the working classes, whose circumstances are often as good at the age of nineteen or twenty as at a later period. If, however, the mortgage was invalid, we say that the plaintiff is not entitled to relief; the whole transaction was for the benefit of the infant and she is not entitled to repudiate the conveyance without paying back the money lent to her: *Holmes* v. *Blogg*, 8 Taunt. 509; *Valentini* v. *Canali*, 38 W. R. 331, 24 Q. B. D. 105; *Cork and Bandon Railway Co.* v. *Cazenove*, 10 Q. B. 935; *London and North-Western Railway Co.* v. *M'Michael*, 5 Ex. 114; *Walter* v. *Everard*, 39 W. R. 676, [1891] 2 Q. B. 369; and *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.*, 43 W. R. 126, [1894] 3 Ch. 589, show that an infant may be liable on a contract even though he has executed an invalid deed in pursuance of it.

Badcock, Q.C., in reply.—The last case can be distinguished on the ground that the plaintiff was an infant suing by her next friend. The word acquittances in the Building Societies Act, 1874, cannot be held to include conveyances. The same expression is used in the Friendly Societies Acts, 1875 (38 & 39 Vict. c. 60), and 1876 (39 & 40 Vict. c. 22), s. 9, and in the Industrial and Provident Societies Act, 1876 (39 & 40 Vict. c. 45), s. 11, sub-section 9. The Building Societies Act was not intended to enable infants to build houses, nor does the Act anywhere say that infants shall have power to grant mortgages.

JOYCE, J.—The facts of this case are simplicity itself. [His lordship here stated the facts, and continued:] It is true that the conveyance and the mortgage were executed on different days, but the transaction was in substance one. Ever since I have understood the facts of the case I have been of opinion that it could be decided on a short and simple ground. It has been argued that the transaction is made valid by the effect of the Building Societies Act, 1874, but I do not think that it is necessary to decide that now, because the case can be decided on the simple ground that it is not open to the plaintiff to affirm one part of the transaction and repudiate the remainder. In the present case the lady is seeking to recover the property without repaying the money which was advanced to her. This claim cannot be sustained. I hesitate to decide that an infant can make a valid mortgage, but I do hold that the lady cannot repudiate her mortgage without recognizing the right of the building society to the repayment of the sums advanced by them. The action is dismissed, with costs to be added to the security.

Solicitors, *Beyfus & Beyfus; Peacock & Goddard*, for *Rothera & Son*, Nottingham.

Q. B. Div. (Ridley and Bigham, JJ.) — May 16, 1900.

THOMAS v. VAN OS. (*a*.)

Local government—Public health—Unsound food—Order for destruction—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 47.

(*a*.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Where an article has been seized by a medical officer or sanitary inspector under section 47 of the Public Health (London) Act, 1891, *and application is made to a magistrate under that section to condemn it and to order its destruction, the duty of the magistrate is ministerial only, and he is bound to make the order on being satisfied that the article is in fact unsound or unwholesome, or unfit for the food of man; and he has no jurisdiction to inquire whether it was intended for food, or exposed or deposited for sale or preparation for sale.*

White *v.* Redfern, 28 *W. R.* 168, 5 *Q. B. D.* 15, *followed.*

Case stated by a metropolitan police magistrate.

The appellant, who was the medical officer of health for Limehouse, applied for an order under section 47 of the Public Health (London) Act, 1891, condemning a vanload of strawberries as unsound.

The respondent and a carman named Whitlock were defendants to the application.

It appeared from the appellant's information that on the morning of the day on which the information was laid, the appellant had seen a van containing 117 tubs of strawberries in Devonport-street, Ratcliff, which, in his opinion, were unsound, unwholesome, and unfit for the food of man; he had them brought to the court, and asked for their condemnation.

The respondent was a general merchant, and had a contract with a merchant or grower in Holland to send him strawberries, the quantity to be sent on any particular day depending on instructions wired by him to Holland. He had wired for three tons to be sent by the Sunday's boat from Rotterdam, and had given instructions to collect them at Bishopsgate-street Station and take them to John Moir (Limited), to sell them.

The respondent, who had seen the strawberries in the station yard and examined them, admitted that they were unsound and unfit for the food of man, and consented to their destruction.

It also appeared that when the manager of John Moir (Limited) saw the strawberries he refused to receive them.

After setting out the information the case proceeded as follows:

"Upon reading the information I considered that not only was there no evidence that the fruit was intended for the food of man and sold or exposed for sale or deposited for the purpose of sale at the time of the seizure, but that there was actual proof that it was not intended for the food of man, or exposed or deposited, &c. The information showed that the original intention of Van Os that the fruit should be used for the food of man was exhausted upon its rejection by John Moir (Limited). I considered that I was entitled to infer from the information that Van Os was not aware of the rejection until after its seizure. There was, therefore, no opportunity between the rejection and the seizure for any fresh intention to attach to the fruit on the part of any person having property therein. Being therefore of opinion (1) that there was no evidence that at the time of the seizure the fruit was intended for the food of man or exposed for sale or deposited, &c., and moreover, finding as facts (2) that there was no intention at the time of the seizure to use the fruit for the food of man and that it was not there exposed for sale or deposited, &c., I ruled that (3) I had no jurisdiction to make any order. I was further of opinion that even if I had jurisdiction (4) I had a discretion as to whether I need further hear and determine the matter of the said application—*i.e.*, to decide whether the fruit was unsound, and in the exercise of that discretion I ruled that (5) it was right to refuse to further hear and determine the matter of the application. With reference to the last finding, I felt that the owner, Van Os, having consented, there was no obstacle to the immediate destruction of the fruit; if in breach of faith Van Os should, after the refusal of the order, have resisted the destruction of the fruit, that would have furnished evidence of a fresh intention, and the application could have been renewed. It was not suggested that the order was required as a condition precedent to a prosecution, nor, in my opinion, would any prosecution be possible, as the only owner in this country who could possibly be liable was Van Os, and, as I have above shown, there was proof in the information that he had had no opportunity of forming any fresh intention as to the disposal of the fruit. An order of destruction of three tons of strawberries in 117 tubs without a personal and immediate examination would have been contrary to the usual practice, and in my opinion unsatisfactory, as the legal position of third parties abroad might have been prejudiced. I therefore came to the conclusion that I ought not to delay the ordinary heavy business of a Monday morning, which, on this occasion, consisted (*inter alia*) of ninety night charges, to enter upon a futile investigation with a view to an order which could in no possible way be required in the public interest, at any rate as the case was then put before me.

"The questions for the court therefore are:

"1. Whether I was right in finding that there was no evidence that the fruit, at the time of the seizure, was intended for the food of man or was exposed for sale or deposited in any place for the purpose of sale, &c.

"2. Whether I was justified in finding upon the evidence that the fruit, at the time of seizure, was not intended for the food of man, and was not deposited in any place for the purpose of sale, &c.

"3. Whether if there was no evidence that the fruit, at the time of the seizure, was intended for the food of man, or was deposited in any place for the purpose of sale, &c., I had jurisdiction to make an order.

"4. Whether, upon my finding as a fact that the fruit, at the time of the seizure, was not intended for the food of man, and was not deposited in any place for the purpose of sale, &c., I had jurisdiction to make an order.

"5. Whether, if I had jurisdiction to further hear and determine for the purposes of deciding whether the fruit was unsound, I had discretion under the circumstances to refuse to so further hear and determine.

"6. Whether, if I had such discretion, I have legally exercised it under the circumstances.

"If in answering the above questions this honourable court is of opinion that I must further hear and determine the above matter without the advantage of the usual examination of the food alleged to be unsound, which in this instance is obviously not now in being, then this case is to be remitted to me for that purpose. If, on the contrary, the court is of opinion that I should not further hear and determine, then this appeal is to be dismissed."

Section 47 (1) of the Public Health (London) Act, 1891, empowers a medical officer of health or sanitary inspector to seize and carry away (in order to have it dealt with by a justice) any animal or article intended for the food of man and sold or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale if it appears to him to be diseased or unsound or unwholesome or unfit for the food of man. Section 47 (2) provides that "If it appears to a justice that any animal or article which has been seized or is liable to be seized under this section is diseased or unsound or unwholesome or unfit for the

food of man he shall condemn the same and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man."

R. D. Muir, for the appellant.—The magistrate had no jurisdiction to inquire whether the strawberries were intended for food or exposed or deposited for sale; on being satisfied that they were unsound he had only the ministerial duty of ordering their destruction: *White* v. *Redfern*, 28 W. R. 168, 5 Q. B. D. 15; *Vinter* v. *Hind*, 31 W. R. 198, 10 Q. B. D. 63. The question whether the article was intended for food only becomes material if proceedings are being taken against a person under the later provisions of section 47; here the proceedings were against the article only. [He was stopped.]

The respondent did not appear.

RIDLEY, J.—At first I was inclined to think that the course taken by the learned magistrate was a reasonable one; but upon considering the decision in *White* v. *Redfern*, I have come to the conclusion that his duty in the present case was merely ministerial—that is, to order the destruction of the strawberries, and that he was not entitled to consider the question whether they were intended for the food of man. At that moment the intention of the respondent to sell the fruit was not material, nor was it a fact that ought to have been inquired into. The respondent was not before the magistrate as a person charged with an offence, and it is clear from *White* v. *Redfern* that he would not be a person charged until a summons had been taken out against him for exposing the fruit for sale; only on the hearing of such a summons would the intention become material. Until that decision was given it was, I think, reasonable to take the same view of the law as was taken by the magistrate in the present case; but it is now clear that the early portion of section 47, under which the order for destruction of the fruit was asked for, relates to proceedings against the article (if I may use the expression), and not to proceedings against a person. I have not a doubt that *White* v. *Redfern* was properly decided, and that it is the only possible way in which effect could be given to the section. I think that the learned magistrate ought to have made the order asked for, and though the fruit has long ago ceased to exist the case must be sent back to him with an intimation to that effect.

BIGHAM, J.—I agree. Section 47 of the Act defines what the medical officer of health or sanitary inspector is to do. Among other things, he may enter upon any premises and inspect and examine articles intended for the food of man and sold or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale. It is obvious from the power given him to enter upon premises that he must make up his mind and determine whether the article is exposed for sale or intended for the food of man. Having made up his mind that the article comes within the meaning of the section, it is his duty to examine it; if he finds that it is unsound, or unwholesome, or unfit for the food of man, then under sub-section 2 the functions of the magistrate come into operation; those functions appear to be merely ministerial except that he may inquire whether the article is in fact unsound, unwholesome, or unfit for the food of man; if he decides that it is, he has nothing to do but to order its destruction. We are bound to interpret the section in this manner by the decision in *White* v. *Redfern*, a decision which, moreover, was, in my opinion, correct.

Appeal allowed.

Solicitors for the appellant, *C. V. Young & Son.*

Q. B. Div. (Ridley and Darling, JJ.) — May 8, 9, 16, 1900.

ATTORNEY-GENERAL v. JEWISH COLONIZATION ASSOCIATION. (a.)

Inland Revenue—Estate and succession duty—Company registered in the United Kingdom—Registered office in London—Property situated abroad—Income administered abroad—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 7, 8, 16.

By a deed made in 1892 *between a foreigner domiciled abroad and owner of property abroad and the defendants, an English company registered in England under the Companies Acts, and having a registered office in London, the owner gave to the defendants certain stocks, shares, and securities on the terms that the defendants would, during the life of the donor, permit him to receive the income thereof, and after his death would apply the said stocks, shares, and securities for the benefit of Russian Jews generally, and principally for the promotion of their emigration and settlement in North and South America, which was the object for which the company had been formed.*

The company, under its articles of association, carried on its business at its office in Paris, but the annual general and other meetings were held in London. The defendants paid the income of the investments during his life to the donor, who, in 1896, *died domiciled abroad. The greater part of the property at that time was situated abroad, and only a small portion in England.*

Held, that the defendants were an English company domiciled in England, and that, in order to enforce the trusts of the deed, they must have recourse to the English courts; and that they were therefore liable to pay estate duty under the Finance Act, 1894, *and succession duty under the Succession Duty Act*, 1853, *in respect of the principal value of the stocks, shares, and securities specified in the deed.*

Information.

The facts of the case as set out in the judgment of Ridley, J., are as follows:

This was an information claiming estate and succession duty upon the death of Baron de Hirsch de Gereuth, in respect of which he had made a disposition in favour of the Jewish Colonization Association.

The Jewish Colonization Association was, on the 10 h of September, 1891, formed into a company under the Companies Acts, 1862 to 1890, by certificate of the Board of Trade. On it being proved that no portion of the income was intended to be used as profit to its members, it was registered under section 23 of the Companies Act, 1867, without the addition of the word "Limited."

Its objects were, stated generally, to assist the emigration of Jews from any parts of Europe or Asia to other parts of the world, and to form colonies for their reception. The office was to be, and was, in London. By article 25 of the articles of association its affairs were to be "under the general control of a council of administration, consisting of not more than six nor less than three persons" (none of whom were required to be members of the company), who were to be elected by the company in general meeting, and to hold office for five years.

By the memorandum of association it was stated that the objects for which the company was established were (amongst others): (*a*) "To assist and promote the emigration of Jews from any parts of Europe or Asia, and principally from countries in

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

which they may for the time being be subjected to any special taxes or political or other disabilities, to any other parts of the world, and to form and establish colonies in various parts of North and South America and other countries for agricultural, commercial, and other purposes"; (c) "to accept gifts, donations, and bequests of money and other property on the terms of the same being applied to all or some one or more of the purposes of the company"; (n) "to invest and deal with the moneys of the company, in any the public stocks or public securities of the English, French, Belgian, Dutch, and German Governments, or of the Government of the United States of America"; (s) "to do all such other lawful things as are incidental or conducive to the attainment of the aforesaid objects. Provided that the company shall observe the provisions of the 21st section of the Companies Act of 1862, where applicable, and that in case the company shall accept any gift on such special trusts as to be subject to the jurisdiction of the Charity Commissioners, the company shall, if required by the Charity Commissioners, vest the same in special trustees thereof."

The nominal capital of the company was to be £2,000,000 in 20,000 shares of £100 each, of which 19,992 were allotted to Baron de Hirsch.

The seventh clause of the memorandum of association provided that, if, in the event of a winding up or dissolution of the company there remained any property, it should not be distributed among the members of the company but transferred to some institution with objects similar to those of the company; and that if such institution should not be selected by the members at or before the time of winding up or dissolution it should be selected by the judge of the High Court of Justice having jurisdiction in that behalf.

By article 18 of the articles of association the first general meeting was to be held within four months after the incorporation, and subsequent general meetings were to be held once at least in every year in London, or such other place as the council might from time to time determine, and that the council might at any time convene an extraordinary general meeting.

The first meeting was held on the 14th of October, 1891, at the offices of the company, at 17, Old Broad-street, London, and at this meeting Baron de Hirsch was elected chairman of the council, and resolutions were passed approving two sets of rules defining the duties and powers of the council. It is not necessary to set out all these rules. By the first of them the directors were to be subject to the control of the council, and to exercise all such powers of the company as were not expressly reserved to the company in general meeting.

The meetings of the company continued to be held at the registered office in London; but the business there transacted was until after the death of Baron de Hirsch on the 21st of April, 1896, of a formal character. The council held their meetings in Paris, and at these meetings they, by virtue of the articles of association and the rules, conducted its affairs.

On the 22nd of July, 1892, at a meeting of the council, Baron de Hirsch proposed to hand over to the association various securities on condition that he was allowed by them during his life to have the income resulting therefrom, and from any which might be substituted for them; and the council resolved to accept the gift, and to affix the seal of the association thereto.

On the 26th of August, 1892, in pursuance of this resolution, an indenture was entered into and executed by Baron de Hirsch and by the association, the terms of which, so far as they need now be mentioned, are as follows:

"(1) That the association would, during the life of the donor, from time to time, as and when directed by the donor or his authorized agents, sell, transfer, exchange, dispose of and deal with the said stocks, shares, bonds and securities, and any other investments which might be substituted for the same, or might be otherwise subject to the provisions of the now stating indenture, and, under the like directions, invest the net proceeds after deducting all costs and expenses of and incident to such sale, transfer, or exchange, in any other modes of investment which should be selected or approved by the donor, irrespective of any conditions which, according to the memorandum and articles of association of the association, were applicable to the investments held by the association for their own exclusive benefit.

"(2) That the association would permit the donor or his agents to receive, or would pay to him or them, the income of the investments for the time being held on the terms of the now stating presents and all benefit in the nature of bonuses upon or accretions to such investments should be treated as income, and not as capital; all outgoings and expenses incident to the receipt of the said income should be paid out of the same.

"(3) That the association would, after the death of the donor, apply the stocks, shares and securities, and any other investments which may be substituted for the same, or be otherwise subject to the provisions of the now standing indenture for the benefit of the Russian Jews generally, and principally for the promotion of the emigration of Russian Jews from Europe, and the settlement of such Russian Jews in various parts of North and South America, and other countries outside the limits of Europe, such settlement to be made preferentially, and as far as possible, in agricultural colonies."

At about the same time all the stocks, shares, and securities mentioned in the schedule (which were at the time held partly by the London and Westminster Bank and partly by other banks situate abroad) were duly transferred by direction of Baron de Hirsch, in pursuance of the indenture, to the account of the association with the several banks, and were thenceforward held by the association upon the trusts and for the purposes declared by the indenture, and pursuant thereto from that time onwards the council paid the income accruing thereon to Baron de Hirsch during his life. All the securities were transferable by delivery.

Baron de Hirsch died, *sine prole*, on the 21st of April, 1896.

The information claimed that, on the death of the said Baron de Hirsch, estate duty under the Finance Act (57 & 58 Vict. c. 30), s. 2 (1) (b) and (c), and succession duty under 16 & 17 Vict. c. 5, ss. 7 and 8, became payable on the principal value of the shares, stocks, bonds, and securities specified in the schedule to the indenture of the 26th of August, 1892, or of the investments and moneys then representing the same.

The Commissioners of Inland Revenue caused application to be made to the defendant company to deliver proper accounts and statements in respect of the said shares, stocks, bonds, securities, and moneys, and to pay the duties which ought to be paid in respect of the value thereof as aforesaid, but the defendant company refused to do so, and contended no such duties were payable.

Sir R. E. Webster, A.G., Sir R. B. Finlay, S.G., and *Vaughan Hawkins*, for the Crown.

Sir R. Reid, Q.C., Swinfen Eady, Q.C., Dicey, Q.C., Danckwerts, Q.C., and *E. Schuster*, for the defendants.

The arguments are fully dealt with in the written judgment of the court.

The following cases were cited: *Wallace* v. *Attorney-General*, 14 W. R. 116, L. R. 1 Ch. App. 1; *Attorney-General* v. *Campbell*, L. R. 5 H. L. 524; *In re Cigala's Settlement Trusts*, 26 W. R. 257, 7 Ch. D. 351; *Attorney-General* v. *Felce*, 10 Times L. R. 337; *Thomson* v. *Advocate-General*, 12 Cl. & F. 1; *In re Lovelace's Settlement*, 7 W. R. 401, 575, 4 De G. & J. 340; *In re Wallop's Trusts*, 12 W. R. 587, 1 De G. J. & S. 656; *In re Badart's Trusts*, 18 W. R 885, L. R. 10 Eq. 288; *Lyall* v. *Lyall*, 21 W. R. 34, L. R. 15 Eq. 1; *Cesena Sulphur Co.* v. *Nicholson*, 25 W. R. 71, 1 Ex. D. 428; *South African Breweries (Limited)* v. *King*, 47 W. R. 681, [1899] 2 Ch. 173.

Cur. adv. vult.

May 16.—RIDLEY, J., delivered a written judgment, and after stating the facts as set out above, proceeded as follows: Baron Hirsch de Gareuth died, *sine prole*, on the 21st of April, 1896, domiciled in Austria, and it is now contended by the Crown that succession duty and estate duty are payable on the value of these securities, or of the investments now representing the same, on the ground that the succession descended upon them by English law, and that by that law the trust must be administered.

On the other hand, Sir Robert Reid, while admitting that estate duty is payable on such of the securities as were situate in England at the time of Baron Hirsch's death (that is to say, on such of them as were at the London and Westminster Bank), contended that no succession duty was payable on any of the securities, and no estate duty on those which were situate abroad.

As by section 2, sub-section 2, of the Finance Act, 1894, "Property passing on the death of the deceased, when situate out of the United Kingdom, shall be included only if, under the law in force before the passing of this Act, legacy or succession duty is payable in respect thereof, or would be so payable but for the relationship of the person to whom it passes," the single question in this case is whether, under these circumstances, where the domicil of the predecessor is foreign and the property is situate abroad, duty is payable under the 2nd and 16th sections of the Succession Duty Act, 1853, which by section 2 enacts as follows: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a succession."

It may be desirable, first, to set out what appears to me to be the result of previous decisions, and then to deal with the arguments. Of the cases quoted, the first in order of date was *In re Lovelace's Settlement*. In that case there had been an English marriage settlement made between English people, under which property was assigned by the lady upon usual trusts for the lives of husband and wife and the life of the survivor, and in the event (which happened) of there being no issue attaining a vested interest then upon the trusts which the wife might by will or deed appoint, and in default of appointment for the next-of-kin. The parties became domiciled in France, and the husband having died in March, 1852, the widow in April, 1852, exercised her power of appointment by will, whereby she appointed £10,000 to two persons, natives of France, and there domiciled. In 1856 she died, and the appointees presented a petition for payment of the £10,000. The Crown thereupon claimed succession duty, and the Vice-Chancellor decided that no duty was payable, upon the ground that the operation of section 2 of the Act of 1853 was restrained by that of section 4, which applies upon the death of persons dying after the time appointed for the commencement of the Act only (which date was the 19th of May, 1853). But the Lords Justices, reversing this decision, held that the case might be within the second section, though not within the fourth. It was further argued that, as the domicil of the lady was French, no duty was payable any more than it would be under the Legacy Duty Act. But the court said: "The trustees of the settlement are here. The money is in the English funds." In effect the decision was that the Act applies to a succession under a British settlement to British property vested in British trustees and falling under the jurisdiction of a British court, though both the predecessor and successor are domiciled abroad.

In re Wallop's Trusts was the next case. There an English testator gave a fund to trustees on trust to pay the income to his daughter for life, and after her death upon such trusts as she should by will appoint. The daughter became domiciled in Jersey and disposed of the fund, giving two legacies to two persons, and the rest to her husband. The fund was in Consols. The decision was, following *In re Lovelace's Settlement*, that the legacies, although not subject to legacy duty, were subject to succession duty. It does not appear that the rule laid down in the former case was in any way modified.

In *Wallace* v. *Attorney-General*, the testator, whose will was in question, died domiciled in France, and possessed of property both in France and in England, including a leasehold house and a large sum in Consols. It was admitted that duty was payable on the leasehold house, but the court decided that neither succession nor legacy duty was payable on the Consols. The Lord Chancellor said: "I think that in order to be brought within the section, he (the legatee) must be a person who becomes entitled by virtue of the laws of this country." He pointed out the difficulty of holding otherwise. The officers of the revenue could not ascertain who were the persons entitled by foreign laws nor the duties to which they might be liable under such law; whereas if the persons are entitled under our laws and liable to duties under our laws, their duty is simple. He further said: "The ground on which my opinion rests is that to the generality of the words in the second section . . . some limitation must be implied, and that limitation can only be a limitation confining the operation of the words to persons who become entitled by virtue of the laws of this country." He distinguished the previous decisions of *In re Lovelace's Settlement* and *In re Wallop's Trusts* as having been cases of testamentary appointment under English instruments and not simply of wills; such an instrument having to be construed by our own law, not by the law of the domicil of the person executing the power.

This decision was explained and commented upon in the case of *Attorney-General* v. *Campbell*; but previously to that had been decided the case of *In re Badart's Trusts*, where the testator, domiciled in Belgium, came to England and lived

there for the last ten years of his life, carrying on business in this country. He left a sum of £12,000 to be invested in Consols and held in trust for A. for life and after his decease for his nephews and nieces, most of whom were foreigners. Vice-Chancellor Malins held that succession duty was payable, and he stated that, in his opinion, there was no succession at all in *Wallace's case*, but that it was a mere question of legacy duty; putting in other words the argument of Mr. Kerslake for the Crown—namely, that here there was not a bare legacy or gift, but a direction to invest money in England for the benefit of *cestuis que trust*, who would, therefore, take under English law.

The next case is that of the *Attorney-General* v. *Campbell*. There one Callanane, an Irishman, became domiciled in Portugal. On a visit to this country he made a will directing his executors to collect his property, which was in Portugal, and convert it into cash, pay legacy duties out of it, and invest the residue in English 3 per cents. They were to appropriate enough to pay an annuity of £50 to his sister, and on her death the appropriated fund was to revert to the residuary estate and be divided (like all the rest) amongst his children. The trusts were performed, and the House of Lords held that succession duty was payable on the death of his sister on the part of his fortune so appropriated, because the duties of the executor involved the placing of the money here in funds within the functions of the judicature of this country. In *Wallace's case*, on the other hand, all the questions relating to the distribution of the estate belonged to the judge of the domicil—that is, the forum of administration. "You cannot apply," said Lord Westbury, "an English Act of Parliament to foreign property whilst it remains foreign property; but after the purposes of administration have been answered, and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it answers the character of a British settlement and British property." That settlement, therefore, though made by a will, became, by reason of the trust for the investment of the property, subject to the rules of English law, and the duty was payable on what Lord Westbury calls "the distributive part." The fact that the investment was to be in the English funds does not seem to have been treated as the governing consideration. It is the investment on trust here that makes the property liable, not its local situation. In *Lyall* v. *Lyall*, there was a marriage settlement by which the husband domiciled in New South Wales assigned to trustees certain property, including a policy of insurance on his life, and a sum in Consols, and £1,000, which he covenanted to pay, on trust to invest and pay the income to the wife for life, then to the husband for life, and then for division among the children. The husband died in New South Wales, and was there domiciled at the time of his death; and then the wife died, leaving one child. At the time of the wife's death neither the policy money nor the £1,000 had been paid to the trustees. The Master of the Rolls decided with reluctance, but following the decision just quoted, that succession duty was payable on the funds to which the child became entitled. He appears to have thought that the distinction established between legacy duty and succession duty—namely, that the one is not payable where the domicil of the testator is foreign, while the latter may be so, is to be regretted. But it follows from the decision of *Attorney-General* v. *Campbell* that if in order to administer the property or to carry out the trusts upon which it has been disposed, resort must be had to English law, succession duty is payable, although the domicil of the testator be foreign; and it follows, also, from that and the previous decisions, that if the disposition of the property be made by a testator acting under a power given him by an instrument which must be construed and carried into effect by the laws of England, then also succession duty is payable, although the domicil of both predecessor and successor is a foreign one; but if the gift or devise be made by a person domiciled abroad, then, even though the property be situate in England, unless the intervention of the English law is required in order to carry the gift or devise into effect, succession duty is not payable.

The next case was that of *In re Cigala's Trusts*, and on this case great reliance was placed by the Attorney-General. There was an English marriage settlement by which certain property, mostly situate abroad, being French Rentes, were settled by the wife on the usual trusts for husband and wife for life and then for the children. The husband always had a foreign domicil, and the wife and children had also a foreign domicil. It was held that the property on passing into the hands of the children under those trusts was subject to succession duty. The court said that it followed from previous decisions that a foreigner may be liable to pay succession duty; that the property was only in a certain sense foreign, and was movable, so that the right to dispose of it followed the person of the owner, and that, as the settlement was British, and the property in fact English property, the duty was payable.

Finally the law was laid down in precisely the same way in a case which in principle it is difficult to distinguish from the present one—namely, *Attorney-General* v. *Felce*, of which case a shorthand note was furnished to us. There a foreigner had property abroad, and apparently wishing to place it under British protection, he appointed a trustee, and there was a declaration of the trusts on which it was held, and the securities were placed in the hands of the trustee in order that they might be deposited with bankers in this country. Upon his death succession duty was claimed from the executors, and held to be payable for this reason—that the settlement was a British one, and designedly so, and that the trustee was subject to British jurisdiction, and that although the domicil was foreign and the property was foreign.

These later cases appear precisely to follow the rule which is to be properly deduced from *Attorney-General* v. *Campbell*, and that is, that upon devolutions of property such as are contemplated by the Succession Duty Act, s. 2, the duty is payable, although there be a foreign domicil and although the property be foreign, if in order to administer the property or the trust, to which it is subject, recourse must be had to an English tribunal.

Now, what is the case in the present instance?

Sir Robert Reid's points were: (1) that the property was situate abroad, (2) that the property was settled by a foreigner domiciled abroad, (3) that the deed was executed abroad, (4) that the deed was executed in favour of foreigners. But the argument appears to assume that in order to make succession duty payable the domicil must be English and the property situated in England, or, at all events, that these are circumstances is to be chiefly considered, whereas from an examination of the authorities it has been shown that that is not so. With regard to the third point, I think this cannot be material. The deed was an English deed. It purports so to be. Baron de Hirsch and the association are alike described in it as residing in England, and the registered office of the latter is stated to be in London. I therefore think it must be treated as an English document.

With regard to the fourth point, this also, if true,

would not be material according to *Lovelace's case*, in which both predecessor and successor were domiciled abroad. But it seems incorrect to say that the beneficiaries of this trust—meaning by that phrase the Russian Jews—were the successors on whom this tax is to fall, if it is to fall. They are not, and no one on their behalf is, in the position of a *cestui que trust*, or can call on the council or the company to carry out the trust in a particular manner in favour of any one applicant or of any body of applicants. Then, is the council the successor, so that it may be argued that the domicil of the members of it is a foreign one? Their whole authority to act in this matter is derived from the company, the owners of the property. It is the company that has become beneficially entitled on the death of Baron Hirsch. Until that event the income had to be paid to him through the persons authorized by the company to do so. After that event the income is dealt with by the same persons, on the same authority, but freed from the life interest. But it was argued that the domicil of the company is French because the meetings of the councillors have been held in Paris. But, according to that view, the domicil could be arranged by a mere resolution to hold the meetings elsewhere, and that does not seem reasonable.

The case of the *Cesena Sulphur Co.* v. *Nicholson* was quoted on this point. That was decided on a question whether certain profits were liable to income tax (Schedule D), as arising to a person (or corporation) residing in the United Kingdom, and it was held that where a company registered in this country makes profits on operations carried on abroad by their agents or delegates, there being a central board of management having general control, all the profits are taxable though earned out of this country. The question was not the same as that which we have to decide, but the court came to the opinion that the company's residence was at their principal seat of business; and that the principal seat of business was at the registered office, although the operations were carried on, with the exception of the general control, elsewhere. So far as that decision goes, it is not against the view that this company was domiciled in England.

It was further put, however, and with much astuteness, that it would not be by the British courts, nor under their jurisdiction, that this property would be administered. It is true that it would not be governed by the rules of our municipal law in all matters. Thus, by the Austrian law (as was stated to us), an Austrian father cannot divest himself of property so as to injure the rights of his children to *legitim*, and any alienation at any time having that effect may, on the death of the father, be set aside to the extent to which it has that effect. The Austrian law was the law of the domicil of the deceased, and it could have been applied in this case if there had been any children.

Again, if there had arisen any question upon which the French Government found that the association were working against their recognized policy, or interfering in colonies in a way not in their opinion desirable, there can hardly be any doubt that they could have enforced upon them the law of France. So could the Government of any country in which the association were working; and, further than that, if a proceeding were brought in England to determine such a point, it can hardly be supposed that, assuming the jurisdiction, it would not have been exercised in favour of, and by reference to the laws of the country concerned. But although it is true that these and other instances may be given where the foreign law would by any tribunal be allowed to apply to the administration of this trust, is it not true also to say that, in order fully to administer the property and to determine all questions relating to it, recourse must be had to the English tribunal? By it foreign law may have to be applied. Some instances have been given where it probably would be so, but the property is owned here by a company registered under the Companies Acts. Suppose a winding up or dissolution—under what court but the English court, having that jurisdiction, could it be conducted? The seventh clause of the memorandum admits that.

But the English law governs this company also in many other ways, such as its very name, the possible acquisition of land, or of gifts on trust, and the share capital—and although the income may be administered abroad and the property is foreign in the sense of being situated abroad, it is here that it is owned. The property may be transferred from one country to another, and the council may sit in Austria, or some other country, but here, until the title be altered, remains the ownership. Probably, as was stated at the bar, it was in order to gain the security given by our law that the company was constituted in England and made owner of the property. For these reasons I think the Crown is entitled to judgment.

DARLING, J.—I will begin by stating—for it is necessary to the decision of this case—that I come to the conclusion that the Jewish Colonization Association is domiciled in England. As to Baron Hirsch, it is admitted that he was domiciled in Austria. The effect of the deed of the 26th of August, 1892, together with the subsequent transactions between Baron Hirsch and the association, was that a large number of stocks, shares, bonds, and investments (for the most part representing property situate in foreign countries) were transferred to the association and became their property. This property the association held as trustees for the benefit of a number of unascertained aliens of the Jewish race. The same deed secured to Baron Hirsch during his life the entire income of the association to be derived from the property he had so given them.

In April, 1896, Baron Hirsch died, and the property is now held by the association upon the trusts for the benefit of the classes of persons indicated in the deed.

The association to which, by means of the deed, the property was given in trust, became a company duly established in England under the Companies Acts. The registered office of the company was in London, and clause 3 of the memorandum of association shows that Baron Hirsch desired "to assist and promote the emigration of Jews from any parts of Europe or Asia, and principally from countries in which they may for the time being be subject to any special taxes or political or other disabilities." He further, in the event of the association being dissolved, and in the last resort, entrusted to a judge of the High Court of Justice in England the selection of some other institution to benefit by his bounty.

The council of administration of the association was accustomed to meet in Paris, and the association transacted most of its business in offices there. It appears by the minutes of the council of administration, dated the 15th of January, 1892, that this was done because Baron de Hirsch had offices in Paris, and desired to have the business of the association conducted in those offices.

In these circumstances the question is whether duty under the Finance Act, 1894, and succession duty under the Succession Duty Act, 1853, became payable by the Jewish Colonization Association upon the death of Baron de Hirsch. The question whether the

association are liable to estate duty depends upon the question whether they are liable to succession duty. Now, this must be decided upon the meaning to be given to section 2 and section 16 of the Succession Duty Act, 1853, and there can be no doubt that if the words of those sections are taken in their widest, or, indeed, in their natural sense, then duty is payable. But it is well established that, in the words of Lord Cranworth, C., in *Wallace* v. *Attorney-General*, there is necessarily an "implied limitation as to the persons liable to duty" under those sections, and many cases have been cited to us to show what limitations ought to be implied. In the first place, it is said that this is not an English settlement or trust, yet I think it is. With every desire not to say anything invidious concerning the laws or the executive of any foreign country, and anxious not even to reflect on the Egypt of the Pharaohs, I think it sufficiently appears from the documents to which I have referred that Baron de Hirsch desired and intended, for reasons to him sufficient, to avail himself of the protection of English laws, and of English Courts of Justice, for the security of the property he gave, and of the rights of those to whom he gave it, and of the *protégés* of those.

Further, it is said that no duty is payable because Baron de Hirsch was of Austrian domicil. I agree that this question has a certain bearing, but I do not think it is of the importance attributed to it by Sir Robert Reid. As Lord Hatherley put it in *Attorney-General* v. *Campbell*, L. R. 5 H. L., at p. 528: "In order to have the personal property administered you must seek the forum of that country where the person whose property is in question has acquired a domicil. Then, when you obtain possession of that property, you do all which has to be done in the country to which the testator belonged." It is true that Lord Hatherley is reported as saying, "You do all which has to be done," but I think his meaning was, "You have done all that was to be done in the country to which the testator belonged," for he at once procee ls to say: "The question is afterwards, when the property has been so obtained and administered, and is in the state in which the testator desired it to be placed, in what condition do you find the fund?"

Now, I assume that the association have taken all steps (if there were any) necessary to be taken in the country of domicil of Baron de Hirsch, or wherever the property may be locally situate, in order to acquire this property, and I assume them to have legally acquired it, for otherwise I think the question of duty payable here would not arise.

It is now property which belongs to an English company by reason of such a disposition by a person of foreign domicil as renders it liable to the duties contended for. The fact that the English company are the owners of the property upon trust to apply it in a particular way in the establishment of foreign Jews does not prevent the company from being the successor, and beneficially entitled within the meaning of the Act There are no other individuals capable of identification as beneficially entitled until the company shall have selected them as persons to profit by Baron de Hirsch's benefaction. Moreover, this seems to be established by *Attorney-General* v. *Felce*. But here it is further objected that the duties are not payable, because the property is locally situate out of this country, and *Attorney-General* v. *Wallace* is relied upon. True it is in that case the property abroad was sold and the price was invested in English Consols; and, naturally enough, that fact is mentioned in the judgments. But I do not think it is necessary to their conclusion. Indeed, Lord Westbury says (at p. 531) in *Attorney-General* v. *Campbell*: "After the purposes of administration have been answered and distribution made, if a party taking this distributive part comes to this country and invests it upon trusts, it assumes the character of a British settlement and British property, and is no longer to be dealt with as if it were merely a portion of a foreign testator's estate to be received in the course of administration." It is true that this passage is somewhat ambiguous, and I may not have understood it rightly; but I am led to think that the meaning is as I have stated, for in *Lyall* v. *Lyall*, L. R. 15 Eq., at p. 10, Lord Romilly, M.R., speaks as follows of *Attorney-General* v. *Campbell*: "In that case their lordships decided that when a person, whether an alien or a British subject, succeeds to property under a British settlement vested in British trustees he is liable to pay succession duty, whether the settlement be made by an alien or a British subject, and whether the settlement be made by deed or will, and, as I understand, wherever the property is locally situated."

Now, this exposition of the law covers, as it seems to me, every controverted doctrine in this case, and, assuming that passage to rightly state the law, concludes it in favour of the Crown; provided I am right in coming to the conclusion that this was a British settlement, and that the trustees were British, because the company was British by domicil, and that the company was the trustee as such, so that the domicil of the various individual directors may be disregarded.

The case, then, stands thus. The words of the statute are most comprehensive, and amply sufficient to give the duties claimed. They are, however, subject to various implied limitations. Is there any decided case which limits them in such a way as to deprive them of application in this case? For my own part I can see none, unless I am wrong in taking the same view of *Attorney-General* v. *Campbell* as commended itself to Lord Romilly nearly thirty years since, and which has obtained until to-day. Moreover, *Lyall* v. *Lyall* was cited in the case of *In re Cigala's Settlement Trusts*, and is relied upon in the judgment; and not only does the Master of the Rolls (Sir George Jessel) not dissent from what Lord Romilly had said, but himself expressly declares at p. 356 (7 Ch D.) that "it is quite clear that a foreigner is taxed by the English law, though the property is actually situated abroad" Having so held, he proceeds to apply this doctrine to shares in the Bank of France, a foreign corporation. Therefore it appears to me we have authority for holding that, in spite of every contention urged by the Jewish Association, they are liable to pay the duties claimed.

Judgment for the Crown.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for defendants, *Tatham & Lousada.*

Court of Appeal.

From Chan. Div. (Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) } Oct. 26; Nov. 2.

In re MILLER.
Ex parte TALBOT. (*a.*)

Bankruptcy—Notice of suspension of payment under section 4 (1) (h) *of the Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52)—*Existence of debt due to petitioning creditor at time of notice—Petition.*

V. T. paid £2,000 into a bank to the use of S. M., with the view of his subsequently becoming a partner of S. M. on the Stock Exchange. It was agreed, however, that, if S. M. should use the said sum for any other than certain specified purposes, or if V. T. should not by a certain specified day become a member of the Stock Exchange and enter thereupon into partnership with S. M., then the said sum of £2,000 should be repayable by S. M. to V. T., and the agreement should be at an end. Prior to the fulfilment of either of these two conditions, S. M. was "hammered" on the Stock Exchange, and informed V. T. that he was utterly penniless and unable to pay his debts.

Held, that, inasmuch as, at the date of the information in question, the sum of £2,000 was not then due from S. M. to V. T. under the terms of the contract, and inasmuch as V. T. was not at that date in a position to sue S. M. for the said sum as money had and received, there was no debt due at that date from S. M. to V. T., and V. T. was not then accordingly a creditor of S. M. within the meaning of section 4 (1) (h) *of the Bankruptcy Act*, 1883.

This was an appeal from a receiving order made by Mr. Registrar Hope on the 10th of August, 1900.

By an agreement dated the 20th of January, 1900, and made between the debtor Samuel Miller of the one part, and the petitioning creditor Victor Talbot of the other part, it was agreed (*inter alia*) that the said Victor Talbot should forthwith pay into a specified bank the sum of £2,000 in the joint names of the said Samuel Miller and himself, with a view to his subsequently becoming a member of the Stock Exchange and entering into partnership with Miller. It was provided that this sum of £2,000 was to be used by Miller till the date of the contemplated partnership for the purposes of his business of a stockbroker, but not for any hazardous or speculative purpose or otherwise; and it was also provided that interest thereon was to be paid in the meantime at the rate of 10 per cent. per annum. Clause 6 provided that "if the said Samuel Miller shall use the sum of £2,000 . . . otherwise than as working capital for his said business . . . the said Victor Talbot shall have the option (at any time after such breach) of cancelling this agreement by notice to the said Samuel Miller left at his office . . . and upon such notice being given the said Victor Talbot shall be at liberty to draw out his said sum of £2,000." Clause 8 of the said agreement provided that "if the said Victor Talbot shall not on or before the 31st day of March next become a member of the Stock Exchange, or if, having become a member, he shall not be at liberty to enter into a partnership within that period by reason of his recommenders withholding their consent, then and in either of the said cases the said Victor Talbot shall at any time after the 31st day of March next have the option . . . of determining this agreement, and thereupon the said sum of £2,000 . . . shall be returned and paid by the said Samuel Miller . . . and this agreement shall be at an end."

By a second agreement dated the 23rd of April, 1900, and made between the same parties, and expressed to be supplemental to the aforesaid agreement of the 20th of January, 1900, the 29th of September, 1900, was substituted for the 31st of March, 1900, in the terms already set out above of the aforesaid agreement of the 20th of January.

The sum of £2,000 was duly paid by Talbot in pursuance of the terms of the two above-mentioned agreements.

On the 28th of June, 1900, Miller was "hammered" on the Stock Exchange; and on the following 3rd of July he was alleged to have informed Talbot that he was utterly penniless, and that he was quite unable to pay anything to anybody. This statement, it was contended, amounted to a notice to a creditor that the debtor had suspended payment of his debts within the terms of section 4 (1) (*h*) of the Bankruptcy Act, 1883, and a petition was accordingly lodged by Victor Talbot on the 5th of July, 1900, and a receiving order made against Samuel Miller on the 10th of April, 1900.

From this receiving order the debtor Miller now appealed.

Section 4 (1) of the Bankruptcy Act, 1883, enacts as follows: "A debtor commits an act of bankruptcy in each of the following cases: . . . (*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

H. Reed, Q.C., and *Abrahams*, for the appellant.—The sum of £2,000 was not a debt immediately due from Miller to Talbot on the 3rd of July; and Talbot, accordingly, was not one of Miller's creditors at the time of the alleged statement in question.

They referred to *In re Scott, Ex parte Scott*, 44 W. R. 587, [1896] 1 Q. B. 619; *Ex parte Taylor, In re Grason*, 28 W. R. 205, 12 Ch. D. 366; *In re Betts, Ex parte Betts*, 45 W. R. 98, [1897] 1 Q. B. 50.

McCall, Q.C., and *Cooper Willis*, for the respondent, referred to *Knowles* v. *Bovill*, 22 L. T. Rep. 70, 18 W. R. Dig. 18.

Cur. adv. vult.

Lord ALVERSTONE, L.C.J.—I am of opinion that if Talbot was a creditor on the 3rd of July for the sum of £2,000, either then payable or payable at a certain future time, there was a notice by the bankrupt under sub-section (*h*) of section 4; but in my opinion there was not upon the 3rd of July any liquidated sum due to Talbot either then or at a certain future time. It was not contended before us that any event had happened which justified Talbot in giving a notice under clause 6 of the original agreement, but it was urged that the whole agreement was subject to the condition that Miller should be in a position to carry on the business, and that what had occurred upon the 28th of June rendered it impossible for him to fulfil the agreement, and that thereupon the £2,000 became immediately payable. I cannot take this view. It seems to me that as things stood on the 3rd of July, Talbot's only remedy was in damages for breach of the agreement. If, for instance, the £2,000 was lost in the business by its being used for hazardous or speculative purposes or by some other cause not contemplated by clause 6, Talbot's right course was to sue Miller for damages; and I cannot see that, either under the agreement or on general principles, the fact that Miller was hammered—it is said without any improper conduct on his own part—gave Talbot a right to demand immediate repayment of the £2,000. I am further of opinion that there was no liquidated debt

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

of £2,000 payable at any certain future time. The question of whether that amount ever became payable would depend upon whether Talbot exercised his rights of terminating the partnership under the agreement. I do not think that this contingency can properly create a debt for a liquidated sum payable at a certain future time. The appeal will be allowed with costs.

RIGBY, L.J., delivered judgment to the same effect.

VAUGHAN WILLIAMS, L.J.—I concur. There can be no doubt that on the 3rd of July, just as much as on the 2nd, the state of things was such that it was impossible for Talbot to sue under the terms of the contract for the money lent by him to Miller. The only remaining question, accordingly, is—was Talbot, on that day in a position to sue for that money as money had and received, on the basis that the contract under which it was originally advanced had been subsequently avoided by the bankruptcy of Miller. Now there is no doubt but that a contract made without any express provision to that effect may yet be provisional on the due performance of the object of the contract. A contract that is quite express in its terms may yet sufficiently denote an intention of the parties that the contract is to apply only to the particular state of things or to the particular adventure contemplated by the parties. But in my judgment there is nothing in the contract in the present case that could possibly imply such a term. Under these circumstances, I agree that, at the crucial moment, Talbot's only right, if any, was to bring an action for damages.

Appeal allowed.

Solicitors, *Michael Abrahams & Co.; H. A. Graham.*

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) Oct. 25.

DAY v. KELLAND. (a.)

Mortgage—Solicitor-mortgagee—Profit costs—Judgment—Further consideration—Mortgagees' Legal Costs Act, 1895 (58 & 59 *Vict. c.* 25), *s.* 3.

An order for foreclosure was obtained in 1893 *by a solicitor-mortgagee in an action to enforce his security. In* 1898 *an order was made on further consideration of the action directing taxation of costs. The taxing-master allowed the mortgagee, who had himself acted, profit costs. On a summons to vary the certificate,*

Held, that the rights of the parties were ascertained by the order of 1893, *and must be determined by the law in force at that date; consequently, the mortgagee was not entitled to the benefit of the Mortgagees' Legal Costs Act,* 1895, *s.* 3.

This was an appeal from a decision of Cozens-Hardy, J.

On the 6th of February, 1891, the defendant W. H. Kelland deposited certain deeds with the Devon and Cornwall Bank to secure certain sums due from him, and signed a memorandum to the effect that the deposit was intended to create an equitable mortgage and that he thereby agreed at any time or times upon the request of the bank to execute such legal mortgages as the bank should require.

On the 13th of March, 1891, Kelland gave a charge subject to the mortgage to the bank.

On the 18th of July, 1891, this charge was transferred to Cuddeford.

Notice was given to the bank on the 19th of February, 1892.

On the 25th of March, 1892, the plaintiff, who was a solicitor, paid off the bank and took a legal mortgage for £6,700.

W. H. Kelland subsequently became bankrupt, and the present action was brought by the plaintiff to enforce his security.

On the 3rd of April, 1893, a foreclosure order was made in the action.

On the 19th of February, 1898, an order was made on further consideration directing taxation of the costs of the plaintiff in the action, including costs properly incurred.

The taxing-master allowed the plaintiff profit costs, though he was a solicitor and had himself acted.

Cuddeford took out a summons to vary the taxing-master's certificate in this respect.

The Mortgagees' Legal Costs Act, 1895, s. 3, provides: "(1) Any solicitor to or in whom any mortgage is made or is vested by transfer or transmission, or the firm of which such solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done, or to charge against the security for all business transacted and acts done by such solicitor or firm subsequent and in relation to such mortgage or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration. (2) This section applies to mortgages made and business transacted and acts done either before or after the commencement of this Act."

Cozens-Hardy, J., held that the rights of the parties were determined under the order of 1893 and that the plaintiff was not entitled to the benefit of the Act.

The plaintiff appealed.

A'Beckett Terrell, for the appeal.—No order was made as to costs till 1898. The rights of the parties as to costs ought to be determined by the law in force at that time. *Eyre* v. *Wynn Mackenzie*, 44 W. R. 273, [1896] 1 Ch. 135, is distinct from the present case, because in that case there had been a judgment which determined all questions between the parties before the Act came into operation.

Stewart Smith, for the respondent, was not called on.

Lord ALVERSTONE, L.C.J.—In my opinion the judgment of Cozens-Hardy, J., is right. I do not intend to express any opinion as to the effect of section 3 of the Mortgagees' Legal Costs Act, 1895, because in the view I take of the facts it is unnecessary for me to do so. I think that the rights of the parties were determined by the order of 1893. At first I thought that the mortgagee got no costs under that order, but I have come to the conclusion that the view taken by the learned judge in the court below was right. Everything that has been done has been done in consequence of that order. It is not disputed on behalf of the appellant that that order did determine the rights of the parties, but it is urged that before effect was given to the order the Act of 1895 had been passed, and that the court ought to give the appellant his rights under that Act. I think that would be to affect rights which had been previously determined, by subsequent legislation. I repeat I do not think

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

any question arises under the Act of 1895. In my opinion the distinction drawn by Cozens-Hardy, J., is correct, and though I do not think that this case is exactly covered by the decision of the Court of Appeal in *Eyre* v. *Wynn Mackenzie*, I think that the principle of that case applies, and that the plaintiff's rights are to be determined by the rights as they were at the date of the order for foreclosure.

RIGBY, L.J.—I am of the same opinion. The rights of the parties were ascertained—I will not say actually given—by the order of 1893. They must be interpreted by the law as it stood at that time. I understand that to be the decision of Cozens-Hardy, J., and I agree with him.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion.

Solicitors, *Taylor, Hoare, & Pilcher; H. Mear*, for *Dunn & Baker*, Exeter.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 16, 17, 1900.

In re HUGHES AND ASHLEY'S CONTRACT. (*a.*)

Vendor and purchaser—Contract—Conveyance—General words—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6—*Practice—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

A vendor is entitled, in the absence of indications in the contract of a contrary intention, to insist on the express insertion in his conveyance of general words of lesser import than those which would be implied, in the absence of such express insertion, by virtue of section 6 *of the Conveyancing Act*, 1881.

The court has jurisdiction under the Vendor and Purchaser Act, 1874, *to decide on summons a question arising on a contract, even in cases in which one of the parties asserts himself to be in a position to rescind the contract or to set up a successful defence to an action for specific performance.*

In re Wallis and Barnard's Contract, 48 W. R. 57, [1899] 2 *Ch.* 515, *approved.*

Appeal from a decision of Kekewich, J., given on the 13th of June, 1900.

The vendors caused certain freehold property to be put up for sale by public auction on the 26th of April, 1899, and it was bought by the Rev. G. Ashley for the sum of £450.

Number 6 of the printed conditions of sale contained a stipulation that the property was to be sold subject to any easements or other rights affecting it; but nothing was said as to any easements or other rights appertaining, or reputed to appertain to, or occupied or enjoyed with, the land sold. It appeared, however, that there was a certain footpath over other property of the vendors which was occupied and enjoyed with the property sold at the time of the sale in question. This footpath, however, was not a way of necessity.

It was also alleged that the auctioneer made a false representation to the purchaser on the occasion of the auction to the effect that the purchaser would be entitled to the use of a certain pump on another part of the vendors' property.

The purchaser in due course prepared a draft conveyance and tendered it to the vendors, but the latter altered it by inserting general words expressly providing that section 6 of the Conveyancing Act, 1881, should have no application, and by striking out a proposed acknowledgment on the part of the vendors of the right of the purchaser to the pump before referred to. There was no express grant in the draft conveyance of the footpath already mentioned; and the result of the alterations proposed by the vendors would have been to have deprived the purchaser of its use altogether.

To these alterations the purchaser objected; and the vendors thereupon took out an originating summons asking for a declaration to the effect that they were entitled to insert in the conveyance the clause already alluded to as being restrictive of the rights which would otherwise be conferred on the purchaser by virtue of section 6 of the Conveyancing Act, 1881.

The summons came on for hearing before Kekewich, J., on the 13th of June, 1899, but was dismissed by him on the ground that it was not proper for him to determine a minor point in connection with the contract under the powers of the Vendor and Purchaser Act, 1874, in a case in which one of the parties to the contract asserted himself to be in a position to repudiate the contract altogether on the ground of the misrepresentation alleged to have been made with respect to the pump.

From this decision the vendors now appealed.

Neville, Q.C., and *Elgood*, for the appellants.—The learned judge was entitled under section 9 of the Vendor and Purchaser Act, 1874, to determine the question raised by this summons, notwithstanding any possible right on the part of the respondent to repudiate the contract on the ground of misrepresentation: *In re Lander and Bagley's Contract*, [1892] 3 Ch. 41, 41 W. R. Dig. 101; *In re Wallis and Barnard's Contract*, 48 W. R. 57, [1899] 2 Ch. 515. As to the main question, the purchaser has no right to insist on the inclusion of the footpath in his conveyance, and we are therefore justified in restricting the general words included in section 6 of the Conveyancing Act, 1881, which would otherwise give him a title to this path.

Renshaw, Q.C., and *Ribton*, for the respondents.—Till it is known whether there is, or is not, a contract, there is no proper ground for a vendor and purchaser summons. The court does not sit to answer conundrums. Here we have a strong case for rescission, or a good defence against specific performance. The court ought either to refuse the summons or order it to stand over till the preliminary question is settled: *In re Burroughs and Lynn's Contract*, 25 W. R. 520, 5 Ch. D. 601; *Scott and Alvarez's Contract*, [1895] 1 Ch. 596, 43 W. R. Dig. 185. The multiplication of actions such as is here proposed is opposed to the spirit of the Judicature Act: Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 24, sub-section 7. As to our right of rescission, we are entitled to rescind on the ground of even an innocent misrepresentation: *Peek* v. *Derry*, 36 W. R. 899, 37 Ch. D. 541. As to the merits, this footpath was an obvious one, and ought to be included in the conveyance: *In re A Contract between Peck and the London School Board*, 41 W. R. 388, [1893] 2 Ch. 315.

Elgood replied.

Lord ALVERSTONE, M.R.—This case raises two questions. It is not, however, seriously asserted by the purchaser that, if there is a contract at all, he could insist on the conveyance being executed in the form in which he first tendered it. It is said, however, that the vendors ought not to raise the question in the present way, because the purchaser might have a successful defence, based on the alleged misrepresentation of the auctioneer with regard to the

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

pump, to an action for specific performance; and it is suggested that it would be inconvenient that the minor question should be decided before the main one. I think, however, that in dismissing the summons on this ground the learned judge in the court below went too far, and that he even acted in opposition to his own decision in *In re Wallis and Barnard's Contract.* For myself, I think it would be very inconvenient if, when either a vendor or a purchaser were seeking the remedy indicated by the Vendor and Purchaser Act, it should be open to the judge, simply because the other party were to assert that he was in a position altogether to repudiate the contract, summarily to dismiss the summons. I quite agree that if the only question raised were a question as to the validity of the contract, that is not a question that could be dealt with by a vendor and purchaser summons, having reference to the the language of section 9 of the Vendor and Purchaser Act. It is impossible to say, however, that that is the only question raised here. The purchaser has tendered a contract embodying section 6 of the Conveyancing Act, 1881, but the vendors are unwilling to accept that embodiment. It seems to me that it is distinctly advantageous that that question should be heard and determined now; and I think that Kekewich, J., ought to have tried it.

RIGBY, L.J., delivered judgment to the same effect.

COLLINS, L.J.—I am of the same opinion. I think the court is bound to give effect to the statute of 1874, which puts a cheap and easy method of deciding points arising on a contract into the hands of suitors without driving them to specific performance. It would be a great misfortune if parties were forced to incur the greater expense of the main action, and were unable, because the result of the main action were doubtful, to raise minor points first. In this case the point raised is important, and, in my judgment, might possibly have considerable influence in helping the parties to determine whether it were worth their while to endeavour to enforce the contract or not. The point raised is whether the purchaser in this case is entitled to insert in his contract the general words embodied in section 6 of the Conveyancing Act, 1887. In my opinion it is quite clear that he is not so entitled. It seems to me that this is a substantial point, and that the court has clear jurisdiction to deal with it on the present summons. It is said, however, that we ought not to decide it now, because, in the last resource, the vendors would be unable to obtain specific performance. It seems to me that the very point arose in *In re Lander and Bagley's Contract.* Everything that has been said in the present case as to the non-enforceability of the contract could just as well have been said there.

Appeal allowed

Solicitors, *Shirley W. Woolmer*, for *Winterbothams & Gurney*, Cheltenham; *Starling & Wright*, for *H. C. Beddoe & Son*, Hereford.

From Chan. Div.
(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) June 27, 28, 1900.

DAVIES v. THOMAS. (a.)

Vendor and purchaser—Vendor's lien—Conversion of purchased property—Lunatic not so found—Receivership order—Priorities—Lunacy Act, 1890 (53 *Vict. c.* 5), *s.* 116.

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

A vendor is not deprived of any lien which he may have for unpaid purchase-money by the fact that the property sold is subject to a trust for sale which has become operative before the property is made over to the purchaser.

An ex parte *order under section* 116 *of the Lunacy Act,* 1890, *directing a person, in the name and on behalf of a lunatic not so found, to receive and give a discharge for the property of a lunatic does not affect any rights which a third party may have in respect of such property.*

In re Winkle, 42 *W. R.* 513, [1894] 2 *Ch.* 519, *distinguished.*

This was an appeal from a decision of Bruce, J.

By his will dated the 28th of March, 1859, William Edmunds bequeathed certain leasehold houses to trustees upon trust for his wife, his daughter, and his son-in-law successively during their respective lives, and after the death of the last surviving tenant for life, upon trust to sell the same and hold the proceeds of sale upon trust for certain persons named in the will. Under this trust Edward Lewis was entitled to a share in the proceeds of sale after the death of the last surviving tenant for life.

The testator died on the 25th of October, 1859, and the last survivor of the tenants for life died in April, 1894.

By a deed dated the 27th of September, 1890, Edward Lewis mortgaged all his share under the testator's will to William Smith to secure the payment of £200 with interest. And by another deed dated the 24th of October, 1891, he gave William Smith a further charge on his share to secure the payment of £50 with interest.

In 1892 the mortgage and further charge were transferred by William Smith to the plaintiff, W. H. Davies.

On the 27th of January, 1894, the plaintiff, in exercise of his statutory power of sale, put up the mortgaged share for sale by auction. At the sale the defendant, David Lewis, was declared the purchaser for the sum of £500.

On the 15th of August, 1894, the plaintiff executed an assignment of the share to David Lewis absolutely in consideration of £500 paid by the purchaser to the vendor on or before the execution of the deed of assignment.

David Lewis was the solicitor of the plaintiff, and there were various monetary transactions between them. The £500 was never in fact paid to the plaintiff by David Lewis. David Lewis accounted to the plaintiff for £294 18s. 11d., the amount due to the plaintiff on his mortgages, but he misappropriated the balance of £205 1s. 1d., and the plaintiff was compelled to pay that sum to the mortgagor out of his own pocket.

In 1895 the trustees of William Edmunds's will sold the leasehold houses, and there was in their hands the sum of £570 9s. 8d., which represented the share of Edward Lewis under the will.

On the 21st of February, 1898, David Lewis became of unsound mind, but was not so found by inquisition.

On the 13th of May, 1898, on the *ex parte* application of the wife of David Lewis, an order was made by a Master in Lunacy under section 116 of the Lunacy Act, 1890, authorizing the wife in the name and on behalf of the lunatic to sell his real and personal estate, and in the meantime to let and manage his freehold and leasehold property, and to receive and give a discharge for the rents and profits thereof, and thereout to pay all proper outgoings, and for getting in and making available any outstanding estate of the lunatic the wife was authorized in his name and on his behalf to receive and give a discharge for all sums of money due to him. And

it was ordered that so much as should be expended not exceeding £200 be allowed for the maintenance of the lunatic from the 21st of February, 1898.

On the 4th of January, 1899, the plaintiff commenced the present action against the trustees of the will of William Edmunds and David Lewis by his wife as guardian, claiming a declaration that he was entitled to a lien on the sum of £570 9s. 8d. in the hands of the trustees in respect of £205 1s. 1d., the balance of the purchase-money unpaid by David Lewis.

On the 29th of July, 1899, another order was made by the master authorizing the lunatic's wife in his name and on his behalf to receive from the trustees of the will of William Edmunds the sum of £570 9s. 8d.

In August, 1899, the action came on for trial at assize before Bruce, J., who held that the plaintiff was entitled to the lien claimed.

An appeal was presented on behalf of the lunatic.

Bowen Rowlands, for the appellant.—First assuming that the plaintiff can have a vendor's lien, it is submitted that such a lien can have no effect against the orders in Lunacy. The receiver is in possession and cannot be displaced except under an order of the court which has appointed her as receiver, in this case the Court in Lunacy. The plaintiff is in no better position than the execution creditor in *In re Winkle*, 42 W. R. 513, [1894] 2 Ch. 519. That case is a direct authority and has not been shaken by *In re Clarke*, 46 W. R. 337, [1898] 1 Ch. 336. [*Ames* v. *Birkenhead Docks Co.*, 3 W. R. 381, 20 Beav. 332, was also referred to on this point.] Secondly, it is submitted that there is no authority for extending a vendor's lien to the proceeds of sale of leaseholds, and it must be remembered that the trust for sale had become operative before the assignment to Lewis: *Mackreth* v. *Symmons*, 15 Ves. 329. Neither *Collins* v. *Collins*, 31 Beav. 346, 11 W. R. Dig. 119, nor *In re Albert Life Assurance Co.*, 19 W. R. 321, 11 Eq. 164, is an authority for extending a vendor's lien to a sum of money.

Upjohn, Q.C., and *Batlhache*, for the respondent.—The respondent has a vendor's lien on the fund in the hands of the trustee, and it is not interfered with by the orders in Lunacy. [They referred to *Mackreth* v. *Symmons*; *Collins* v. *Collins*; *In re Albert Life Assurance Co.*; *Aberaman Ironworks Co.* v. *Wickens*, 17 W. R. 211, L. R. 4 Ch. App. 101; *Levy* v. *Stogdon*, [1898] 1 Ch. 478, 46 W. R. Dig. 173; *In re Clarke*; *In re Leavesley*, 39 W. R. 276, [1891] 2 Ch. 1; *Lloyd* v. *David Lloyd & Co.*, 26 W. R. 572, 6 Ch. D. 339; *In re Winkle*; *Ex parte Williams*, 20 W. R. 430, L. R. 7 Ch. App. 314; *In re Plenderleith*, 42 W. R. 324, [1893] 3 Ch. 332; *In re Brown*, 48 W. R. 461, [1900] 1 Ch. 489; *Ames* v. *Birkenhead Docks Co.*] In any case the plaintiff could have got leave to prosecute his claim as a matter of course from the Court in Lunacy: *Lane* v. *Capsey*, 40 W. R. 87, [1891] 3 Ch. 411.

Brynmor Jones, Q.C., for the trustees of the will.

Bowen Rowlands, in reply, referred to *Woodland* v. *Fuller*, 11 A. & E. 859.

Lord ALVERSTONE, M.R., after stating the facts, continued: Two important questions arise—(1) Whether the plaintiff is entitled to a vendor's lien in respect of unpaid purchase-money upon so much of the money in the hands of the trustees as represents the share of which the defendant David Lewis became the purchaser; (2) whether the orders made in Lunacy prevent the rights of the plaintiff from now being effectually enforced against the money. In my opinion the plaintiff is in the position of an unpaid vendor, and is entitled in respect of his unpaid purchase-money to a lien upon the property which he sold, unless something has happened to deprive him thereof. At the time of the sale by the plaintiff the property was leasehold property, and at the time of the conveyance to David Lewis it was still leasehold property, though the last tenant for life was then dead, and the duty of the trustees to convert the property into money had arisen. But, even if the thing sold had been simply a claim to receive a share of the money arising from the realization of the leaseholds, I think the unpaid vendor would have been entitled to a lien upon the share which he sold. In my opinion *Collins* v. *Collins* and *In re Albert Life Assurance Co.* show that the principle entitling a vendor to a lien for unpaid purchase-money has been applied to other property besides land. *Collins* v. *Collins* is a direct authority for that proposition. [His lordship referred to that case, and continued:] I think, therefore, that the principle on which a vendor's lien is based applies, and that the plaintiff was entitled to a lien on the property in the hands of the trustees which was sold to the defendant. It is to be observed that the plaintiff has been treated throughout as the vendor of the whole of the mortgaged property which he sold under his statutory power, and he was entitled to receive the £500 purchase-money. Do the subsequent transactions prevent him from relying on his right of lien? We have not, I think, sufficient information to enable us to come to that conclusion. On the facts before us I think it would be going too far to say that the plaintiff agreed to look to the defendant D. Lewis solely as his debtor. Therefore I come to the conclusion that the plaintiff was entitled to a lien, and is now entitled to enforce it, unless the orders in Lunacy have deprived him of it.

It has been argued that the orders in Lunacy made under section 116 of the Lunacy Act. 1890, whereby the lunatic's wife was authorized in his name and on his behalf to receive all moneys due to him, and to receive from the trustees of the will this particular fund, have discharged the fund from the lien, or prevent the lien being enforced. If this is so, it must be by virtue of the provisions either of the statute or of the orders themselves. That the court in making the orders intended to affect rights acquired by third parties against the property of the lunatic cannot be suggested. I think the effect of an order under section 116 is to enable the person thereby appointed to get in the lunatic's property and nothing else, and if other persons have acquired rights against his property, I do not think the order affects those rights. The order is made *ex parte*, and it authorizes the person appointed by it to do in the name and on behalf of the lunatic that which he himself could have done if he had been sane. If that is the true construction of the order, it is impossible to say that it was intended to effect the rights of third parties. We have been pressed with the decision of this court in *In re Winkle*, which, it is said, shows that the fact that the property of a lunatic has become subject to the control of the court by the appointment of a receiver prevents any charge on the property from being effectual. In my opinion the court did not intend in that case to decide anything of the kind, as appears clearly from the later case of *In re Clarke*. In *In re Winkle* the court held that in their view of the facts there was no effective charge entitling the judgment creditor to the possession of the goods, or to a lien upon them, at the time when the receiver took possession of them under the order of the court. In *In re Clarke* Lindley, M.R., said: "Even if an order appointing a receiver related back, which it never does, the receiver has never in fact been in possession

of the goods. This circumstance distinguishes this case from *In re Winkle*, where the receiver had possession and the sheriff had not, he having gone out of possession under an order of a judge at chambers. The judgment of the court proceeded entirely on this ground, and *In re Winkle* is no authority for saying that the Court in Lunacy can deprive execution creditors of their rights over property not under the control of the court when seized under legal process." We were pressed to say that *In re Winkle* is a decision that, though a third person has acquired valid rights against a property of a lunatic the effect of such an order in Lunacy is to deprive him of those rights. I should require much stronger authority to establish that proposition, and, indeed, the long line of cases referred to by Lindley, M.R., show that such an order is only intended to authorize the receiver to take possession of the lunatic's property, and not to interfere with any rights affecting that property at the date of the order.

It was also urged that a receiver appointed by an order in Lunacy stands in the same position as a receiver appointed in the Court of Chancery, and that it would be a contempt of court for the plaintiff to pursue his claim, and *Ames* v. *Birkenhead Docks Co.* was cited as showing that any interference with such a receiver without the leave of the court would not be permitted. I do not think that case is an authority for anything of the kind. There the court, at the suit of a mortgagee, had appointed a receiver of the rates and tolls and of the rents of the property of the defendants, and it was held that a judgment creditor of the defendants was not entitled, without the leave of the court, to interfere with the receiver's collection of those tolls, and that such interference would be a contempt of court, even though the order appointing him might be erroneous. In my opinion that decision has no application to an order appointing a receiver to get in the property of a lunatic. I come to the conclusion, therefore, that neither of the two orders in Lunacy can override any rights which the plaintiff possessed in virtue of his lien. In my opinion the judgment of Bruce, J., was right. The plaintiff is entitled to a vendor's lien upon the money in the hands of the trustees, and the orders in Lunacy have not deprived him of that lien.

RIGBY, L.J.—I am of the same opinion. It appears to me unnecessary to go carefully into the question of a vendor's lien. There is another way of stating the case which seems to me clear, though the principle may be the same. The trustees of the will at the time of the mortgage held the property on trust to pay the income to certain persons for life, and after their deaths on trust to sell the property and divide the proceeds of sale among specified persons, of whom the mortgagor was one. At the time of the sale of the mortgagor's interest to David Lewis the trustees held the property in the condition of leasehold, and subsequently to the assignment to the purchaser they converted the leaseholds into money, and they held the money on trust for the persons entitled to it. What was the position of the trustees? David Lewis, the purchaser, was throughout the solicitor who acted for the trustees as well as the solicitor for the plaintiff, who was the vendor. Observations have been made as to the propriety of his becoming the purchaser from his own client, but I think it is unnecessary to go into this matter. It would, in my opinion, be impossible for the trustees to say that they had not constructive or at any rate effective notice in equity of the purchase by their solicitor of the mortgaged property, and of the fact that he had not paid the whole of the purchase-money. It was their duty to administer the trust fund produced by the sale of the leasehold property which was in their hands subject to the trusts of the will. Could they in favour of their solicitor ignore the rights of the vendor and say that they were not concerned with him, but were concerned only with their own solicitor who had purchased the mortgaged share from him. If a court of equity had been administering the fund, it would have inquired into the facts, and, finding that the purchaser had not paid the purchase-money, it would have held that it was its first duty to see that the mortgagee, and through him the mortgagor, had been satisfied before handing over the purchased share to the purchaser. The court would have found no difficulty in doing that, and, in my opinion, the trustees are bound to do that which the court would have done had it been administering the fund. That is not carrying the equitable doctrine very far. In my opinion, therefore, even if a vendor's lien had never been spoken of, the result would have been the same in the present case.

As regards the other point, I have no hesitation in saying that this court never intended to lay down an Alsatian rule that if the Court of Lunacy once gets hold of the property of a lunatic it will disregard the rights of third persons, and treat the lunatic as solely entitled to it. It is, no doubt, remarkable that the court does to a certain extent ignore the rights of the creditors of a lunatic, and holds that it is bound to provide for the maintenance of the lunatic in preference to the claims of his creditors. This has been the practice of the court for centuries, and we cannot now avoid giving effect to it. But I have always understood that any rights against the property of a lunatic which are of such a nature that effect can be given to them at law or in equity will be respected by the court, and that it is only when such rights are shown not to exist that the court will deal with the lunatic's property for his own benefit in the way which I have mentioned. I am satisfied that the court did not intend in *In re Winkle* to lay down anything to the contrary.

COLLINS, L.J.—I am of the same opinion. There is here in the custody of the trustees of a will a fund which represents the money value of leasehold property which they have sold in pursuance of the directions of the will. An interest in the property is the subject-matter of the sale to the purchaser from the mortgagee. It is an accident that that interest is represented by money. The purchaser has not paid all his purchase-moneys. It appears to me that the plaintiff stands in as good a position as regards the fund as he would have stood in regard to the leasehold property if it had not been sold. I agree with the Master of the Rolls that the plaintiff has done nothing which can deprive him of his lien for unpaid purchase-money. My view of the case, therefore, is that the fund is in the hands of the trustees, but as they had full notice of all rights affecting it, they hold the money subject to those rights, including the unpaid vendor's lien.

As regards the orders in Lunacy, apart from any authority, it seems to me obvious on the face of the orders that they entitle the wife only to get in the equitable interest of the lunatic in his property—that is, in this case, the money representing the share which he purchased, subject to the vendor's lien. The orders do not affect the existing rights of third persons. But it is said that *In re Winkle* is an authority to the contrary, and that the right of an unpaid vendor is analogous to that of a judgment creditor who has only lodged a writ of *fi. fa.* in the hands of the sheriff. *In re Winkle* was a remarkable case, and I think the decision turned

upon the special facts. Physical possession of the lunatic's property had been taken by the sheriff, and the creditor had thereby become a secured creditor. On the same day the lunatic's wife was appointed *interim* receiver of his property, and the sheriff was ordered by a judge in chambers to withdraw, and he did so; and thereupon the *interim* receiver took physical possession of the property. In that state of facts the court held that the receiver being in actual, not merely in constructive, possession, they must consider the claim of the lunatic to be maintained out of his property before the right of the execution creditor, who, as matters stood, was only in the position of having delivered his writ to the sheriff. In my opinion that case is clearly distinguishable from the present case. I do not think that the position of a vendor who has a lien for unpaid purchase-money is analogous to that of a judgment creditor who has merely delivered his writ to the sheriff: see *Ex parte Williams*. I think the right of such a creditor, whatever it may be, falls short of actual or constructive possession of the goods of the debtor. Moreover, rightly or wrongly, the decision of *In re Winkle* was based on the physical possession of the receiver, the sheriff having relinquished the possession which he had taken. There are authorities both before and since *In re Winkle* which show that a receiver appointed by the Court of Lunacy is only authorized to take possession of the lunatic's equitable interest in his property. Therefore that case does not prevent our holding that the orders made in the present case were intended to affect the interest of the lunatic himself, and nothing more. In my opinion the judgment of Bruce, J., was right.

Solicitors, *Wrentmore & Sons*, for *Spickett & Sons*, Pontypridd; *Metcalfe & Sharpe*, for *T. S. Edwards*, Newport, Mon.; *W. R. Davies*, Pontypridd.

High Court of Justice.

Chan. Div. Stirling, J. — Aug. 7, 9, 11, 1900.

In re COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY. DAVIS *v.* NORTON. (*a.*)

Building society—Withdrawal of members—Construction of rules—Winding up—Priorities—Executor of deceased member—Right to "set off."

In a building society incorporated in 1880 *under the Act of* 1874, *notice was given on the 26th of June,* 1895, *for a meeting on the 10th of July, to consider the question of dissolution. On the 8th of August, at the adjourned meeting, a resolution was carried for voluntarily winding up. On the 1st of November,* 1895, *the deed of dissolution was registered. The notices of withdrawal given by different members under the rules of the society had matured before the four above-mentioned dates respectively, and one member had died before the 26th of June,* 1895, *without giving notice of withdrawal.*

This was a summons by the trustees of the deed of dissolution to determine the priorities of such members inter se *in the distribution of the surplus assets of the society. An advance, on the security of his share, had been made* ultra vires, *on the terms of a circular issued by the secretary, to a member who had given notice of withdrawal before the 26th of June,* 1895.

Held, on the construction of the rules, (1) *that the members who gave notice of withdrawal prior to the date of the resolution for winding up were entitled to the surplus assets in priority to the other members;* (2) *that the deceased member took precedence of all persons who had given notices of withdrawal, and that his executor took priority accordingly;* (3) *that the member to whom the advance had been made was to be treated as having waived his notice of withdrawal, and was not entitled, as against those whose notices of withdrawal matured prior to the 26th of June,* 1895, *to set off the moneys due from him against the sum due to him from the society on his fully paid-up share, but was bound to contribute the moneys to satisfy the claims of those entitled to the assets in priority to himself.*

In re West London and General Permanent Building Society, 78 *L. T. Rep.* 393, 46 *W. R. Dig.* 19, *followed.*

Brownlie *v.* Russell, 8 *App. Cas.* 235, 31 *W. R. Dig.* 28 *distinguished.*

This was a summons for the determination of questions which had arisen in the winding up of a building society under a deed of dissolution of which the plaintiffs were the trustees.

The society was incorporated in 1880 under the Building Societies Act, 1874, and its business was carried on regularly for some years. Early in 1895, however, dissatisfaction was expressed by many members at the mode in which the society's business was being conducted, and on the 26th of June, 1895, two notices were sent out, one summoning the members to an annual meeting, which was held on the 10th of July and was purely formal; the other, under a rule of the society, summoning a special general meeting also for the 10th of July to consider the advisability of dissolving the society. This meeting was duly held and adjourned till the 8th of August, when it was resolved that the society be voluntarily wound up; the deed of dissolution was accordingly prepared, and on the 1st of November, 1895, was duly registered.

Upon the 26th of June, 1895, the society consisted of 396 members, of whom 130 had paid up the full amount of their shares. 151 had already given notice of withdrawal under the rules, and their notices had matured before the 26th of June, 1895. Other members had given notices of withdrawal which matured at different times—viz., (*a*) before the 10th of July; (*b*) before the 8th of August; (*c*) before the 1st of November, 1895; one member died prior to the 26th of June, 1895, without having given any notice of withdrawal. The directors determined that the amounts receivable on withdrawal should be subject to payments or deductions under rule 67 (see below), and they also exercised the power given them by rule 68 of limiting the number of shares that should be withdrawn in any one month or of limiting the withdrawals so that they should not exceed one-half of the monthly income from share subscriptions. The summons was taken out to determine the priorities of such different members *inter se* in the distribution of the surplus assets of the society. All outside creditors had been paid; the amount due to members was twice as much as the entire assets, and as those entitled in priority would exhaust the assets, no one had been served who had given no notice of withdrawal at all.

E. A. Wurtzburg, for the trustees.

F. H. Maugham, for the defendant Cobley, whose notice of withdrawal matured after the 26th of June, 1895.—The right to withdraw was suspended by the resolution for winding up. The society itself was not stopped in any way. *Walton* v. *Edge*, 33 W. R. 417, 10 App. Cas. 33, is a different case.

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

G. Cave, for the defendant Greener, the sole executor of the above mentioned deceased member, Meadows.—There is no provision in the rules for an executor giving notice of withdrawal. This being so, and having regard to the ambiguity of the word "withdrawing" in the rules (see below), my client comes first: *In re West London and General Permanent Building Society*, 78 L. T. Rep. 393, 46 W. R. Dig. 19.

R. J. Parker, for the defendant Norton, whose notice matured prior to the 26th of June, 1895.—No limitation which the directors can put upon the number of shares to be withdrawn under rule 68 (see below) affects the right to withdraw under rule 67. As to the case of *In re West London, &c., Building Society*, there was a different rule in that case.

Owen Thompson, for the defendant Saunders, to whom an advance on the security of his shares had been made on the terms of a circular issued by the secretary of the society as set out in the latter part of his lordship's judgment.—Saunders received £41 and paid back £13; he is entitled to prove in the winding up for the value of his equity of redemption. It is admitted that the advance to Saunders was *ultra vires* (*Cullern* v. *London and Suburban General Permanent Building Society*, 39 W. R. 88, 25 Q. B. D. 485), but he claims an equitable right to set off the money he owes to the society against his fully paid-up shares, the outside creditors having been paid: *Brownlie* v. *Russell*, 8 App. Cas. 235, at pp. 237, 248, 31 W. R. Dig. 28.

[His lordship first decided the questions raised by the defendants Cobley, Greener, and Norton, and gave a reserved judgment upon the question of "set off" raised by the defendant Saunders.]

STIRLING, J.—On the first point arising on the summons, I have, in this case, to construe a rule of a building society which is, perhaps, not less clearly expressed than a good many others. It is a rule which relates to the withdrawal of shares. Rule 67 provides "Any person who shall have been a member of the society for six months and shall not have received any advance out of the funds of the society, and whose subscriptions and fines are not in arrear, shall be at liberty to withdraw from the society, upon giving the society one month's previous notice in writing of his intention. The amounts receivable by members on withdrawal will be those contained in Table A scheduled to these rules, but subject, nevertheless, to any payments or deductions, as may be determined by the directors. Payment of withdrawals shall be made according to the priority of the receipt of the notice of withdrawal by the society." That, therefore, empowers any person who has become a member of the society for the prescribed time of six months, and who has not received any advance, and whose subscriptions and fines are not in arrear, to withdraw from the society; and he is to exercise that power upon giving the society one month's previous notice in writing of his intention. The result of that is, that he becomes entitled to receive certain amounts mentioned in Table A contained in the schedule to the rules, and that the payment of those amounts, which are receivable by whoever overdraws, is to be made according to the priority of the notice of withdrawal. So that, out of the funds available, those members who give notice of withdrawal are entitled to be paid the prescribed amounts according to the priority of the receipt of the notice of withdrawal by the society. Now we come to the rule which gives rise to the question, which is No. 68: "The directors shall have full power from time to time to limit the number of shares that shall be withdrawn in any one month, and to limit the withdrawals so that they shall not exceed one-half of the monthly income from share subscriptions, and all previous applications for advances shall have priority over notices of withdrawals." Now, what the directors did at that meeting on the 23rd of March, 1893, was to pass a resolution in these terms: "It was unanimously resolved that the terms of rule 68 limiting the shares withdrawable be enforced." That is perhaps less clear than the rule but it does not seem to me, if I am to read it *ut res magis valeat quam pereat*, that I can apply that to the first branch of the rule which says, "The directors shall have full power from time to time to limit the number of shares that shall be withdrawn in any one month," because they do not say any number and they do not say that no shares are to be withdrawn.

I suppose they could pass such a resolution, but that is not what they did. They simply say "The terms of rule 68 limiting the shares withdrawable shall be enforced." If that has any meaning at all it must be limited to the class of shareholders who claim the withdrawals, so that they shall not exceed one-half of the monthly income from share subscriptions. Now, what is the meaning of that clause? The first branch of rule 68 confers on the directors a power to say how many shares shall be withdrawn in any one month, and they might have so done, but they have not. The second branch of the rule seems to me to be directed to limiting the amount which is to be withdrawn during that period and to limit the withdrawal—that is, the amount to be withdrawn—so that the total amount withdrawn shall not exceed one-half of the monthly income from share subscriptions. That seems to me to be directed to the amount.

Now, it is contended that when once the notice of withdrawal is given in a particular month exceeding the amount of one-half of the monthly income from share subscriptions during that month the notice ceases to have any effect. But that is not in the rule, and I do not see how I can read that into the rule. Rule 67 confers an absolute right of withdrawal, and all that rule 68 appears to me to do is to limit the working out of the withdrawals so as to confine them in operation to a fund consisting of one-half of the monthly income from share subscriptions. I do not think that the notice of withdrawal becomes invalid because there happens to be a large number of notices of withdrawal given in a particular month. Then it is said that in giving effect to this rule injustice may be done to the withdrawing member because he may have a long time to wait for payment, and in the interval he will not be entitled to any interest. All I can say as to that is that it is at his own option to do so; he is not compelled to withdraw, and if he chooses to withdraw he must take the consequences which are prescribed by the rule of the society of which he has become a member. That seems to me to be the result of the rule as it now stands. The result of that, therefore, will be that the notices which were given prior to the date of the resolution for winding up will exhaust the whole of the funds of the society.

As to the priority of the deceased member, I think the matter is really covered by the decision of the Court of Appeal in *In re West London and General Permanent Building Society*, because there it is laid down broadly by Lindley, L.J., that "there is nothing requiring notice of withdrawal to be given. Whether a member gives notice to withdraw or not, on his death he ceases to be a member." There is nothing in these rules which takes this case out of that. That is the basis of the decision. I think, therefore, that the executors of a deceased member take priority according to the declaration that is

contained in the order in that case. The effect of it seems to be that a deceased member will take precedence of all persons who have given notice to withdraw. The rights must be determined as at the date of the dissolution.

As to the right of "set off" claimed by the defendant Saunders, he was a holder of one share in this building society. In September, 1892, that share became fully paid up. Mr. Saunders thereupon gave notice of withdrawal pursuant to the rules, and in answer the secretary of the company sent him a circular of which the material passages are these: "I am in receipt of your intimation to withdraw the amount of your share account, but allow me to call your attention to our system of advances, adopted largely by subscribers, which enables them to retain their capital or investments untouched or diminished. We can grant you an advance of £41 at once, simply on your certificate. This sum can be repaid by monthly or other instalments, for such an amount as you may determine (suiting your circumstances) and as the expenses (which are trifling) are included in the repayments the above-named amount will be paid in full." After pointing out the advantages of the system, the circular proceeds: "The advance does not interfere with the interest on your investment, which is payable as if no advance had been made, the advance being treated as a separate and distinct transaction by the society from the investment, which is in no way disturbed by it." After explaining the operation of the system, it says: "I have frequently found from subscribers, that because they require a few pounds for some trifling necessity they forthwith transmit a notice to withdraw their invested savings. To prevent such an ill-advised course, the society's system is intended to supply them with those means without withdrawing any part of their investments, but once the investment is repaid by the society, all feeling of duty to replace the withdrawn amount by the investor ceases, and a valuable source for emergencies extinguished, which might afterwards be regretted through greater necessity arising." Now, Mr. Saunders accepted the terms of that circular. He received £41 from the society, in respect of which he has made repayments; and until the society came to be wound up he received interest on his share. An instrument of dissolution has now been executed under which the affairs of the society are being wound up. All the assets of the society will be required to pay withdrawing members who had given notice of withdrawal prior to the date when the winding up commenced. The question that now arises is whether Mr. Saunders is liable to pay to the society the balance which remains unpaid of the advance of £41. It is admitted that this advance was an *ultra vires* transaction. The result of that is that part of the assets of the company have got improperly into his hands, and he is liable to restore that part of the assets to the coffers of the company to be applied in accordance with the rights of those who are entitled to those assets. All outside creditors of the society have been paid, and the shareholders who have given notice of withdrawal prior to the commencement of the winding up are entitled next to have the assets applied in payment of the sums due to them on withdrawal in accordance with the rules. For the present purpose, under the circumstances which I have stated, Mr. Saunders is not to be treated as a member who has given notice to withdraw. I think that by accepting the proposal of the secretary of the society he waived the notice he had given; and elected to remain a continuing member of the society. Now he has paid up his share in full, and consequently he cannot be called upon to pay anything more in his capacity of a member of the society in respect of that share. But, unfortunately for him, he has entered into a transaction which has resulted in a liability to make good part of the assets of the society, and this liability is not one which arises out of his position as a shareholder, but by reason of a separate transaction which he has entered into in the way I have described. I am unable to see why he should not be required to discharge this liability for the purpose of satisfying the claims of those who are entitled to the assets of the society in priority to himself. Then the case of *Brownlie* v. *Russell* was relied upon on behalf of Mr. Saunders; but when that case is carefully examined it appears to be quite different in its nature. There a holder of a share was insisting on a benefit which was expressly conferred by the rules, and it was held that he had the right to do so, and was not to be deprived of it by any implication which might arise in the absence of express provision. The portion of Lord Selborne's judgment which was so much relied upon, when read in connection with the context, appears to show this clearly. [His lordship read from the judgment, at p. 248, from the words "We have nothing to do here with creditors" down to "this particular contract."] When that particular contract was looked at it was found that there was an express stipulation dealing with that case. In the present case there is none. It is intimated that the rights of the contributories or members of the society *inter se* are to be adjusted; but there is no express provision in the contract which shows, in the present case, how that is to be done. It seems to me that I must do it according to the general equitable principles, and it does not seem to me to be in accordance with equity that Mr. Saunders should be allowed to retain for himself a portion of the assets of the society to which other persons have a prior claim. In my judgment, therefore, he is bound to contribute.

The order would be as follows: Declare that the defendant Greener, as executor of the deceased member James Meadows, is entitled to be paid in priority to all members who have given notice of withdrawal, the order in this respect to follow that made by the Court of Appeal in *In re West London and General Permanent Building Society*, and that subject thereto members whose notices of withdrawal matured prior to the 26th of June, 1895, are entitled to be paid in full and without any deduction in priority to all other members, and according to the priority of the receipt of the notice of withdrawal by the society; declare that members to whom advances have been made on the security of their shares on the terms of the circular exhibited to the affidavit of the defendant Saunders are not entitled to set off the amounts due from them against the sums due to them out of the surplus assets of the society as against the persons whose notices of withdrawal matured prior to the 26th of June, 1895; appoint defendant Norton to represent class of members whose notices matured prior to the 26th of June, 1895, and the defendant Cobley to represent the class of members whose notices matured after the 26th of June, 1895, or who gave no notice of withdrawal, and the defendant Saunders to represent the class of members to whom advances on the security of their shares were made on terms of the above-mentioned circular; costs of all parties as between solicitor and client to come out of the fund, including in the case of the plaintiffs all proper costs, charges, and expenses. The rest of the summons to stand over with liberty to apply.

Solicitors, *Busk, Mellor, & Norris*, for *Little & Lyle*, Bath; *Peacock & Goddard*, for *R. D. Sharp & Symonds*, Bournemouth.

Chan. Div. Stirling, J. } Aug. 1, 7, 9, 1900.

In re DUKE OF ST. ALBANS.
LODER *v.* DUKE OF ST. ALBANS. (*a.*)

Inland revenue—Estate duty—Settlement estate duty—Incidence—Will—Contingent legacies and annuities—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 7, 9, 14, 22—*Finance Act,* 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Finance Act,* 1898 (61 & 62 *Vict. c.* 10), *s.* 14.

A testator by his will gave certain contingent legacies and annuities, and directed that they should be primarily charged upon and payable out of his personal estate, but, if this was insufficient, he charged his real estate in aid, but not in exoneration, of the personal estate; and, after devising his real estate in strict settlement, he declared that, if his residuary personal estate should be insufficient for payment of funeral and testamentary expenses, debts, legacies, and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits and not by raising a capital sum to provide for the same, and he charged the residuary personalty with the payment of the legacies and annuities, and directed that the ultimate residue of the personalty was to be invested and was to follow the limitations of the real estate. The executors had paid estate duty and settlement estate duty in respect of the contingent legacies and annuities, but there was a probability that the personalty would be insufficient to pay the funeral and testamentary expenses, debts, legacies, and annuities.

Held, that the contingent legacies were to be treated as settled, and that the settlement estate duty must be borne by the legatees, as in In re Maryon-Wilson, 48 *W. R.* 338, [1900] 1 *Ch.* 565; *and that, as to the annuities, the decision in* Attorney-General *v.* Owen, [1899] 2 *Q. B.* 253, 47 *W. R. Dig.* 73, *applied to personalty, and therefore the annuitants must bear the proper proportion of the settlement estate duty, in accordance with the rule established in* In re Parker-Jervis, Salt *v.* Locker, 47 *W. R.* 147, [1898] 2 *Ch.* 643.

This was a summons taken out by the trustees and executors of the will of the late Duke of St. Albans for the determination of various questions on the administration of the estate.

The questions now before the court related to the incidence of the estate duty and settlement estate duty paid in respect of certain portions of the estate.

By his will the testator gave to his sons and daughters, other than his eldest son, certain legacies and annuities. Some of the legacies were contingent—for instance, one given to Lord William Beauclerk.

By clause 6 of the will the testator gave to his trustees the sum of £5,000 in trust for the said Lord W. B. if he should attain the age of twenty-one, and he also gave him an annuity of £300, to commence from the day of the testator's death or the day of Lord W.'s attaining twenty-one, whichever might last happen, and to continue during the remainder of his life.

The testator gave like legacies and annuities to others of his children.

By clause 9 he directed that every legacy and annuity should be primarily charged upon and payable out of his personal estate, but if that should be insufficient (after payment of funeral and testamentary expenses and debts) to pay and provide for all such legacies and annuities, then he charged all his real estates in aid, but not in exoneration, of the personal estate with the legacies and annuities. Then he devised all his real estate to his trustees to the use of his eldest son, the Earl of Burford, during his life with divers remainders over.

By clause 15 the testator declared that if the residuary personal estate should be insufficient to pay the funeral and testamentary expenses and debts, legacies and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that annuities should be paid out of rents and profits and not by raising a capital sum to provide for the same.

The testator gave his residuary personal estate to his trustees upon trust for sale and conversion and to pay his funeral and testamentary expenses, debts, legacies and annuities, and to apply the surplus as if it had arisen from a sale of a part of his Bestwood estate and other hereditaments devised by his will under the statutory power of sale conferred by the Settled Land Act.

At the death of the testator the trustees and executors were called upon by the Inland Revenue authorities to pay, and did pay, the estate duty and settlement estate duty upon various portions of the estate. In particular they paid settlement estate duty in respect of the contingent legacies and the annuities. The questions asked by the summons were, *inter alia*: (1) Whether any, and if any which of the legatees or annuitants ought to bear any, and if any what part of the estate duty payable in respect of the general personal estate bequeathed by the will; (2) whether any, and if any which of the legatees or annuitants ought to bear any, and if any what part of the settlement estate duty payable in respect of the residuary personal estate under the will; (3) whether any, and if any which of the legatees or annuitants or persons under the said will or otherwise entitled to charges on the real estate thereby settled ought to bear any, and if any what part of the estate duty or settlement estate duty payable in respect of the real estate. In assessing the value of the residuary personal estate for the purposes of settlement estate duty the Inland Revenue authorities had deducted the legacies vested at the testator's death, but had not deducted the contingent legacies or made any allowance in respect of the annuities.

J. I. Stirling, for the trustees of the will.

J. G. Butcher, Q.C., and *J. A. Cartmell*, for the Duke of St. Albans.—The decision in *Attorney-General* v. *Owen*, [1899] 2 Q. B. 253, 47 W. R. Dig. 73, applied to the personal estate. An annuitant is to be looked upon as *pro tanto* a life tenant in the property, and must pay his contribution in respect of the settlement estate duty according to the rule laid down in *In re Parker-Jervis, Salt* v. *Locker*, 47 W. R. 147, [1898] 2 Ch. 643, at p. 656; Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 6, 9, 14 (1) referred to. In practice, the settlement estate duty has generally been charged on the whole of the *corpus*—*i.e.*, upon the personalty where the realty has been insufficient: *In re Grant, Walker* v. *Martineau*, 31 W. R. 703. With regard to the contingent legacies, the legatees should bear their contribution of settlement estate duty, as it is chargeable on the settled mass which includes such legacies as well as on every part of the settled sum.

Howard Wright, for an infant son of the testator, Lord William Beauclerk, a contingent legatee and annuitant.—There is no authority that either contingent legatees or annuitants should contribute to settlement estate duty under the Finance Act, 1894, ss. 5 (1) and 22 (*h*) (*i*). At present a contingent legatee takes nothing and, in certain events, can take nothing; how, then, can anyone "succeed" to him? It was decided in *Attorney-General* v. *Fairley*, 45 W. R. 589, [1897] 1 Q. B. 689,

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

that a contingent settlement of property was a settlement within the meaning of section 5 (1) of the Finance Act, 1874, and it was in consequence of that decision that the Finance Act, 1898 (61 & 62 Vict. c. 10), was passed, which by section 14 deals with the repayment of settlement estate duty.

Ingle Joyce, for the testator's second son, Lord Osborn Beauclerk, a legatee and annuitant, and the trustees of the settlements of two married daughters.—There is nothing in the statutes or any decision to make a mere annuity given generally out of personal estate chargeable with settlement estate duty.

J. G. Butcher, Q.C., in reply.

Cur. adv. vult.

STIRLING, J., after stating the circumstances as above, continued: As to the first question no point has been raised before me and it is admitted that estate duty cannot be charged on any of the legacies or annuities. None of them are under a liability to bear that; that is admitted. It is on question 2 that the most serious part of the argument arose. It is said that there is a probability, not a certainty, that the personal estate will be insufficient for payment of debts, funeral and testamentary expenses, legacies, and annuities. The question which is put to me is, it will be observed, as to the incidence of settlement estate duty which has been actually paid by the executors. They were required by the Crown to pay it, and they paid it. There is nothing in the evidence to show that the executors acted improperly in making that payment. They did not see fit to contest the right of the Crown, which was based upon the decisions in certain cases which it may or may not be are distinguishable from the present. Under these circumstances it seems to me that upon this occasion I must assume that the settlement estate duty was properly paid by the executors. If any person on whom the settlement estate duty falls under this decision desires to say that the executors acted improperly, so that any further steps ought to be taken with respect to the settlement estate duty already paid or otherwise, it seems to me that it will be for that beneficiary to indicate his wishes, and it may be considered whether any steps ought or ought not to be taken. But for the purposes of the present decision it seems to me that I must take it that the settlement estate duty was properly paid, and that all I have to do is to decide how as between the residuary estate and the legatees and annuitants the settlement estate duty or an appropriate part of it is to be borne. That being so, it seems to me that I must hold that the contingent legacies are to be treated as settled, and that the duty was claimed and paid on that footing; and if so, then it appears to me that the settlement estate duty must be borne by the legatees in accordance with the decision of the Court of Appeal in *In re Maryon-Wilson*, 48 W. R. 338, [1900] 1 Ch. 565, and the decision given yesterday by Cozens-Hardy, J., in *In re Robinson, Clarkson* v. *Robinson*, which was a sequel to the case of *Attorney-General* v. *Clarkson*, 48 W. R. 216, [1900] 1 Q. B. 156. Again, as regards the annuities, it appears to me that it must be taken that the decision in *Attorney-General* v. *Owen* applies to the personal estate, and consequently that the annuities must bear the proper proportion of the settlement estate duty in accordance with the rule laid down in *Re Parker Jervis, Salt* v. *Locker*, 47 W. R. 147, [1898] 2 Ch. 643. As to question 3, there is again really no contest, and it was admitted that under the statute the legatees and annuitants entitled to such charges must bear the estate duty and settlement estate duty payable. I think the only other question which remains to be dealt with is that which is in the last clause of question 4—viz., whether any and if any what sums should be deducted or retained for estate duty or settlement estate duty in respect of such interest or annuity, and if so out of what part of the testator's estate. As to that it would seem to me to be quite clear that whatever has to be borne by a legatee or annuitant must be deducted from anything which is found to be payable to them. That, I think, disposes of the whole case.

Solicitors for all parties, *Freshfields*.

Chan. Div. } Wright, J. } Oct. 25.

In re CHARTERLAND STORES AND TRADING CO. (LIMITED). (*a.*)

Company—Winding up—Evidence in support of petition — Companies (Winding-up) Rules, 1890, *rr.* 36, 176, 177.

The statutory affidavit in support of a petition to wind up a company must be made by the petitioner, or one of the petitioners, and the power to make it cannot be delegated to a subordinate.

Petition to wind up the company.

In the absence of the petitioner, Julius Weil, in South Africa, the statutory affidavit in support of the petition was made by the manager of the petitioner's business in this country, who swore that he held a power of attorney from the petitioner which authorized him, among other things, to commence, prosecute, and enforce all actions and legal proceedings touching the business and affairs of the petitioner, and to deal with such proceedings as he might think fit. He also stated that the petitioner had instructed him by telegraph to take the present proceedings.

Mulligan, Q.C., and *J. W. M. Holmes*, for the company, took the preliminary objection that the evidence in support of the petition was not in the proper form, as it had not been made by the petitioner himself, as required by rule 36 of the Companies (Winding-up) Rules, 1890.

They also referred to *In re St. David's Gold Mining Co.*, 14 W. R. 755. [WRIGHT, J.—That case does not help us.]

Waggett, for the petitioner, referred to rules 176 and 177 of the Companies (Winding-up) Rules, 1890, and contended that the court had power to rectify the irregularity.

WRIGHT, J.—Two objections to this petition have been raised—the first of which is bad, the second good. The former is that one of the material points to be proved by the affidavit is upon information and belief. The other is a technical point, but one which I cannot pass over, that rule 36 prescribes that the affidavit must be made by the petitioner, or one of the petitioners. The rule is explicit, and I cannot hold that an affidavit made by a manager for the petitioner is within it, even though it be authorized by a power of attorney to bring legal proceedings. I do not think this objection can be got over by means of rules 176 and 177. But this is obviously a case in which further time should be given to the petitioner, and I shall direct it to stand over, with leave to amend by adding another petitioner.

Solicitors, *Hollams, Son, Coward, & Hawksley; Ingle, Holmes, & Sons.*

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Aug. 3, 1900.

In re LEACH.
Ex parte BARNES. (*a.*)

Bankruptcy—Practice—Summary case—Release of trustee—Subsequent assets—Right of creditors to appoint new trustee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 82, 121—*Bankruptcy Discharge and Closure Act,* 1887 (50 & 51 *Vict. c.* 66), *s.* 6, *sub-section* 2.

Where a bankrupt's estate is administered in a summary manner under section 121 *of the Bankruptcy Act,* 1883, *the official receiver is to be the trustee in the bankruptcy, and after he has obtained his release as such trustee, he still remains* ex officio *trustee by virtue of section* 82, *sub-section* 4, *of the same Act.*

The creditors, therefore, have no power to appoint a new trustee after the official receiver's release because there is no vacancy in the office.

Motion by Mr. Barnes in a declaration that the Board of Trade were wrong in refusing to certify his appointment as trustee in the bankruptcy of R. Leach.

A receiving order was made against Leach on the 8th of December, 1885, he was adjudicated a bankrupt, and the court ordered that his estate should be administered in a summary manner with the official receiver as trustee.

The official receiver obtained his release as such trustee upon the 21st of January, 1887.

In 1900 the bankrupt came into some property, and upon the 21st of May, 1900, the creditors met and appointed Mr. Barnes trustee for the purpose of administering the recently-acquired assets.

The Board of Trade refused to certify Mr. Barnes' appointment, contending that there was no vacancy in the office, as by virtue of section 82, sub-section 4, of the Bankruptcy Act, 1883, when a trustee in a bankruptcy has obtained his release, "the official receiver shall be the trustee."

Mr. Barnes thereupon made the present application.

Reed, Q.C., and *Davis,* for the applicant.—Section 82 can only be construed in reference to estates not administered in a summary manner. There is no provision in the Acts which deprives the creditors in a summary case of the power of appointing a trustee of their own selection in place of the official receiver.

Muir Mackenzie, for the Board of Trade.—The terms of section 82, sub-section 4, are imperative, and the creditors cannot appoint a new trustee after the release of the original trustee, either in an ordinary bankruptcy or a summary case, for the statute declares that "the official receiver shall be the trustee."

Reed, Q.C., replied.

WRIGHT, J.—I find some difficulty in this case, but, as I have formed a strong opinion upon it, I do not think I shall do any better by considering it further.

I think that the Board of Trade are right. It seems to me, in the absence of any authority, that in the case of an ordinary bankruptcy, when the trustee has been released under section 82 of the Act on the one particular ground that the estate has been, so far as he can ascertain, fully realized and wound up, then in that case sub-section 4 of the same section prevents the appointment of any future trustee by the creditors, because it enacts that when all that has happened, when there has been a release on the ground of complete realization—something like the close or determination of the bankruptcy—that the official receiver shall thereupon be the trustee. It seems to me that there is a very good reason why some such provision should have been made, because, when to all appearance the estate has been completely got in and distributed, it is very much better to have some one permanent official to take the charge of any future assets that may come in, in the very rare cases in which they do come in, than to have any uncertainty in the matter. After the lapse of time the original creditors, whose judgment might be trusted in such a matter as appointing a trustee, have to a great extent disappeared, or many things may have happened which would make their control of the matter one which no longer ought to be encouraged. If that is the case in an ordinary bankruptcy, I think that gives a clue to the proper construction of section 121. The proviso in that section no doubt says in terms that the creditors may "at any time," by special resolution in the case of a summary bankruptcy, resolve that some person other than the official receiver be appointed trustee, and that thereupon the bankruptcy shall proceed as if an order for summary administration had not been made. But even on the face of it that looks to me as if the proviso was intended to apply only whilst there is something continuing which can be fairly described as the proceeding of the bankruptcy; and that is to my mind exactly the same thing, or involves the same dividing line, as that adopted in section 82—namely, that when the official receiver is acting as trustee under a summary bankruptcy, and has been released on the ground that the whole estate has been got in, so far as he can get it in, and, therefore, that he is entitled to a release under section 6 of the Act of 1887, then the same consequence follows as under section 82, and that he shall continue to act as trustee for any subsequent purpose of the administration of the debtor's estate. It can hardly be contended, if I am right in construing section 82 as to ordinary bankruptcies, that section 121 is intended to apply a different rule to summary bankruptcies, and to extend the power of the creditors in summary bankruptcies down to a period beyond that at which they are removed by section 82 in the case of ordinary bankruptcies. I think, therefore, that the view taken by the Board of Trade is right.

Solicitor for the applicant, *R. Chapman.*

Solicitor for the respondent, *Solicitor to the Board of Trade.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

C. C. R.
(Lord Russell of Killowen, L.C.J., and Mathew, Grantham, Wright, Bruce, Ridley, Darling, and Channell, JJ.) — March 17; May 5; July 2, 1900.

THE QUEEN *v.* OLLIS. (*a.*)

Criminal law—Evidence—Admissibility—Course of conduct—Acquittal on previous indictment—Admission of evidence given on previous trial.

A person was charged with obtaining money by falsely pretending that certain cheques drawn by him would be honoured. He was indicted on two separate indictments in respect of separate transactions of this kind, all occurring within the space of a fortnight. He was acquitted on the first indictment, and was afterwards tried on the second indictment. Evidence which had been given on the trial of the first indictment was given again on the trial of the second indictment, such evidence being relevant on both indictments.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

Held, by Lord Russell of Killowen, L.C.J., *and* Mathew, Grantham, Wright, Darling, *and* Channell, JJ. (Bruce *and* Ridley, JJ., *dissenting*), *that the evidence was admissible on the second trial.*

Case stated by the Recorder of Bath.

The facts were as follows:

Thomas Edwin Ollis was tried at the Bath Quarter Sessions on the 13th of October, 1899, on an indictment charging him with having on the 5th of July, 1899, obtained from Harold F. Ramsey a cheque for £3 by falsely pretending that a cheque for £5 drawn by the prisoner on the Birkbeck Bank and given by him to Ramsey was a good and genuine order for the payment of £5 and of the value of £5.

At the trial Ramsey proved that on the 1st of July he lent the prisoner £2, and that on the 5th of July he requested payment, whereupon the prisoner wrote the cheque for £5 mentioned in the indictment, and gave it to Ramsey asking him to cash it: Ramsey then gave the prisoner a cheque for £3, thus deducting the debt of £2.

The prisoner's cheque was paid in to Ramsey's account and was dishonoured. On being remonstrated with the prisoner gave Ramsey a second cheque for £5, which was likewise dishonoured.

It was also proved that in July, 1899, there was only 3s. 10d. standing to the prisoner's account at the Birkbeck Bank, and that nothing had been paid in to that account since March, 1896. Also that the prisoner was adjudicated bankrupt in May, 1899, his liabilities being to £450 and assets nil.

A member of a firm of solicitors stated that if the sale of a certain hotel had taken place the prisoner would have been entitled to £183 for commission, but that the sale had not taken place. The prisoner stated that in giving the cheque he had relied on the firm of solicitors advancing him some part of this commission.

The jury acquitted the prisoner.

On the following day the prisoner was tried at the same sessions on another indictment containing three counts, each charging him with obtaining money by falsely pretending that a worthless cheque was a good and valid order for the payment of money: these cheques were drawn by the prisoner on the 6th of July, the 24th of June, and the 26th of June, 1899, in favour of Bertha L. Rawlings, William H. Morris, and William H. Morris respectively.

On the trial of this indictment similar evidence was given (by Lomath, Boyle, and White) as to the state of the prisoner's banking accounts; his bankruptcy and his claim to a commission. B. H. Rawlings and W. H. Morris also gave evidence, the effect of which was not stated in the case. Counsel for the prosecution proposed to call H. F. Ramsey to repeat the evidence given by him at the previous trial, but the recorder declined to receive it on the ground that it had formed the subject of the previous indictment upon which the jury had negatived any false pretence, and that it was therefore not admissible for the purpose of showing guilty knowledge or otherwise.

The jury disagreed.

On the 8th of January, 1900, the prisoner was tried again on the second indictment. Counsel for the prosecution again tendered the evidence of Ramsey, and after argument the recorder decided to receive it. The case did not state what other evidence was given, but the witnesses who had given evidence at the previous trial of the second indictment had been bound over to give evidence at this trial, and may be presumed to have given evidence.

The jury found the prisoner guilty. The recorder stated this case, the question for the opinion of the court being "whether the evidence of the witness Ramsey, which was the subject of the first indictment upon which the prisoner had been tried and acquitted, was legally admissible upon the trial of the second indictment for the purpose of proving guilty knowledge.

The case was first argued on the 17th of March, 1900, before Lord Russell of Killowen, L.C.J., and Grantham, Lawrance, Wright, and Bruce, JJ., and was by order re-argued before a differently-constituted court on the 5th of May, 1900.

J. Harris Stone (*W. T. Lawrance* with him), for the defendant.—This evidence was not admissible on the second trial because it had been given on the former trial, and related to facts upon which the defendant had been acquitted. The finding of the jury on the former trial amounts to a finding that the transaction with Ramsey was not fraudulent, therefore it could not be evidence of guilty knowledge or a course of fraud.

He cited *Makin* v. *Attorney-General for New South Wales*, [1894] A. C. 57; *Reg.* v. *Roebuck*, 4 W. R. 514, 25 L. J. M. C. 101; *Reg.* v. *Long*, 6 C. & P. 179; *Reg.* v. *Oddy*, 2 Den. C. C. 264; *Reg.* v. *Salt*, 3 F. & F. 834.

Sir Sherston Baker, for the prosecution.—The evidence in question was relevant on the second trial as showing a guilty knowledge and a fraudulent course of conduct. The jury in the first trial merely declined to find a verdict of guilty upon those facts: that does not render the evidence inadmissible on the second trial; the maxim *nemo debet bis puniri pro uno delicto* does not apply.

He cited *Reg.* v. *Rhodes*, 47 W. R. 121, [1899] 1 Q. B. 77; *Blake* v. *Albion Life Assurance Society*, 27 W. R. 321, 4 C. P. D. 94; *Reg.* v. *Geering*, 18 L. J. M. C. 215; *Reg.* v. *Francis*, 22 W. R. 663, L. R. 2 C. C. R. 128; *Reg.* v. *Gilmore*, 15 Cox C. C. 85; *Reg.* v. *Gray*, 4 F. & F. 1102; *Rex.* v. *Westwood*, 4 C. & P. 547.

Cur. adv. vult.

July 2.—Lord RUSSELL OF KILLOWEN, L.C.J., read a written judgment, which, after stating the facts as above set out, proceeded as follows: Now the only point on which the learned recorder has asked our opinion is whether this evidence was admissible on the second trial for the purpose of proving the prisoner's guilty knowledge, being evidence of facts which were relevant to the charge on which the prisoner had been acquitted. It does not appear to have been argued before the recorder, nor was it argued in this court, that the evidence while relevant to the charge of obtaining money by false pretences was not on the first occasion relevant to the question of guilty knowledge. It is clear that there was no estoppel. There was no negation by the jury of the criminal intention. "*Nemo debet bis puniri pro uno delicto*": therefore on the second trial the evidence was not admissible to show that the prisoner was guilty on the first charge of obtaining money by false pretences. It was, however, evidence of the state of the prisoner's knowledge and it was not the less admissible because it was evidence tending to show that he was in fact guilty of the first charge. It was clearly relevant on the second trial for it was evidence negativing a reasonable belief by the prisoner that the cheques would be honoured. He drew cheques on the 24th of June, the 26th of June, the 5th of July, and finally on the 6th of July, all on a bank into which nothing had been paid and nothing drawn since the 31st of March, 1896, and in which his balance was only three shillings and tenpence. It seems to me impossible to say that this evidence was not relevant as tending to show a system of fraud. I have had the advantage of reading the judgment of Bruce, J., and while appre-

ciating the value of the arguments in that judgment, it seems to me that they go more to the weight of the evidence than to its admissibility. The result, therefore, will be that the conviction will be affirmed. In the judgment I have delivered Mathew, J., concurs.

GRANTHAM, J.—As my lord has gone so fully into the facts of this case, I will confine my remarks to what seems to me to be the only legal question for our determination, and the only one argued before us —viz., Whether or not evidence given against a prisoner on one charge on which he has been acquitted can be afterwards used against him on another charge, not for the purpose of again attempting to get him convicted of the offence of which he has been aquitted, but merely to prove guilt in his conduct on the second charge by reason of his conduct in the first case; in other words, to negative the suggestion of the innocency of his conduct in the matter which is the subject of the second charge by giving evidence of facts previously given on the first charge which disprove his suggestion of an innocent mind, and an innocent action, in the second case. Take as an example the case of a man charged with uttering base coin. He is first charged with uttering a base half-crown. He pleads ignorance of its being bad, and that he remembers he took that one half-crown from a stranger on the sale by him of a particular article for half-a-crown. He is acquitted, and is afterwards tried on a charge of uttering another bad half-crown made in the same mould as the last one, having endeavoured to pass it off within five minutes of his uttering the first bad one, and under exactly similar circumstances—say, for example, buying half a pint of ale, and tendering this bad half-crown for it. Can it be suggested that the prosecution could not give evidence of the first uttering to disprove his anticipated allegation of innocence in the second case? What is the difference between that case and this? None that I can see. The objection to the admissibility of the evidence had arisen, I think, from an entire misapprehension of the principle *nemo debet bis puniri pro uno delicto*. That fundamental maxim of our criminal law means that a man shall not be put in peril for the same offence after a verdict has been returned by the jury, where the verdict has been given, it must be remembered, on a good indictment on which the prisoner could be legally convicted. How can it be said that this is the same offence as that on which he was acquitted. The indictment charges an entirely different offence. *Rex.* v. *Westwood*, 4 C. & P. 547, seems in point. There evidence of finding a coat of the prosecutor or of one of the witnesses in the prisoner's possession was admitted to prove the identity of the prisoner, though the prisoner had during the same trial been acquitted, at the suggestion of the judge, to enable the prosecution to give in evidence the possession of the coat as a means of identification. Again, in *Reg.* v. *Birchenough*, 1 Moody C. C. 477, it was held that a person having been acquitted as a principal on a charge of murder may be afterwards charged on the same evidence as an accessory before the fact. It was held in another case that evidence given against a prisoner on a charge of murder on which he was acquitted could be given in evidence against him on a charge of burglary arising out of the same transaction. The real test is, was the first charge the same as that on which the prisoner is being charged again, or was the second indictment sufficient to prove a legal conviction on the first. If not, the evidence on the first charge can be used again because it is being used in a different case and on a different charge. For these reasons, in my judgment, our answer must be Yes, the evidence was admissible.

Lord RUSSELL OF KILLOWEN, C.J., then read the judgment of Wright, J., which, after stating the facts, proceeded as follows:

WRIGHT, J.—We have not on this case to consider whether the trial or the evidence was satisfactory, but only the question of law reserved for our consideration whether Ramsey's evidence was or was not legally admissible. If we think that the procedure of the trial was unfair to the prisoner it is competent for us to recommend a pardon or to intimate that no sentence should be passed.

The first question argued, though not, I think, intended to be raised, nor properly or sufficiently raised by the case as stated, is, whether on the trial of the indictment for obtaining money by a false pretence from Rawlings and Morris on the 24th and 26th of June and the 6th of July, evidence was relevant, which was admitted to show that on the 5th or 6th of July the prisoner was endeavouring by an exactly similar pretence to obtain money from Ramsey. It think that this question, if it arises, must be answered affirmatively. The evidence tended to show that the conduct of the prisoner in tendering drafts on a bank at which he had no living account was not inadvertent or accidental, but was part of a systematic fraud extending over a period immediately preceding and following the date of the offence charged, and the case in this respect seems to me to be governed by *Reg.* v. *Francis*, and *Reg.* v. *Rhodes*.

The real question is whether this relevant evidence of the false pretence on the 5th or 6th of July ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial at which the prisoner was charged with having obtained money from Ramsey on that false pretence, and was acquitted of that charge. I think that the objection to the admissibility of the evidence was rightly overruled. The reason for this conclusion is, that in my opinion it is not shown that the jury at the first trial negatived the making or the fraudulent character of the pretence charged at that trial: the offence charged was not alone the making of that false pretence, but was the making of it and the obtaining of the prosecutor's money by means of it. It is certainly possible, and so far as I can gather from the case, I think it was probable, that the jury acquitted on the ground that the prosecutor parted with his money on the faith, not of the pretence alleged in the first indictment, but on the faith of the other representation which was made by the prisoner, and which had some colour in fact, and was not made a ground of the indictment—namely, that he had money coming to him from his solicitors. If the jury decided on this ground their verdict did not negative the falsity of the pretence, which is the subject of this case. The only possible ground of objection to the reception of the evidence, assuming it to be relevant, seems to be that there is an estoppel of record or "*quasi* of record." An objection in the nature of a plea of *autrefois acquit* cannot, of course, be maintained, because on either indictment the prisoner could not have been convicted of the offences, or any of them, which were alleged in the other indictment. Nor can there be an estoppel of record or *quasi* of record, unless it appears by record of itself, or as explained by proper evidence, that the same point was determined on the first trial, which was in issue in the second trial. But in this case the record of the first trial would show no more than a general verdict of not guilty. It would not show, nor would evidence be admissible to show whether the jury acquitted on the ground that, in their opinion, the pretence was not false or on the ground that though false it was not fraudulently

made, or on the ground that the money was not thereby obtained from the prosecutor. Suppose that a person is tried on an indictment for bigamy, and he disputed the fact, or the validity of the first marriage; and also the continuance of the life of the first wife, and also the fact of the second marriage, and there is a general verdict of not guilty. He is afterwards indicted for bigamy by a third marriage with a different woman. It could not be contended that at the second trial the Crown is estopped by the record from attesting the fact or the validity of the first marriage or the continuance of the life of the first wife or (if that became material) the fact of the second marriage. So an acquittal upon indictment for non-repair of a highway binds no right: *Rex* v. *Burton*, 5 M. & Sel. 392; *Reg.* v. *Hutchins*, 29 W. R. 724, 6 Q. B. D. 300, *per* Lord Selborne, who cites *Rex* v. *Burton* and Buller's N. P. 245, where it is said that an acquittal ascertains no fact, as a conviction "does," and in note (*a*) "defendant might have been acquitted for many reasons." So it has been held (*Reg.* v. *Dungey*, 4 F. & F. 99) that an acquittal upon charges of rape, and of assault, with intent to rape, are no bar to an indictment for common assault.

It is not necessary to determine how this case would have stood if at the first trial there had been a special verdict negativing the falsity or the alleged fraudulent character of the pretence to Ramsey. But even so it seems to me that there would not have been any estoppel according to the limitations of the doctrine of estoppel on the ground of *res judicata* as explained by Knight Bruce, V.C., in *Barrs* v. *Jackson*, 1 Y. & C. C. C. 585, which, notwithstanding the reversal of the judgment on other grounds (1 Phil. 582) continues to be a leading authority on this subject: see *per* Lord Selborne in *Reg.* v. *Hutchins*. "It is," says Knight Bruce, V.C., "I think, to be collected that the rule against re-agitating matter adjudicated is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question, provided that the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object."

In the present case the use at the subsequent trial of Ramsey's evidence was not an attempt to re-open the question of the prisoner's innocence on the charge on which he had been acquitted, or to defeat the immediate and direct object of the former acquittal on that charge.

Lastly, it may be observed that the defence of *autrefois acquit* seems never to have been rested on the ground of estoppel. Both that defence, as well as the defence of *autrefois convict*, has always been rested on the rule that a man shall not be twice put in jeopardy for the same matter, a rule which has not been violated in this case.

BRUCE, J.—The indictment on which the prisoner was convicted contained three counts, each count alleging a separate offence. The 24th of June, the 26th of June, the 6th of July, 1899, are the dates laid for the several offences. In form there are three separate false pretences alleged in each count, but I think, having regard to the judgments of Kelly, C.B., and Pollock, B., in this court in the case of *Reg.* v. *Hazelton*, 23 W. R. 139, L. R. 2 C. C. R. 134, that the false pretence upon which the jury must be taken to have founded their verdict, was a false pretence that the cheque which was passed in each case was a good and valid order for the payment of its amount; in other words, that the prisoner represented that the existing state of facts at the time each cheque was passed was such that the cheque would not be met, when he knew at the time that the facts were such that the cheque would not be met, so that the real question for the jury on each count was whether the prisoner, at the time he passed the cheques in the counts mentioned, believed that the facts were such that the cheques would be met. We are not told in the case what was the nature of the evidence offered in support of any of the charges in the indictment, save that we are told that a witness, Harold F. Ramsey, gave the same evidence he had given on the trial of the prisoner on a former indictment. Now, the question in this case is, whether the evidence of the witness Harold F. Ramsey was admissible, and it becomes a little difficult to decide that question without knowing what was the direct evidence offered in support of the charges in the indictment upon which the prisoner was convicted, and what was the nature of the defence raised by the prisoner. But it appears to me that enough is stated to show that the evidence of Harold F. Ramsey was not admissible on the trial of the prisoner on the indictment on which he was convicted, which I will call for shortness the second indictment.

Although it was not stated in terms, I think we are justified in concluding that the three cheques in the second indictment mentioned were all passed by the prisoner on the dates in that indictment mentioned, and were all dishonoured, and further I think we may assume that the defence raised on the second indictment was in substance similar to the defence which we are told was raised on the first indictment—namely, that the prisoner at the time when each cheque in the second indictment mentioned was passed, believed that the state of facts was such that the cheque would be met.

That defence raised a question the answer to which must have depended upon the knowledge or belief of the prisoner as to the state of his banking account on the respective dates of the 24th of June, the 26th of June, and the 6th of July.

There may have been evidence given on the trial of the second indictment to show that the prisoner, on each of the three dates in the second indictment mentioned, must have known that the state of his banking account was such that there was no reasonable probability of the three cheques, or any of them, being honoured. I assume that such evidence was given, and that the witnesses Lemath, Boyce, and White, who were called on the trial of the second indictment gave at that trial the same evidence they had given on the trial of the first indictment. That evidence alone may have been sufficient to support a conviction; but that does not concern the question we are asked to consider—which is, whether the statements of the witness Ramsey, with reference to the issuing by the prisoner of a cheque to him on the 5th of July, were relevant to the question affecting the prisoner's knowledge of the state of his banking account on the 24th of June, the 26th of June, and the 6th of July. I do not think that the transactions of the 5th of July can reasonably be considered to have any bearing upon the prisoner's knowledge or belief as to the state of his banking account on the 24th of June and the 26th of June. They certainly had no direct bearing on those questions, and if they are admissible, they are admissible on the ground that they fell within the rule which allows in some cases evidence to be given of facts distinct from, but similar to, the the facts on which a charge is based. It seems to me

to be important to bear in mind that the rule to which I have last referred does not render it competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment on which he stands charged for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried: Lord Herschell, L.C., in *Makin* v. *Attorney-General for New South Wales*. Of this *Reg.* v. *Oddy*, is a good illustration. It was held that on the trial of an indictment containing counts for stealing and receiving property knowing it to be stolen, evidence of the possession by the prisoner of other property stolen some time before from other persons was not admissible upon the count for receiving with guilty knowledge. The statute 34 & 35 Vict. c. 112, s. 19, although it lays down a special rule with regard to the evidence admissible in proceedings against a person for having received goods knowing them to be stolen, does not affect the general principle laid down in *Reg.* v. *Oddy*. On the contrary, it seems that a statute was necessary to introduce an exception in the general law with reference to a special class of cases. The case of *Reg.* v. *Holt*, Bell C. C. 280, is a decision illustrating the same principle. In *Reg.* v. *Holt* the question was whether A. obtained money from B. by falsely pretending that C. had authorized him to collect the money. It was held that evidence that A. subsequently obtained money from D. by a similar false pretence was inadmissible to show that he had no authority on the occasion in question.

It is difficult to distinguish *Reg.* v. *Holt* from the present case, for in the present case the questions as to the second and third counts were, whether the prisoner on the 24th and 26th days of June had obtained money by false pretences from Morris, and in support of these charges evidence was offered and admitted to prove that on the 5th day of July the prisoner had by a similar false pretence obtained an order for the payment of money from Ramsey.

A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same person, having no bearing upon or connection with the acts charged in the indictment save that the acts are similar and done by the same person. This rule is sometimes stated, I think accidentally, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to leave no other alternative, but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident.

When upon a charge against A. of the murder of B. by administering arsenic, arsenic is proved to have been administered by A. to B., and the question arises whether the administering of the poison was by mistake, evidence is admissible that other persons to whom A. had access died from the same poison. So where A. is charged with uttering a counterfeit coin knowing it to be counterfeit, and the question is raised whether he knew it to be counterfeit, or uttered it by mistake for a genuine coin, the fact that A. had at other times uttered counterfeit coin is admissible. So on a charge of arson where the question arises whether the fire was caused by accident or design evidence that other fires had occurred in other houses which the prisoner had previously occupied is admissible. In the same way, where a person is charged with obtaining money by falsely pretending that false jewellery was genuine jewellery, and the defence is raised that he mistook the false jewellery for genuine jewellery, evidence is admissible to show that the accused had previously on other occasions passed off to other persons false jewellery for genuine. The ground upon which evidence of this class is admissible is that it tends to raise a presumption that the accused person was not acting under a mistake. To quote the words of Lord Coleridge, C.J., in *Reg.* v. *Francis*, L. R. 2 C. C., at p. 132, which are cited with approval by Lord Russell of Killowen, C.J., in *Reg.* v. *Rhodes*, [1899] 1 Q. B., at p. 82, "It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man be many times under a similar mistake, or may be many times the dupe of another, but it is not likely that he should be so oftener than once, and every circumstance which shows that he was not under a mistake on any one of those occasions strengthens the presumption that he was not on the last." When the real question raised in the present case is accurately stated, I think it becomes clear that the case does not fall within the category of the cases I have mentioned.

In the present case there was no question of accident or mistake, the question was knowledge of the state of the banker's account, or of circumstances raising a belief in the mind of the prisoner respecting the state of his banker's account, just as in *Reg.* v. *Holt* the question was authority or no authority: see *per* Blackburn, J., in *Reg.* v. *Francis*.

There is, no doubt, a superficial resemblance between the act of pretending that a false coin is a genuine one and the act of pretending that a cheque is a valid cheque when it is not. But the distinction, and it seems to me it is an important one, is this: In the case of the coin the character of the coin is inherent in it, it is the same to-day and every day—a false coin; and its character does not depend upon external circumstances; but in the case of a cheque which is a genuine cheque (that is, signed by the person by whom it purports to be signed), the validity of the cheque depends upon the state of the banker's account, or upon arrangements made between the customer and the banker, and which may vary from day to day, and are in no way inherent in the cheque. Successive acts of passing false coin as genuine, of putting off false jewellery as genuine, are successive acts of the same character. So successive acts of administering the same kind of poison are successive acts of the same character, and if a mistake is made in administering the poison in the place of food or medicine, the mistake is as to the inherent character of the thing administered, which does not vary and is the same at the time of the commission of each successive act. But the act of pretending that a genuine cheque is a valid one is in substance a pretence that circumstances exist at the time of the passing of the cheque which justify a belief that the cheque will be met. Such circumstances may exist on one day and not on another, and the fact that such circumstances exist or do not exist on one day have no necessary connection with the question whether such circumstances exist or do not exist on another day. In other words, the successive acts of passing at different dates genuine cheques falsely pretending that they are valid are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing

the cheque of circumstances existing at the time external to the instrument itself and varying in character from day to day. Therefore I think that indirect evidence, based upon transactions other than those charged in the indictment, was not admissible within the rule which permits such evidence to be given to negative mistake or accident.

The case of *Reg.* v. *Rhodes* has been spoken of as though it were an illustration of the rule to which I have referred. When the case is carefully examined, I think it is plain that the evidence in that case was admitted because it had a direct bearing upon the matter in issue.

The false pretence alleged in that case was that the defendant pretended that he was carrying on a *bonâ fide* business when in truth it was a bogus business. The fact that the business was a bogus business could only be proved by showing the manner in which the business had been carried on, and therefore all transactions tending to show the general character of the business carried on had a direct bearing upon one of the main questions in the case. The principle of that case seems to me to have no analogy to the present.

The case of *Blake* v. *Albion Life Assurance Society* is a case in which it was held that in order to establish that a particular transaction was fraudulent to the knowledge of the person charged, evidence was admitted to prove that the act in question was one of a series of fraudulent acts having common features. In that case, a person acting under the real or assumed name of Howard had induced the plaintiff to pay to the defendant company a sum of money by way of premium to effect a policy of assurance on his life upon the representation that if he effected the policy he would obtain from the defendant company a loan of money. The plaintiff never did obtain any such loan, and he brought his action against the defendant company to recover back the amount of the premium paid by him, on the ground that it had been obtained from him by fraud, and that there never was any intention on the part of the defendant company to make the promised loan. In order to prove that Howard was the agent of the defendant company and that the company had obtained the money paid to them by the plaintiff through the fraud of Howard, committed for them, and with their knowledge, evidence was admitted to prove a series of similar transactions extending over years. But the present case does not fall within the rule of the case I have last referred to. The single incident of the 5th of July cannot be regarded as evidence of a system of fraud.

If, then, the evidence of the transaction of the 5th of July is not admissible to negative mistake or accident, and is not admissible as evidence of a system of fraud, it is inadmissible on the ground that it tended directly to prove the knowledge of the prisoner of the state of his banking account at the dates when the cheques mentioned in the second indictment were issued.

But I think it is obvious that the passing of a cheque by the prisoner on the 5th of July, which was dishonoured, had no bearing upon the question of the knowledge of the prisoner of the state of his banking account on the 24th or 26th of June, and such evidence was, I think, inadmissible on the charges contained in the second and third counts. Further, I think evidence was not inadmissible on the charge of the 6th of July contained in the first count, because there is no evidence to show that the dishonour of the cheque of the 5th of July was brought to the knowledge of the prisoner before or at the time he issued the cheque of the 6th of July.

But even if this evidence were admissible on the charge of the 5th of July, I think it was clearly not admissible on the charge of the 24th and 26th of June. The evidence of Harold F. Ramsey was admitted without any restrictions and the jury were not directed that they were to consider it as bearing upon the first count only. The jury, as I understand, returned a general verdict, and if any evidence was improperly admitted I think the conviction should be quashed. No doubt in cases where a general verdict has been given and in the opinion of this court the evidence adduced has been insufficient to support the charge on another, it may be right to quash the conviction on one count only and to uphold the conviction on the other. But where evidence which was admissible on one count only has been admitted generally, I do not think that such a course can be safely pursued, because it is impossible to know what effect the admission of such evidence may have had upon the minds of the jury.

I therefore think that the evidence of the transaction of the 5th of July was not admissible on any of the counts of the second indictment, and that the conviction should be quashed, and even if the evidence of the transaction of the 5th of July should be held to be admissible as bearing on the first count, yet, as it was admitted generally, and the jury were not directed to consider that evidence in connection with that count alone, I should still be of opinion that the conviction should be quashed.

Upon the question whether, if the evidence of Ramsey were admissible on other grounds, it ceased to be admissible on the ground that the defendant had been acquitted of the charge contained in the first indictment, I entertained during the argument considerable doubt, but on consideration I am of opinion that that objection cannot be maintained.

I have had the advantage of reading the judgments of Wright and Channell, JJ., and on the last-mentioned point I agree with the opinions expressed by them.

RIDLEY, J.—I have read the judgment which has been delivered by Bruce, J. I agree with it, and I do not think that I can usefully add anything further.

DARLING, J.—It appears to me that the evidence of Ramsey would certainly have been admissible in the first instance on the trial of the indictment on which the defendant was convicted, although in itself incapable of sustaining another charge against him of a criminal offence; that is, had there not been the former trial in the course of which this evidence had already been given. I think it was material, for it went some way to show that the defendant knew he had no assets at the bank on which he gave a cheque, as this had already been brought to his notice with regard to another cheque given by him but a very short time before. This evidence had, however, been given in the first trial, and it is said that therefore it was not again admissible, on the ground stated in the case reserved. This is in effect to state that this case comes within the rule *Nemo debet bis puniri pro uno delicto*, a rule which applies equally in civil action under the form *nemo bis vexari debet pro eadem causa*. This rule is the foundation of the pleas in bar known as *autrefois acquit* and *autrefois convict*.

Now to this indictment, on which the defendant was convicted, it would not have availed him to plead either of those pleas, and to have supported them by evidence of the trial in Ramsey's case. Had only the evidence given on the trial of Ramsey's case been given on the trial of this indictment there would have been no evidence to go to the jury, for there would have been none of the giving of the cheque, or making the false pretence, charged as a crime by this

indictment. It seems to me, therefore, that by the admission of this evidence the defendant was not *bis vexatus*, for I feel sure that those words are not to be understood as meaning that a man is not to be more than once annoyed by the same evidence. I think they mean that he is not to be by legal process twice exposed to the risk of being found guilty of the same crime or the same tort, or liable twice to pay the same debt be it to the State or his fellow citizen. To hold otherwise seems to me to rule that evidence which has been given once should never be produced again against the same defendant; yet it is plain that up to a certain point the evidence must often be the same, although the defendant is accused of wrongs done to two distinct persons and that in different suits or forensic proceedings.

It seems to me impossible to say that the evidence, of which a summary has been given by my lord, was irrelevant to the issue, but I think it might well have produced a prejudice against the defendant out of all proportion to its real weight and importance. The recorder might, therefore, I think, well have suggested to the counsel for the prosecution that he should not press the evidence on the court. But as a matter of law I am of opinion that the evidence of Ramsey was admissible.

CHANNELL, J. (in the course of a written judgment), said: It is an elementary principle of criminal law that a man can only be convicted on a charge by evidence bearing directly on that charge and that it is inadmissible to endeavour to support the charge by showing that the prisoner has committed other similar offences and is therefore likely to have committed the offence with which he is charged. I know of no exception to this rule. But there are cases in which evidence of transactions other than those the subject of the charge can be given on the ground that those transactions have a direct bearing upon the questions at issue on the trial of the particular charge. Where the offence charged involves an intent to defraud or guilty knowledge or the like, evidence of other transactions is often the only evidence by which that essential ingredient in the offence can be proved. In such cases evidence of other transactions is admitted, not for the purpose of showing that the prisoner was guilty of other offences, but for the purpose of showing that the transaction the subject of the indictment was done with the criminal intent or with the guilty knowledge as the case may be. It seems to me to be a mistake to say that because the other transactions have been the subject of a previous indictment on which the prisoner has been tried that the prisoner is being twice vexed for the same matter by the proof of them being allowed on a subsequent indictment. The objection in the present case is to the evidence of Ramsey. The mere fact that he had given evidence in the case in which the defendant was acquitted did not, of course, make his evidence inadmissible. It was not suggested that the evidence of Lomath, Boyle, or White was inadmissible at the second trial. If the evidence of Ramsey was directed to show that the defendant had committed a fraud on Ramsey—that not being the fraud for which he was being tried, it would have been inadmissible. But it was not directed to that purpose: it was given to show, if possible, that frauds were committed on Rawlings and Morris. In my opinion its admissibility depends on its relevancy, and upon the question of relevancy I fully concur in the judgment of the majority of this court.

Conviction affirmed.

Solicitor for the defendant, *Tuttell*, Bath.

Solicitor for the prosecution, *The Treasury Solicitor.*

Court of Appeal.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — Aug. 6, 1900.

ECCLESIASTICAL COMMISSIONERS v. PINNEY. (a.)

Vendor and purchaser—Purchase by a trustee of settled estate—Specific performance—Charge on trust estate—Vendor's lien—Trustee's right to indemnity—Subrogation.

A vendor was entitled to a lien on land purchased by the trustee of settled estates. The purchase, under the circumstances, was invalid as against the persons having an interest under the settlement.

Held, that, as the trustee had no right to an indemnity against the settled estates, the vendor could have no right of subrogation, but only a lien for unpaid purchase-money.

Decision of Byrne, J. ([1899] 2 *Ch.* 729, 48 *W. R. Dig.* 198), *affirmed.*

Appeal from Byrne, J.

By a contract made in 1873 between the then incumbent of the vicarage of Coleshill, G. Digby Wingfield Digby (the patron of the living), the Ecclesiastical Commissioners, and R. B. Wingfield Baker, described as the surviving trustee of the will and codicils of Edward, Earl Digby, the incumbent, in pursuance of the powers conferred by the Ecclesiastical Leasing Acts, 1842 and 1858, with the consent of G. Digby Wingfield as patron and with the approval of the Ecclesiastical Commissioners, agreed to sell, and R. B. Wingfield Baker, with the consent of G. Digby Wingfield Digby as tenant for life of the estates settled by the will of Earl Digby agreed to purchase, the glebe lands of the vicarage for £24,963.

It was agreed that R. B. Wingfield Baker should pay the purchase-money into the Bank of England on or before the 29th of September, 1874, at which time the purchase should be completed and a conveyance executed; but if, from any cause except the wilful default of the vendor, the purchase should not be then completed, the purchaser should pay interest at 4 per cent. until completion, but that condition was to be without prejudice to the vendor's right to enforce completion or to any of his rights under the contract, and to rescind the contract.

Under the will of Earl Digby the settled estates were limited to G. D. Wingfield Digby for life, with remainder to his sons successively in tail male, with remainder to J. D. Wingfield Digby (No. 1) for life, with remainder to J. D. Wingfield Digby (No. 2) for life, with remainder to the sons of J. D. Wingfield Digby (No. 2) successively in tail male, with remainders over. By the will residuary personalty was given on similar limitations and upon trusts for investment in the purchase of land with the approbation of the tenant for life.

On the death of the testator in 1856 without issue, G. D. Wingfield Digby entered into possession of the settled estates, and on the marriage of J. D. Wingfield Digby (No. 2) he covenanted to exercise a power of creating portions under the testator's will in favour of younger children to the extent of £20,000. J. D. Wingfield Digby (No. 1) died in 1878, and R. B. Wingfield Digby in 1880.

In 1881 a disentailing deed was executed, to which G. D. Wingfield Digby, J. D. Wingfield Digby (No. 2), and J. K. Digby, the eldest son of J. D. Wingfield Digby (No. 2), were parties. By the recitals of this

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

deed it appeared that the trustees had invested the greater part of the residuary personalty, and that a considerable part of the remainder had been advanced for the purposes of a fund known as the "Digby Estate Improvement Fund," and expended generally on the improvement of the estates. Repayment of part of that sum, amounting to £158,000, was secured by policies of assurance on the life of the tenant for life. The disentailing deed operated on all the estates, including the heriditaments settled by the will, and therefore also on the glebe lands comprised in the contract of 1873, and assured them, subject and without prejudice to the uses and estates limited by the will preceding the estate in tail male or the estates tail of J. K. Digby and the powers annexed or exercisable during the continuance thereof, to such uses as G. D. Wingfield Digby, J. D. Wingfield Digby (No. 2), and J. K. Digby should jointly appoint. The £158,000 secured by the policies and any other money subject to be laid out in the purchase of land secured thereby were also disentailed and assured so as to be subject to a similar power of joint appointment as the land.

By a resettlement made in 1882 the joint power was executed and all the settled lands were settled to uses whereunder J. D. Wingfield Digby and J. K. Digby were created successively tenants for life, with remainders in strict settlement.

By deeds of assignment and resettlement of even date the policies for £158,000 and all moneys payable thereunder were, subject to a mortgage for £30,000 created in 1872, vested in the defendants, Adderley and Madan, in trust for the younger children of J. D. Wingfield Digby, with a proviso that the sums appointed should be taken in satisfaction of the £20,000 covenanted to be appointed by J. D. Wingfield Digby's marriage settlement, and with a proviso that the receipts of the children should operate to discharge the settled estates from their proportions of the £20,000. The whole of the £158,000 secured by the policies had been distributed by the trustees, Adderley and Madan.

No part of the purchase-money of the glebe lands was ever paid, nor had the conveyance been executed, but the successive tenants for life, while in possession, had paid to the vicar of Coleshill interest upon the purchase-money. The value of the lands comprised in the contract had considerably decreased.

In 1896 the Ecclesiastical Commissioners brought the present action, claiming specific performance of the agreement of 1873, or, in the alternative, that they were entitled to their vendors' lien on the land and for its enforcement by sale.

The defendants were the incumbent Pinney; J. K. D. Wingfield Digby, tenant for life of the settled real estate; the legal personal representatives of R. B. Wingfield Baker, the purchasing trustee; and the trustees of a subsequent settlement.

It was admitted that the plaintiffs were entitled to their vendor's lien. After the judgment of Byrne, J., the tenant in tail was added as a defendant.

Byrne, J., held ([1899] 2 Ch. 729, 48 W. R. Dig. 198) that the plaintiffs were entitled to enforce their vendor's lien for unpaid purchase-money upon the land sold, but that they were not entitled to any other remedy against the defendants. As, however, the land was now worth much less than the purchase-money fixed by the contract, the lien would not extend to the full amount of the plaintiffs' claim.

The plaintiffs appealed.

Levett, Q.C., and *Abraham*, for the plaintiffs.

Neville, Q.C., and *Norton, Q.C.*, for the tenant for life and the tenant in tail.

T. H. Carson, for the vicar.

Sargant, for the trustees of the settled estates.

Brinton, for the representative of the trustee who had entered into the contract for sale.

Lord ALVERSTONE, M.R., said: This is an appeal from Byrne, J., who has decided that the plaintiffs are only entitled to have a lien upon the property which was the subject of a contract in 1873, and are not entitled to enforce the contract against any of the defendants. The defendants are the present tenant for life of the Digby estate, the executors of the trustee, a gentleman named Baker by whom the contract was made, the trustees under the resettlement of the estate in the year 1882, and the present tenant in tail, who was allowed to be joined for the special purpose of the vendor's lien being enforced against the property. Now, the facts are very fully stated in the report in the court below, in which the judgment of Byrne, J., is given, and I need not restate any of them, except such as are absolutely necessary in order to make my opinion in this case clear.

The contract was made in the year 1873; it was made with the concurrence of the then tenant for life, and was in effect a contract whereby Mr. Baker purported to buy 524 acres of glebe land for a sum of about £25,000. Baker was the surviving trustee of the will, or the trustee of the will of the late Earl Digby, and under that will it is said that personal estate had been directed to be turned into money and to be laid out in the purchase of land. We are asked to assume for the purposes of this case and of the rights against the persons now interested, that this contract made by Baker was a contract that was made in pursuance of the powers contained in that will, and that he was purporting to make a contract in the exercise of that power, and intending to apply, or purporting to apply, towards payment of the purchase-money some of the personal estate which he had been so directed to convert. I ought to add, before I express my view upon that matter, that it appears, prior to this contract being made, a considerable portion, if not the whole, of the testator's personal estate had been advanced for the purposes of a fund known as "The Digby Estate Improvement Fund," and its repayment had been secured by policies of insurance on the lives of three possible tenants for life for the sum of £158,000. Now, speaking for myself, I am by no means satisfied that the contract made by Mr. Baker was made by him in the exercise of this power or in the discharge of his duty under the power. I asked Mr. Levett upon what facts I was to draw that conclusion, and he said the principle fact was that Baker did contract as surviving trustee and that in subsequent recitals there was a reference to the transaction whereby the £158,000 had been so advanced. He also pressed upon us that it was a family arrangement for the benefit of the settled estates and therefore we were to assume on these facts that Baker was so acting. Now, so far as there is any actual evidence before us it certainly does not to my mind support that statement. There certainly does appear to be evidence that there was a family arrangement, but that might well be a family arrangement whereby the tenant for life desired to improve the settled estates by getting hold of this property which was obviously mixed up with the other property which was part of the settled estates, and it does not by any means follow that it was the act of the trustee in the exercise of that power. The correspondence in fact appears to show that the purchase-money was intended to be raised by selling certain outlying portions of other parts of the settled estates and so obtaining the money. The foundation of Mr. Levett's argument upon this part

of the case is that we are to assume that there had been either a direct exercise of the power, knowing that the purchase-money could be obtained somehow or another out of the £158,000 or that there had been a breach of trust and that inasmuch as in some proceedings Baker could have been made to have some of the personal estate called in and to have applied the money towards the completion of this purchase, the Ecclesiastical Commissioners are at the present day entitled to assert, that being the basis of the original contract, that they are entitled to enforce the rights of unpaid vendors against the persons who are now in possession of the settled estates or have become trustees of the policy moneys to which I have referred.

Now, the property was disentailed and resettled in the year 1882. In the year 1888 the policy moneys were distributed, and I shall have to consider briefly in a moment or two the grounds upon which it is suggested that each one of these defendants is liable. One other matter I ought to mention, as it has formed a very substantial part of the plaintiff's argument, and that is that under the deed of 1888, a marriage taking place in the family, there had been a covenant to raise a sum of £20,000 out of the settled estates for the purpose of providing certain portions for the children, and that when the policy moneys were paid off that £20,000 was provided for, so that to that extent the settled estates got some of the £158,000.

Under those circumstances who are the persons who are sought to be made liable? The first is the existing tenant for life. It is said he has got the settled estates. It is said interest has been paid on the purchase-money throughout by the tenant for life. In my opinion, in the view that I take, which I have already expressed, as regards this contract, whether it was a breach of trust or not, or whether it is true that the money was hoped to be raised out of the sale of certain portions of the settled estates or not, it seems to me quite impossible to hold that it falls within that class of cases in which it is said you are to make good the contract out of interests which have been received, or which are enjoyed by the persons from time to time entitled. I do not think in the view that I take of this case it is necessary to consider under what circumstances you can enforce such a right against the person so entitled. I am clearly of opinion that this was not a contract in which you are entitled to say because the property has by virtue of the disentailing deed, and by virtue of the resettlement, become part of the settled estates, that gives you a right, not against the property by way of enforcing the vendor's lien, but a right to have the contract made good out of the whole settled property of the persons who have become entitled to the income of the settled property. I daresay there would be a good deal to be said if it was necessary to go into it from the point of view of the argument urged by Mr. Neville as to the position of the present tenant for life, and to his action when the resettlement of the estate took place. In my opinion it was perfectly clear that he did act in ignorance of this supposed liability, and I should have hesitated a very long time before—apart from the particular ground on which I am basing my judgment—saying that I should have been prepared to enforce that right against him. But I think that as far as he is concerned, it is not a contract which the appellants are entitled to act upon and make good out of the interest of the funds which the tenant for life has come into the enjoyment of.

With regard to the two executors of Baker, it is not really suggested, of course, that there is any remedy against them personally. It is said, in some way or another, that they did not distribute their right to an indemnity. In the view I take of this contract, that question does not arise, because, in my opinion, it was not a contract in respect of which, under the circumstances, any state of facts has arisen which would entitle the vendors to claim to have indemnity against the persons who ultimately became entitled to the benefit of the estate. With regard to the three trustees of the resettlement, it is said that they have distributed these policy moneys, not with actual notice, but with constructive notice of the existence of this contract, or with notice binding them in law. I think for the reasons which were urged by Mr. Sargant it is quite impossible to say that, having had no actual notice (nor do I say they would be liable even if they had actual notice), on the allegations made in these pleadings or in the evidence, there was any personal liability on these trustees by reason of the part they took in distributing the policy moneys under the two deeds that were made when the estate was disentailed and resettled in the year 1882.

Lastly, as to the present tenant in tail, who was only made a party in order to give effect to the judgment which Byrne, J., pronounced, it is not contended in these proceedings that any remedy could be enforced against him. For these reasons, and without attempting to deal at greater length with the points that have been raised by Mr. Levett, I am of opinion the judgment of Byrne, J., was right and this appeal ought to be dismissed. I think with regard to the Ecclesiastical Commissioners that effect has been given to the full rights they now have, having regard to what has been done with regard to the property since the contract was made.

RIGBY, L.J.—This is an action in which the question arises as to who is to bear the result of what all sides admit to be a very serious depreciation of certain glebe lands alleged to have been purchased for the benefit of the settled estates of the Digby family. The Ecclesiastical Commissioners are asking in fact, on behalf of all persons interested in the glebe land, that the contract may be carried into effect. Now, the first question which lies at the root of all this suit is, was there a valid purchase of the glebe land for the benefit and on account of the family estates, and I am of opinion that there was not. If that be established there can be no question either of the right of the trustee himself to be indemnified out of the estate or the right of the owners of the estate before the contract by subrogation to his rights to be themselves indemnified. Now how does it stand? Mr. Baker was the surviving trustee of the will of the late Earl Digby who gave all his residuary personal estate, whatever it was, upon trust to invest in real estate. There was also, as was stated, a trust for sale and exchange of lands subject to the will. As far as Mr. Baker is concerned I do not think he had a single farthing of trust money in his control to expend. The personal estate whatever it might have been had been advanced (if not necessarily, or whether in breach of trust or in pursuance of a trust) for the purposes of the fund known as the Digby Estates Improvement Fund, and it was to be repaid out of the moneys to arise from policies which would fall in at the death of the third tenant for life. At the time of this alleged contract there was no possible means of getting the money until the death of that third tenant for life, who lived for a good number of years afterwards. If the advance of the money had really been in pursuance of trusts, it is obvious that by no means could it be got in or made available for the purchase of lands or anything else until the death

of that third tenant for life. If it were not so, it cannot be supposed that a trustee would be able to advance out of his own moneys £158,000, the amount secured by the policies, even to make good a breach of trust, and it is quite plain from the correspondence that Baker never dreamt of doing such a thing as that. He entered into the contract which was believed by every person—not only by himself, but by all the persons who were in existence or interested in the settled estate, and by the incumbent of the living for the time being to which the glebe belonged—to be very much for the benefit of all parties concerned. If he were guilty of a breach of trust in entering into the contract it certainly was not a breach of trust that was made from any improper motive, it was really to carry out what was thought to be for the advantage of all persons. But it came to this, that he agreed to give £25,000 or thereabouts for 524 acres of glebe, the contract to be completed and the purchase-money paid when he should get the money, and that leaves it quite doubtful whether the estate purchased would be at that time worth £25,000 or not; that was a matter that no one could possibly say. If events happened which brought down the value of the property to £10,000, then £25,000 would have to be paid out of the trust estate for property possibly only worth £10,000. I do not say that was so, that it was only worth £10,000 at the time the lease fell in, but it might have been so for anything the trustee knew to the contrary; and therefore I am of opinion that taking it substantially—not in any moral sense, for he was trying to do the best he could and incurring risks for the benefit of the people interested—he was entering into a contract as to which he could not have the slightest idea whether when it was carried out it would be a fit and proper contract, and whether he could enter into it under this power or not.

In my opinion that was a clear breach of trust, and it follows from that, as I think, that he had no right to be indemnified at all and that no question of subrogation can possibly arise, and that the persons who are interested in the glebe lands and the Ecclesiastical Commissioners as representing them, have no right now to come down upon the settled estates. It is said, and we know, that the glebe lands purchased have been dealt with as part of the settled estates, and the successive tenants for life as and when they came into possession have gone on paying what at first was the larger amount of interest but subsequently by arrangement was reduced to three and a quarter per cent. interest on the purchase-money during the whole time. That certainly has not been to the detriment of the incumbent for the time being, whoever he might be. He was rather better off, in effect, than if the contract had never been entered into. The only thing which will now affect him is that he cannot get that continued. The persons in possession of the settled estates are ready, however, to give up the property now or pay its present value. It is the same thing as calling in a vendor's lien. The tenant for life, who is an infant, has been made a party to the action in order that it may be effective in a legal manner. Now, I do not think under these circumstances that there really has been any claim before us that the property should be reconveyed to the incumbent. He and the Ecclesiastical Commissioners, on behalf of him and his successors, are willing to take the money which could now be got by the sale of the property, and in my opinion that is the utmost that they can now require. It is the successive incumbents who must bear the loss and not the persons who are the owners of the settled estates. I do not think the other questions arise. There were questions of some interest which have been argued, but I do not think it is necessary at present to deal with them or give any opinion upon them. I base my judgment entirely upon the ground that there never was a contract which as against the settled estates could be held to be a proper and binding contract.

COLLINS, L.J.—I am of the same opinion and on the same grounds.

Appeal dismissed.

Solicitors, *Milles, Jennings-White, & Foster; Dawson, Bennett, & Ryde; Hulberts, Hussey, & Metcalfe.*

From Q. B. Div. (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — Aug 2, 1900.

LYLE SHIPPING CO. (LIMITED) *v.* CORPORATION OF CARDIFF. (*a.*)

Ship—Demurrage—Cargo "to be discharged with all despatch as customary"—Delay caused by deficiency of railway wagons—Liability of consignees.

By a charter-party the cargo was "to be discharged with all despatch as customary." By the custom of the port of discharge cargo was discharged into railway wagons belonging to certain railway companies. Owing to a scarcity of wagons caused by stress of work at the port, and through no default or negligence of the consignees, the discharge of the cargo was delayed. In an action by the shipowners against the consignees to recover damages for the delay,

Held, that the consignees were not liable.

Appeal from the judgment of Bigham, J., in favour of the defendants at the trial of the action without a jury.

The action was brought to recover damages for the detention of the plaintiffs' ship *Cape Wrath* during the discharge of a cargo of jarrah wood at Cardiff.

The defendants were the indorsees of the bills of lading, which incorporated the terms of the charter-party.

The charter-party contained the following clause: "The ship to be discharged with all despatch as customary, weather permitting."

The ship arrived at Cardiff on the 2nd of October, 1899. The discharge began in the East Bute Dock on the 3rd of October, and was not completed until the 23rd of November, occupying forty-five working days.

The plaintiffs claimed that the discharge should have been at the rate of 150 tons per working day, upon which basis it would have occupied twenty-two or twenty-three working days.

The East Bute Dock was the property of the Cardiff Railway Co., which did the work of discharging.

Certain railway companies, among them the Great Western Railway Co., had access for their wagons to the dock. It was impossible to discharge the cargo on to the quay or otherwise than into wagons.

The defendants made an arrangement with the Great Western Railway Co. for the supply of wagons to convey the cargo from the ship's side to the corporation depôt. There was great pressure of work at Cardiff during that month, and in consequence there was great difficulty in procuring wagons. The delay in the discharge was due to the difficulty of procuring wagons, and was not due to the acts or default of the defendants personally, who

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

took delivery of the cargo as quickly as it was practicable for them to do.

Bigham, J., held that the obligation upon the defendants was to do their best both to procure and to make use of the wagons, and that they had fulfilled that obligation. He accordingly gave judgment for the defendants.

The plaintiffs appealed, contending that the defendants were not excused by the difficulty in obtaining wagons, that being a risk undertaken by the defendants.

Joseph Walton, Q.C., and *D. C. Leck*, for the plaintiffs.

Rufus Isaacs, Q.C., and *Bailhache*, for the defendants.

Cur. adv. vult.

Aug. 2.—The following judgments were read:

A. L. SMITH, L.J.—This is an action by shipowners against the receivers of cargo under a bill of lading for demurrage or damages for detention—it matters not which it is called—of the plaintiffs' ship at Cardiff, which was the port of discharge, the allegation being that the ship was detained by the defendants in unloading for forty-five instead of twenty-three working days, and the plaintiffs claim for this the sum of £382. The real question is, What is the contract the plaintiffs have with the defendants as to the discharge by them of the plaintiffs' ship? By the terms of the charter-party, which were incorporated into the bills of lading, by which terms the defendants are bound, the cargo was "to be discharged with all despatch as customary." It will be noticed that the plaintiffs have taken no contract from the defendants, as they might have done if they had desired to do so, that the cargo should be discharged in any fixed period of time, in which case beyond question the obligation to discharge undertaken by the cargo owners would have been absolute, and no matter what unforeseen circumstances might have arisen or how diligent they might have been in their endeavours to discharge the ship within the contracted time, if they did not do so they would have broken their contract and must have paid damages to the shipowners for the breach. But this is not the contract which the plaintiffs have taken from the defendants, for the only contract, as before stated, is that the cargo should be "discharged with all despatch as customary." I think it is important to state at the outset the findings of my brother Bigham, for, considering the arguments addressed to us on behalf of the appellant shipowners, the findings are very important in this case. The learned judge finds that the rule or custom of the port of Cardiff, as applicable to the plaintiffs' ship, was that the cargo was to be delivered into wagons (railway wagons) and in no other way; that the appliances customarily used at the port of Cardiff were the wagons of certain specified railway companies and no others; that the defendants were not personally guilty of any negligence at all in taking discharge of the cargo, and that they did their best to get the appliances which were available at the port at the time, and which were customarily used for the purpose of discharging vessels; that when the plaintiffs' ship arrived there was a great stress of work, and difficulties had to be contended with, and that it was a record month, and that the defendants did their best to deal with the difficulties, and took delivery of the cargo as quickly as it was practicable for them to do. The findings were really not contested before us, and there is evidence to support them. Now, these being the facts as found by the learned judge, the question arises, have the plaintiffs proved that the defendants have broken their contract with the plaintiffs that the cargo should be discharged with all despatch as customary? That the plaintiffs have no absolute contract with the defendants that the latter will discharge the plaintiffs' ship in any given time is clear, nor have they, in my judgment, an absolute contract that the defendants will have railway wagons down upon the quay ready to take delivery of the cargo at Cardiff, which is the only way delivery can there be taken, for, as Lord Blackburn says in the House of Lords in *Postlethwaite* v. *Freeland*, 28 W. R. 833, at p. 836, 5 App. Cas. 599, at p. 620, "If the obtaining lighters or other customary appliances for the discharge of a ship on its arrival was, like the procuring a cargo for loading the ship, a matter which fell entirely on the merchant, so that he might choose his own mode of fulfilling it, I am not prepared to say that on the same principle he ought not to be held to undertake, without qualification, to provide those appliances. . . . But I do not think that the undertaking to supply lighters or other appliances to assist in discharging the ship does fall within the same principle as the undertaking to supply a cargo." This appears to me to meet the last suggestion made in the reply of Mr. Joseph Walton that there was an absolute duty on the goods owner to prepare himself to take the cargo. In my judgment the duty is not absolute, but to do his best. Now, the contract which the plaintiffs have in this case with the defendants for the discharge of the cargo, as will be seen from the latest authority upon the subject in the House of Lords—no fixed time being stipulated for the discharge—is that the plaintiffs will discharge the cargo within a reasonable time under existing circumstances, or, in other words, with all due diligence having regard to all the existing circumstances, and in my opinion there is no limit as to what are existing circumstances, as argued by Mr. Joseph Walton—namely, the limit of the user of the port appliances. The case to which I allude is that of *Hick* v. *Raymond and Reid*, in the House of Lords, 41 W. R. 384, [1893] A. C. 22, and when what is therein laid down is understood it will be seen that the defendants' contract is what I have said it is. In *Hick* v. *Raymond and Reid* the terms of the contract were that the cargo was to be delivered at the port of London, and that it was to be applied for within twenty-four hours of the ship's arrival, but no time was specified within which the discharge of the cargo was to be completed. It was held by the House of Lords in a considered judgment that when a bill of lading is silent as to the time within which the consignee is to discharge the cargo his obligation is to discharge it within a reasonable time and that he performs his obligation if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming those circumstances, so far as they involve delay, are not caused or contributed to by him. Lord Herschell, then Lord Chancellor, in his judgment in that case, in clear and unambiguous language states the law applicable to a bill of lading which contains no fixed time for unloading. I am myself inclined to think that it matters not in this case whether the words "as customary" are in the contract or not, for if not they would be implied. The Lord Chancellor (Lord Herschell) said that the bills of lading in that case contained no stipulation that the discharge should be effected in a particular number of days, "and therefore in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, has the appellant (the shipowner) proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in deter-

mining whether more than a reasonable time was occupied." Lord Herschell then states the rival contentions of the shipowner and cargo owner, the shipowner contending that the cargo owner was liable if the discharge of the vessel was delayed beyond the time required to discharge her under ordinary circumstances, the cargo owner, on the other hand, contending that he was not liable if he only occupied the necessary time under existing circumstances. Lord Herschell then continued—and here is the principle to be applied to the present case —"the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee." It will be seen Lord Herschell says that reasonable time should depend on the circumstances which actually exist. What circumstances? Why, all the circumstances which have relation to the discharge of the cargo. The judgment of Lord Watson, though shorter, in no way differs from that of the Lord Chancellor, and Lord Ashbourne's judgment is valuable for bringing together prior decisions, especially that of Blackburn, J., in *Ford* v. *Cotesworth*, 17 W. R. 282, L. R. 4 Q. B. 127, 18 W. R. 1169, L. R. 5 Q. B. 544, in which that learned judge held that reasonable time must be a reasonable time under the circumstances, and the judgment of Lord Selborne, when Lord Chancellor, in *Postlethwaite* v. *Freeland*, 5 App. Cas., at p. 608, which was delivered some twelve years before Lord Herschell delivered his judgment in *Hick* v. *Raymond and Reid* above referred to. Lord Selborne said the same as Lord Herschell subsequently said, though in different language. He said, "There is no doubt that the duty of providing, and making proper use of, sufficient means for the discharge of cargo, when a ship which has been chartered arrives at its destination and is ready to discharge, lies (generally) upon the charterer. If, by the terms of the charter-party, he has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated. If, on the other hand, there be no fixed time, the law implies an agreement on his part to discharge the cargo within a reasonable time—that is, as was said by Blackburn, J., in *Ford* v. *Cotesworth*, 'a reasonable time under the circumstances.' Difficult questions may sometimes arise as to the circumstances which ought to be taken into consideration in determining what time is reasonable. If (as in the present case) an obligation, indefinate as to time, is qualified or partially defined by express or implied reference to the custom or practice of a particular port, every impediment arising from or out of that custom or practice, which the charterer could not have overcome by the use of any reasonable diligence, ought, I think, to be taken into consideration." These judgments of two Lord Chancellors in the House of Lords on the point I have now to consider, coupled with the facts found by the learned judge in this case, to my mind are amply sufficient to show that the judgment of Bigham, J., is correct, and cover all the points taken by Mr. Joseph Walton in argument. It appears to me simply waste of time to discuss in detail other authorities cited in argument, such as *Good & Co.* v. *Isaacs*, 40 W. R. 629, [1892] 2 Q. B. 555; *Castlegate Steamship Co.* v. *Dempsey*, 40 W. R. 533, [1892] 1 Q. B. 854; and *Wyllie* v. *Harrison*, 13 Court Sess. Cas., 4th series, 92, which are all consistent with the judgments in *Postlethwaite* v. *Freeland* and in *Hick* v. *Raymond and Reid*, and with the exception of *Wright* v. *New Zealand Shipping Co.*, 4 Ex. D. 165, 27 W. R. Dig. 199, decided in 1879, before *Postlethwaite* v. *Freeland*, in the House of Lords, there is not a single case in this country in the plaintiffs' favour. As regards the case of *Wright* v. *New Zealand Shipping Co.*, in my judgment it is not now law, dissented from and discussed as it has been on different occasions, and especially by Lord Blackburn in *Postlethwaite* v. *Freeland*, 5 App. Cas., at pp. 616, 617, and inconsistent, as it is, with the two cases in the House of Lords. If, however, the case of *Wright* v. *New Zealand Shipping Co.* is to be upheld upon the ground suggested by Lord Herschell in *Hick* v. *Raymond and Reid*, [1893] A. C., at p. 32—viz., that it was not shown in that case that the cargo owner could not by reasonable precautions or exertions have procured the necessary lighters elsewhere or earlier, and so have avoided the delay which took place—then, if that be the ground of the decision, the case is not hostile to the defendants, for the findings in this case are that they had taken all reasonable precautions and exertions and done their best as regards the discharge of the cargo, and the case has therefore no application to the present. In my opinion the present case upon the facts found is amply covered by the highest authority, and all Mr. Joseph Walton's points are equally covered. This appeal must be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree that the learned judge has found such facts in this case as to put the charterers out of court, whether or not one treats *Wright* v. *New Zealand Shipping Co.* and the law as there laid down by Bramwell, Cotton, and Thesiger, L.JJ., as overruled by the House of Lords, and the judgments in the House of Lords to which my brother has referred. I think I should have arrived at the conclusion in fact in this case, taking into consideration all the evidence as to the practice of the port of Cardiff, that the defendants took upon themselves to supply all the appliances ordinarily required for the discharge of a ship in that port, including, therefore, trucks. I see nothing in the evidence to show that the discharge at Cardiff was to be into appliances to be provided or determined by the port. It is true that the discharge was to be into railway trucks, but there is nothing to show that the defendants might not have provided trucks from any source they chose, and used the railway to introduce their trucks on to the quay to take discharge, or that the railway was blocked. But for the findings of the learned judge I should have thought there was an obligation on the defendants to provide the trucks and have them ready, and that this obligation was not affected by the fact that no time was fixed by contract for taking delivery.

ROMER, L.J.—The first question we have to consider is as to the meaning of the not uncommon provision in a charter-party as to the ship being discharged "with all despatch as customary." I think it is now settled that such a provision means that the discharge shall take place with all reasonable despatch, and that in considering what is reasonable you must have regard, not to a hypothetical state of things (that is, to what would be reasonable in an ordinary state of circumstances), but to the actual state of things at the time of discharge, and in particular to the custom of the port of discharge. So that a charterer is not liable for delay if he has, under the circum-

stances, used all reasonable diligence in procuring the discharge, and in considering what is reasonable diligence you must have regard (*inter alia*) to the appliances for discharge customary at the port. That principle, to my mind, is established finally by *Postlethwaite* v. *Freeland*. Before that case some doubt existed on the subject, chiefly by reason of some observations which had been made by Bramwell and Cotton, L.JJ., in *Wright* v. *New Zealand Shipping Co.*, and which had been dissented from by Lord Herschell. But that the principle I have mentioned was established by *Postlethwaite v. Freeland* is, I think, clear from the addresses of the noble lords in that case, and especially from the observations of Lord Selborne and of Lord Blackburn, and in particular the remarks of Lord Blackburn as to the distinction between the obligation of loading and the obligation of discharging the ship. This view of *Postlethwaite v. Freeland* has been generally adopted, as, for example, by the judges who decided *Castlegate Steamship Co. v. Dempsey* in the Court of Appeal, and by those who decided *Wyllie v. Harrison*. I think we ought to follow *Postlethwaite v. Freeland* in this case, for I do not think this case can be distinguished on principle, having regard to Bigham, J.'s, findings of fact, which appear to me to be supported by the evidence. I refer in particular to the findings at pp. 2, 6, and 9 of the accompanying type-written copy of his judgment. From those findings it is clear that by the custom of the port the discharge of the ship could only be into wagons to be supplied by the railway companies who had access to the Cardiff docks, and further that, though they used all reasonable diligence, the charterers could not get wagons to receive the discharge according to the custom, so that the delay was not caused by any default on their part. It follows from the above view of the law as settled by the House of Lords and of the facts of this case that the present appeal must, in my opinion, be dismissed. But before parting with the case I desire to say something with reference to an ingenious argument of Mr. Joseph Walton. He suggests the following view with regard to the law as laid down in *Postlethwaite* v. *Freeland*: that though the charterer is only bound to use reasonable care and diligence in effecting the actual discharge of the ship, he is still absolutely bound to have ready at the moment the ship arrives in port all the appliances for discharge, such as lighters, that can be used at the port, and all the men necessary to effect the discharge. I cannot find any judgment supporting such a view of the law, or drawing a distinction between the duty of a charterer in regard to circumstances up to the time the discharge begins and his duty in respect to the actual discharge after it has commenced. It does not appear to me reasonable to make such a distinction. To use an example, I cannot see on principle why a charterer should not be liable if he uses reasonable care and diligence in keeping his men to work after the discharge has begun, and yet should be liable for not getting his men together ready for discharge, though he has used all reasonable care and diligence to procure them. Such a distinction appears to me an unjustifiable refinement on the law as laid down in *Postlethwaite* v. *Freeland*, and one not supported by any observation of any of the noble lords who decided that case, or by any clear expression of opinion of any judge in any other case.

Appeal dismissed.

Solicitors for the plaintiffs, *Lowless & Co.*

Solicitors for the defendants, *Riddell, Vaizey, & Smith*, for *J. L. Wheatley*, Cardiff.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 26, 1900.

In re CHEADLE. BISHOP *v.* HOLT. (*a.*)

Will — Construction — Bequest — Ambiguity — Admissibility of evidence—Selection by legatee.

A testatrix bequeathed "140 *of my shares*" *in a brewery company to a legatee. At the date of her will and death the testatrix had* 280 *of such shares, of which forty were fully paid up and the rest partly paid. The legatee claimed the right to select and to take the forty fully paid-up shares as part of the bequest. Extrinsic evidence was tendered to show that the testatrix intended the bequest to be satisfied out of the partly-paid shares.*

Held, that the extrinsic evidence of the intention of the testatrix was not admissible; but that, the will itself manifested an intention that the bequest was to come out of the partly paid shares, and therefore that the legatee had no right of selection.

Tapley *v.* Eagleton, 28 *W. R.* 239, 12 *Ch. D.* 683, *distinguished.*

Asten *v.* Asten, [1894] 3 *Ch.* 260, 43 *W. R. Dig.* 198, *followed.*

This was an appeal from a decision of Kekewich, J.

A testatrix who died in November, 1898, by her will dated the 30th of October, 1897, bequeathed "my 140 shares in the Crown Brewery Co. of Bury" to her trustees, Ada Letitia Holt and Charlotte M. R. Holt, upon trust to pay the income thereof to the plaintiff Mrs. Bishop for her life and after her death upon trusts in favour of her children, and if she died without issue in trust to divide the same between Ada Letitia Holt, Charlotte M. R. Holt, and their four brothers therein named.

The testatrix bequeathed her residue upon trusts in favour of Ada Letitia Holt and Charlotte M. R. Holt.

The testatrix at the date of her will and also at her death was possessed of 280 £5 shares in the Crown Brewery. Forty of these were fully paid up, the rest having £2 10s. per share paid up on them.

The plaintiff as tenant for life claimed the right to select the 140 shares specifically bequeathed and to take the 40 fully paid-up shares as part thereof.

A summons was taken out to determine the question, and on the hearing before Kekewich, J., an affidavit was tendered by the solicitor who prepared the will to prove that the testatrix intended to bequeath to the plaintiff 140 partly-paid shares.

Kekewich, J., held that the affidavit was inadmissible and that the plaintiff had the right to select.

The defendants, the residuary legatees, appealed.

St. John Clerke, for the appeal.

Eustace Smith, for one of the four brothers contingently entitled, who supported the appeal.

Ingpen, Q.C., for the plaintiff.

The following cases were referred to: *Doe d. Hiscocks* v. *Hiscocks*, 5 M. & W. 363; *Charter* v. *Charter*, L. R 7 H. L. 364, 23 W. R. Dig. 84; *Asten* v. *Asten*, [1894] 3 Ch. 260, 43 W. R. Dig. 198; *Jacques* v. *Chambers*, 2 Coll. 435; *Millard* v. *Bailey*, 14 W. R. 385, L. R. 1 Eq. 378; *Tapley* v. *Eagleton*, 28 W. R. 239, 12 Ch. D. 683.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Lord ALVERSTONE, M.R.—In my opinion this is not a case in which the right of selection arises. It is said that the case is governed by the decision of Jessel, M.R., in *Tapley* v. *Eagleton*. In that case a testator bequeathed to trustees "all those my leasehold houses situate in" various streets, including "two houses in King-street," upon trust for P. for life, und after his death to form part of the testator's residuary estate. The testator had three houses in King-street, and Jessel, M.R., held that two of the houses passed under the gift, and that P. was entitled to select which two he would take. The learned judge said: "If the testator had said 'Two of my houses in King-street' the result would have been the same." But I think the distinction which was pointed out by Romer, J., in *Asten* v. *Asten* is correct—namely, that "In all these cases it is, of course, essential that the will should not show that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shows that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty, and the court cannot, in order to avoid an intestacy, change the will, or construe it as giving to the legatee the option of choosing any one of the properties." And the learned judge added that "*Tapley* v. *Eagleton* does not throw any doubt on this principle, for there Sir George Jessel construed the gift by the testator of 'two houses' as being equivalent to a gift of 'two of my houses.'" So far as I may properly express an opinion I agree in the view of Romer, J. In that case there was no means of solving the doubt to which of the properties the testator was referring. In the present case we have been pressed to admit direct evidence of the intention of the testatrix from an affidavit made by the solicitor who prepared her will. In my opinion that affidavit is not admissible. As a general rule evidence of intention outside the will cannot be received, and I think this is not one of the exceptional cases in which it may be admitted. But I think that, having regard to the surrounding circumstances, the intention of the testatrix, as manifested by her will, was to give 140 of the shares upon which only £2 10s. per share had been paid. The only subject-matter out of which 140 shares could be given was the 240 partly-paid shares, and it would not, in my opinion, be right to fulfil the bequest partly out of one class of shares and partly out of the other. Therefore, in my opinion, the trustees should take, to satisfy the bequest, 140 of the 240 shares on which only £2 10s. per share has been paid.

RIGBY, L.J.—I agree. I am clear that this is not a case in which extrinsic evidence of intention is admissible. It is not a case of mere equivocation—a case in which the words used by a testator turn out to be equally descriptive of two distinct subject-matters. I agree with the Master of the Rolls that the 140 shares must be taken out of the 240 partly-paid shares.

COLLINS, L.J.—I am of the same opinion.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *H. S. Threlfall*, Southport; *Thomsons, Brooks, & Danby*, for *W. & J. Cooper*, Preston; *Whitfield & Harrison*.

From Q. B. Div. (A. L. Smith and Vaughan Williams, L.JJ.) — July 25, 1900.

REG. v. JUSTICES OF WORCESTERSHIRE. (*a*.)

Licensing law—Appeal to quarter sessions—Refusal to renew licence—Costs of licensing justices—Alehouse Act, 1828 (9 *Geo.* 4, *c.* 61), *s.* 29.

Where licensing justices have been served with notice of appeal to quarter sessions against their refusal to renew a licence, and have appeared and successfully resisted the appeal, they are entitled, under section 29 *of the Alehouse Act*, 1828, *to an order for the payment to them by the appellant of such a sum as shall, in the opinion of the court of quarter sessions, indemnify them against the costs to which they were put in consequence of the service upon them of the notice of appeal.*

Appeal from an order of a Divisional Court (Ridley and Bigham, JJ.) discharging a rule *nisi* for a *mandamus*.

An application for the renewal of a licence for the sale of intoxicating liquors at a house known as the "Lamp Tavern" having been refused at the general annual licensing meeting for the City of Worcester, an appeal was taken to the quarter sessions for the connty of Worcester.

The licensing justices were served with notice of appeal, and appeared as respondents on the hearing at quarter sessions and contested the appeal.

The quarter sessions dismissed the appeal, refusing, however, the application of the licensing justices that the appellant should pay them their costs of the appeal.

The licensing justices obtained a rule *nisi* for a *mandamus* to the quarter sessions commanding them to enter continuances and hear and determine according to law the application by the licensing justices for an order that the appellant should pay to them such sum by way of costs as should in the opinion of the court of quarter sessions be sufficient to indemnify them from all costs and charges whatsoever to which they might have been put in consequence of their having been served with the notice of appeal.

The Divisional Court discharged the rule, holding on the facts that no sufficient demand had been made by the licensing justices at the quarter sessions for the costs.

The licensing justices appealed.

The Court of Appeal came to the conclusion upon the facts that a sufficient demand had been made.

A. Lyttelton, Q.C., and *R. W. Coventry*, for the licensing justices.—Under section 29 of the Alehouse Act, 1828, the licensing justices are entitled to indemnity costs when they have successfully resisted an appeal at quarter sessions The *dictum* of A. L. Smith, L.J., in *Reg.* v. *Justices of London*, 43 W. R. 387, [1895] 1 Q. B. 616, is not law now, since the decision of the House of Lords in *Boulter* v. *Justices of Kent*, 46 W. R. 114, [1897] A. C. 556.

J. A. Foote, Q.C., and *J. B. Matthews*, for the licensee.—Section 27 of the Alehouse Act, 1828, gives the quarter sessions a discretion as to the costs of all appeals, including the costs of licensing justices. That section deals with the party and party costs of an appeal. Section 29 deals with any costs arising from the service of the notice of appeal where the justices do not appear upon the appeal. The case of *Reg.* v. *Justices of London* is still law.

Roskill, for the Justices of Worcestershire.

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

A. L. SMITH, L.J.—The point before us is a short one. The licensing justices for the city of Worcester, sitting at the general annual licensing meeting, refused an application for the renewal of a licence. An appeal was brought to quarter sessions, and at the hearing of the appeal the refusal was confirmed. The quarter sessions, upon demand being made by the licensing justices—who had been served with notice of the appeal, and had appeared at quarter sessions on the hearing— for an order for their indemnity costs against the licensee, refused to grant the application. The question turns upon section 29 of the Alehouse Act, 1828. That is the material section. Sections 27 and 29 both deal with costs, but they each deal with different sets of costs. Section 29 says that in every case where notice of appeal against the judgment of any justice in or concerning the execution of the Act shall have been given, and such appeal shall have been dismissed, the court is hereby required to adjudge and order that the party so having appealed, or given notice of his intention to appeal, shall pay to the justice to whom such notice shall have been given such sum by way of costs as shall in the opinion of such court be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been put in consequence of his having had served upon him notice of the intention of such party to appeal. In my opinion that section is imperative on the quarter sessions upon the event therein specified happening, to order the appellant to pay the licensing justices indemnity costs. The quarter sessions had no discretion as to those costs. The appeal must be allowed, and the rule for a *mandamus* must be made absolute.

VAUGHAN WILLIAMS, L.J.—I entirely agree.

Appeal allowed.

Solicitors, *Smiles & Co.*, for *A. H. Halford*, Worcester; *Church, Rendell, Todd, & Co.*, for *Samuel Southall*, Worcester; *Clarke & Blundell*, for *R. Owen Seacome*, Worcester.

(Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) July 23, 1900.

In re FULLER (A PERSON OF UNSOUND MIND NOT SO FOUND). (*a.*)

Lunacy—Jurisdiction of master—Appointment of person to exercise power of appointing new trustees—Vesting order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-sections* 1 (c), 2; *ss.* 128, 129, 135—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-section* 1.

A master in Lunacy has jurisdiction under the Lunacy Act, 1891, *s.* 27, *sub-section* 1, *and the Lunacy Act*, 1890, *ss.* 128, 129, *to make an order appointing a person to exercise a power, vested in a person of unsound mind not found lunatic by inquisition, of appointing new trustees and to vest property in the trustees when appointed.*

This was a summons by W. F. Wilson, asking that J. H. Strange might be appointed to exercise the power vested in Charles Fuller (a person of unsound mind not found lunatic by inquisition) in his character of surviving trustee of a settlement dated the 10th of December, 1888, to appoint two new trustees thereof, and that an order might be made as to all the trust property in pursuance of sections 128 and 129 of the Lunacy Act, 1890, as to the judge might seem beneficial and expedient.

The persons beneficially entitled under the trusts of the settlement were all *sui juris* and consented to the application.

The trust funds had been divided amongst the beneficiaries with the exception of a small sum of cash and a freehold house.

Evidence was given as to the mental condition of Fuller.

The master made an order appointing Strange to exercise the power of appointing new trustees of the settlement, and directed that upon the appointment being made the freehold house should vest in the new trustees. But as there was some doubt as to his jurisdiction to make the vesting order, he directed that the order should be submitted to one of the Lords Justices before being issued. The order was submitted to Collins, L.J., and was by him referred to the court.

Ashton Cross, for the beneficiaries, referred to *In re Shortridge*, 43 W. R. 257, [1895] 1 Ch. 278.

The Lunacy Act, 1890, provides:

Section 116.—(1) The powers and provisions of this part of this Act relating to management and administration apply (*a*) to lunatics so found by inquisition; (*b*) to lunatics not so found by inquisition for the protection or administration of whose property any order has been made before the commencement of this Act; (*c*) to every person lawfully detained as a lunatic though not so found by inquisition. (2) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the judge shall be exercised by such person in such manner, and with or without security, as the judge may direct, and any such order may confer upon the person therein named authority to do any specified act or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the judge. . . . (4) The powers of this Act relating to management and administration shall be exercisable in the discretion of the judge for the maintenance or benefit of the lunatic, or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic.

Section 128.—Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs.

Section 129.—Where under this Act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees.

[The group of sections 116 to 130, both inclusive, is headed "Management and Administration."]

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Section 135.—(1) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage, the judge in Lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs. (2) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs. (3) An order under sub-sections 1 and 2 shall have the same effect as if the trustee or mortgagee had been sane, and had executed a deed conveying the lands for the estate named in the order, or releasing or disposing of the contingent right.

[The group of sections 130 to 143, both inclusive, is headed "Vesting Orders."]

The Lunacy Act, 1891, provides:

Section 27.—(1) Subject to rules in Lunacy the jurisdiction of the judge in Lunacy as regards administration and management may be exercised by the masters, and every order of a master in that behalf shall take effect unless annulled or varied by the judge in Lunacy.

Lord ALVERSTONE, M.R.—It was quite proper, having regard to the difficulties which have been pointed out to us, that the matter should be considered as a question of principle. I think the master had jurisdiction to make the vesting order. [His lordship referred to sub-section 1 (*c*) and sub-section 2 of section 116 of the Lunacy Act, 1890, and continued:] There can be no doubt that under the provisions of sections 128 and 129, if new trustees had been appointed, the judge in Lunacy could have made such an order as to the trust estate as might have been made in the same case by the High Court under the Trustee Act, 1850, or any Act amending the same, upon the appointment thereunder of new trustees of the settlement. Then section 27, sub-section 1, of the Lunacy Act, 1891, enables the master to exercise the jurisdiction of the judge in Lunacy "as regards administration and management." It cannot, I think, be seriously doubted that section 129 of the Act of 1890 is included in the provisions of that Act as to "administration and management," and if so, section 27, sub-section 1, gives express power to the master to exercise the power conferred by section 129. I felt at first pressed by the fact that what I may call the analogous power conferred by section 135 can be exercised only by the judge. That is to say, it has not been transferred to the master by section 27, sub-section 1, which transfers to him only the jurisdiction "as regards administration and management." But it may well have been thought by the Legislature that the limited powers which form part of the provisions for "administration and management" could properly be conferred on the master as well as on the judge. It is clear, as it appears to me, that there are many cases to which section 135 would apply which do not come within section 129. In my opinion, having regard to section 27, sub-section 1, the master had jurisdiction to make such a vesting order. By so holding we shall save the parties from the necessity of incurring a double set of costs; and, on the other hand, I can see no reason why, having regard to the provisions of the Acts, the master should not have power to make the order.

RIGBY, L.J.—I am of the same opinion. After a careful consideration of the language of the different sections, I think the master had power to make the order.

COLLINS, L.J.—I am of the same opinion.

Solicitor, *C. M. Trevor.*

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 18, 1900.

CHAMBERLAIN'S WHARF (LIMITED) v. SMITH. (*a.*)

Trade union—Association—Agreement in restraint of trade—Expulsion of member—Directly enforcing agreement between members—Jurisdiction of court—Trade Union Act, 1871 (34 & 35 *Vict. c.* 81), *s.* 4 (1) —*Trade Union Act,* 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

An association established to give facilities to trade which by its rules provides that its members shall charge specified rates, subject only to a discount fixed by the rules, is a combination for imposing restrictive conditions on the conduct of a trade, and is therefore a trade union according to the definition in section 16 *of the Trade Union Act,* 1876.

An action by a member of such an association to restrain the committee from expelling him from the association is an action for "directly enforcing" the agreement between the members of a trade union, and consequently cannot be entertained by the court by reason of the Trade Union Act, 1871, *s.* 4 (1).

This was an appeal from Kekewich, J.

The defendants were members of the committee of an association called the Tea Clearing House.

The objects of the Tea Clearing House were:

"(1) To give facilities to the wholesale trade in tea for the lodgment and transmission of warrants, delivery orders, carding, cording, and other orders to the various docks and warehouses from a central office.

"(2) To provide a central clearing house or office where all such warrants and orders may be lodged instead of at the various docks and warehouses, and further, to provide facilities for the return of warrants and other documents to the trade, and generally to avoid the necessity of the personal attendance of the trade clerks and others at the offices of the various docks, warehouses, wharves, &c.

"(3) To insure frequent and rapid transmission of documents thus lodged or returned, and to provide and afford facilities for answering inquiries, and giving information relative to the storage, working, or delivery of tea."

Rule 1 provided, among other things, that every member of the clearing house should pay an annual subscription of £20.

Rule 2 provided that the affairs of the clearing house should be conducted by a committee of management, which committee had, by rule 5, power from time to time to make such bye-laws as they might think fit not inconsistent with the rules for the time being of the clearing house and also to rescind and vary the same.

Rule 10, after providing how expenses not covered by the annual subscriptions were to be borne, continued: "Any surplus shall be, in the discretion of the committee, either divided among all the members . . . , or may be retained and invested in such manner as they may think fit."

Rules 11, 14, and 15, which were the most important rules in connection with the present case, were as follows:

"(11) Every member shall charge on teas by ships reporting on or after the 1st day of July, 1888, and on new season's China tea arriving before that date, the respective rates, charges, and rents, and adhere to the terms and conditions specified in the schedule to these rules, and shall not be at liberty to depart therefrom in any way, subject to the following

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

allowance, viz.: a discount not exceeding ten per cent. may be allowed on the said rates, charges, and rents, or any of them, being importers' charges. No other discount, no money gratuities, and no advantages, direct or indirect, shall be offered or allowed by any member, or his agents or employees, to any merchant, broker, employee, agent, or other person in connection with any matter or thing in anywise relating to the Tea Clearing House agreement; but any member shall be at liberty to allow any difference in premiums on insurance of teas warehoused or deposited with him beyond 3s. 6d. per cent. per annum paid for the same goods if on an annual policy, or a proportionate difference according to tariff rates if on a short time policy. All payments under the duties head to be notified to the committee and entered in a book kept for the purpose, which shall be open at all times to the members."

"(14) No subscribers shall be entitled to warehouse or deposit tea with, or employ in connection with tea, any dock company or tea warehouse keeper who is not a member of the clearing house, or to purchase or sample any tea from the warehouse of any non-member."

"(15) Any member or subscriber breaking or failing to observe any of the rules or bye-laws of the clearing house for the time being in force, shall be liable to expulsion from the clearing house by resolution of committee. An expelled member or subscriber may be readmitted on such terms as may be determined by the committee."

On the 26th of June the defendants passed a resolution purporting to expel the plaintiffs from membership of the association.

The plaintiffs brought the present action, claiming an injunction to restrain the defendants from acting on this resolution on the ground that the resolution was passed before they had a fair opportunity of being heard.

On the interlocutory application Kekewich, J., adopted the plaintiffs' view, and granted an *interim* injunction.

The defendants appealed.

Warrington, Q.C., and *C. James*, for the defendants.—This association is a trade union within section 16 of the Trade Union Amendment Act, 1876. Section 4 (1), therefore, of the Trade Union Act, 1874, prevents the court from interfering to enforce this agreement, as it is an agreement between members of a trade union as such. The agreement is not illegal, but it is one which cannot be enforced by the court as between the members of the association: *Hilton* v. *Eckersley*, 6 E. & B. 47, 3 W. R. Dig. 176; *Mogul Steamship Co.* v. *McGregor*, 40 W. R. 337, [1892] A. C. 25. Further, the plaintiffs will not be deprived of any property, and consequently the court has no jurisdiction to interfere: *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482. As to the merits of the case, the plaintiffs had quite sufficient notice of what was going to be done.

Renshaw, Q.C., and *Stewart Smith, contra.*—On the facts the plaintiffs had not sufficient information either of the charge made against them or of the day on which it was to be heard: *Fisher* v. *Keane*, 11 Ch. D. 353, 27 W. R. Dig. 32. As to the question of illegality, there is nothing at all illegal in the objects of the association, which in no way constitute an agreement in restraint of trade, and the rules are mere machinery for carrying out those objects. Even if some of the rules are illegal, others are legal, and are consequently enforceable. Further, the plaintiffs are not within section 4 (1) of the Act of 1874, as this action is not to enforce the agreement at all, but only to restrain the committee from acting on a resolution which ought not to have been passed.

They referred to *Collins* v. *Locke*, 28 W. R. 189, 4 App. Cas. 674; *Rigby* v. *Connol*; *Swain* v. *Wilson*, 38 W. R. 261, 24 Q. B. D. 252.

C. James replied.

Lord ALVERSTONE, M.R.—The main question raised by this appeal is one of considerable importance—namely, whether or not the action which the plaintiffs have brought against the committee of the association can properly be maintained, having regard to the Trade Union Acts. I will first consider what the nature of the association is. We are not bound by either the preliminary statement of its objects or by the rules taken separately; we must look at the two together in order to see what is its real object and scope. Apart from formal matters such as notices, the amount of the subscriptions of members and the management of the business, the substantial essence of the association seems to be the arrangement contained in rule 11, whereby all the members agree to charge in respect of certain services not less than a specified tariff, with a maximum discount of 10 per cent. And in order to ensure that there should be no evasion of that contract or bargain there is a provision in rule 11: "No other discount, no money gratuities, and no advantages, direct or indirect, shall be offered or allowed by any member to any merchant, broker, or other person in connection with any matter or thing in anywise relating to the Tea Clearing House agreement."

Another important provision is made by rule 14 [His lordship read the rule], and then comes rule 15, with reference to which the present question actually arises, that any member or subscriber breaking or failing to observe any of the rules shall be liable to expulsion by resolution of the committee.

The question for our determination is, whether this agreement is one in respect of which the jurisdiction of the court is limited by the Trade Union Acts, and whether the plaintiffs in the proceedings which they have taken are asking the court to do that which the Trade Union Acts have said the court shall not entertain. We must look at the language of the two Acts and consider whether this action is one which the court can properly entertain. For many purposes trade unions are now perfectly lawful associations, and by the Act of 1871 the objections which could formerly be taken to them have been limited. [His lordship read section 3 of the Act of 1871, and continued:]

Then we come to section 4, which deals specifically with this matter—namely, how far the court shall interfere to enforce such a class of agreements. For this purpose the agreement in the present case is aptly described by section 4, sub-section 1: "Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed." And possibly sub-section 3 also applies: "Any agreement for the application of the funds of a trade union," though in my opinion that sub-section does not directly bear upon the point I am now considering. There might possibly have been some doubt whether a society which imposed conditions with regard to the transaction of business was a trade union, and this doubt led to the passing of the Act of 1876, which by section 16 further defines a trade union. [His lordship read section 16, and continued:]

I was at first troubled by the point that this action, brought to restrain the committee from expelling the

plaintiffs from the association, is not a proceeding instituted with the object of "directly enforcing" the agreement between the members. But on consideration I think it is. The charge made against the plaintiffs was that they had offered a financial advantage to someone in contravention of the provisions of rule 11. The decision of Kekewich, J., is in effect an order of the court that the plaintiffs shall remain members for the purposes of those mutual obligations which rest on the members so long as they are members. It is said that a member can voluntarily retire at any time. But it is as members that the plaintiffs invoke the jurisdiction of the court in order to restrain the action of the committee. In other words, the plaintiffs claim the aid of the court in order to maintain their position as being entitled to rights in the character of members of the association. Looking at the substance of the matter, I think this action is a proceeding "instituted with the object of directly enforcing" the agreement contained and embodied in the rules of the association. And in my opinion we could not come to any other conclusion without, I will not say overruling, but to a great extent limiting the decision of Jessel, M.R., in *Rigby* v. *Connol*. Undoubtedly one part of the claim made by the plaintiff in that case was to remain a member of a trade union, not to be turned out of it, he being entitled as a member to the benefits of the association, and Jessel, M.R., expressly decided that those sections of the Act of 1871 to which I have referred were a bar to the proceedings, on the ground that the action was brought directly to enforce an agreement between members of a trade union for the application of its funds "to provide benefits to members." It is true that in that case the question arose under sub-section 3 of section 4 of the Act of 1871, but, if I am right in my view of the essence of this agreement, I think the same principle applies to a proceeding to enforce the terms of an agreement which falls within sub-section 1 of section 4. *Swaine* v. *Wilson* certainly does not purport to decide anything contrary to *Rigby* v. *Connol*, which indeed was recognised by Lindley, L.J., as a case in which the action could not be maintained unless it could be maintained independently of section 3 of the Act of 1871, and the learned judge proceeded to point out that in *Swaine* v. *Wilson* the rights of the plaintiff depended on rules, the main objects of which were quite outside the Trade Union Act, and were in no way touched by its enactments, and that the fact that some of the rules might be open to objection under the Act did not affect the main objects and scope of the association the benefit of which the plaintiff was seeking to obtain.

I come therefore to the conclusion that, whether the agreement between the members of this association is or is not open to objection (although in my view it is not for all purposes void), it is an agreement which the court has no power to enforce. Consequently the chief objection which has been taken to the plaintiffs' proceedings must succeed.

I do not propose to deal with the other points which have been taken, because the first objection goes to the root of the whole of these proceedings, this being one of the matters in which the court cannot properly exercise jurisdiction.

The objection with which I have dealt is fatal to the proceedings, and the action ought not to be allowed to go on.

RIGBY, L.J.—As regards the interpretation of the Trade Union Acts, I agree with what the Master of the Rolls has said, and this, I think, closes all further discussion on the case. The court can no more enter upon any discussion with regard to the proceedings of this association than it could if the society were totally illegal. I do not say it is, but the Act prevents the court from interfering to enforce certain agreements connected with societies of this kind.

Now, what the plaintiffs really want is this. They say that, purporting to act under certain rules of the association which are no doubt illegal, the committee have passed a resolution turning them out of the association. They desire to be restored to their membership, and for that purpose to discuss the rules, on the footing of which the committee acted, and they ask the court to decide this point. The court has no jurisdiction to entertain the case, and the application ought to have been dismissed.

The other points which have been raised need not be discussed, because the court cannot look into them. No injunction should have been granted, and I do not see what possible object there can be in continuing the action.

COLLINS, L.J.—I am of the same opinion. When the rules of the association are read as a whole, having regard not only to the initial statement of the objects, but also to the machinery by which those objects are to be carried out, it is perfectly clear that it comes within the definition of a trade union contained in section 16 of the Act of 1876—namely, "Any combination, whether temporary or permanent, . . . for imposing restrictive conditions on the conduct of any trade or business." Rule 11 really defines the true object of the society, and in my judgment that object clearly falls within the definition which I have just read. That being so, we are at once confronted with the prohibition of the Trade Union Act, 1871. Without differing in any way from what has been said by my learned brethren, I think that the present case comes in terms within the decision in *Rigby* v. *Connol*. Rule 10 provides that "Any surplus shall be, in the discretion of the committee, either divided among all the members in like proportions or may be retained and invested in such manner as they may think fit." A member who has been expelled from the society, and who claims to be restored to his membership, does, I think, claim a benefit from the funds of the association, and comes within these very words of Jessel, M.R.: "I am satisfied that the agreement contained in the rules is an agreement to provide benefits for members, and that, if I decide in favour of the plaintiff, I directly enforce that agreement, because I declare him entitled to participate in the property of the union, and the only property they have is their subscriptions and fines, and I restrain the society from preventing that participation." It seems to me that the facts of the present case bring it within those words, and that the plaintiffs' claim is clearly one of those which this court cannot enforce. I agree, therefore, that the appeal must be allowed.

Solicitors, *Druces & Attlee; Rollit & Sons.*

High Court of Justice.

Q. B. Div.
(Lawrance and Kennedy, JJ.) Oct. 26.

BULLOCK v. REEVE. (a.)

Metropolis — Management Acts — Sewer — Drain — Nuisance—Drainage of group of houses by combined operation—Order of Commissioners of Sewers—Departure from plan authorized—Increased burden on

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

pipe—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.

In 1855 *an order of the Metropolitan Commissioners of Sewers was obtained for draining four houses in the metropolis by a combined operation. The work was carried out before the* 1*st of January*, 1856, *but not in accordance with the plan authorized by the commissioners. From the group of four houses one was left out, and two others were added. A nuisance having arisen in regard to the pipe draining the group, and the owner of the houses having been required to abate the nuisance,*

Held, that the departure from the plan authorized was material, and, there being no evidence that such departure was sanctioned by the commissioners, the pipe was not a drain but a sewer, and that therefore the owner was not liable to abate the nuisance.

Case stated by a metropolitan police magistrate.

A complaint was made before the magistrate by the appellant, a sanitary inspector, against the respondent charging him that on the 3rd of May, 1900, a nuisance existed at the premises, No. 67, Arcadia-street, Poplar, of which he was the owner—to wit, the drain was defective and the said nuisance was caused by the respondent's act, default, or sufferance in contravention of the Public Health (London) Act, 1891.

It was proved to the satisfaction of the learned magistrate that owing to the defective condition of a pipe passing under 67, Arcadia-street a nuisance did exist at the said premises; that the pipe was used for the drainage of more than one building and premises not within the same curtilage; and that if the pipe had been in law a drain the nuisance arose from the default and sufferance of the respondent. It was contended on behalf of the appellant that the pipe was a drain for draining a group or block of houses by a combined operation and laid before the 1st of January, 1856, pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers within the meaning of section 250 of the Metropolis Management Act, 1855, as amended by section 112 of the Metropolis Management Act, 1862. The respondent contended that the existing drainage had not been laid or constructed pursuant to the order of the commissioners and with their sanction or approval, and that the pipe was a sewer.

Upon this point the following facts were taken to be proved or admitted: On the 18th of July, 1855, a plan showing the proposed mode of draining the estate of which 67, Arcadia-street was a part was forwarded to the Commissioners of Sewers, and on the 23rd of August, 1855, a formal application was made to the commissioners for the sanctioning of the plan of combined drainage. The plan showed that the houses 63, 65, 67, and 69, Arcadia-street (then known as Sydney-street) were grouped together for the purposes of drainage, and were drained by a nine-inch pipe drain which, having passed along the backs of the houses Nos. 63, 65, and 67, passed under No. 69 into a twelve-inch pipe sewer in Arcadia (or Sydney) street. The plan provided for the drainage of 269 other houses. The houses were for the most part grouped for the purpose of drainage in fours, but in some cases five houses were drained by one nine-inch pipe drain. On the 16th of October, 1855, the commissioners ordered and directed that the combined drainage of the houses shown upon the plan and referred to in the application should be carried out, and the combined system of drainage existing upon the premises in question on the 3rd of May, 1900, was laid out and constructed before the 1st of January, 1856.

The existing system of drainage differed from that ordered and directed by the commissioners inasmuch as Nos. 59, 61, 63, 65, and 67 were grouped for the purpose of drainage instead of Nos. 63, 65, 67 and 69, and the nine-inch pipe drain passed under No. 67 instead of No. 69. There was no evidence to show that the departure from the plan were sanctioned or approved by the commissioners.

The learned magistrate was of opinion that, as the original combination had not been adhered to, but altered, the pipe under No. 67 as laid, not having been so laid with the sanction or approval of the commissioners, or pursuant to their order or direction, was a sewer within section 250 of the Metropolis Management Act, 1855, as amended by section 112 of the Metropolis Local Management Acts Amendment Act, 1862. He therefore held that the respondent was not liable to abate the nuisance, and dismissed the summons.

Section 250 of the Metropolis Local Management Act, 1855, defines the word "drain" as follows: "The word 'drain' shall mean and include any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses, by a combined operation, under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of any description except drains to which the word 'drain' interpreted as aforesaid applies."

Section 112 of the Metropolis Local Management Acts Amendment Act, 1862, provides that "The word 'drain' shall be deemed to apply to and include the subject-matter specified in the 250th section of the Act of 1855, and also any drain for draining a group or block of houses by a combined operation laid or constructed before the 1st of January, 1856, pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers."

R. D. Muir, for the appellant.—The departure from the plan sanctioned by the commissioners is not of sufficient importance to make the pipe a sewer within the meaning of section 250 of the Metropolis Local Management Act as amended by section 112 of the amending Act of 1862: *Greater London Property Co.* v. *Foot*, 47 W. R 541, [1899] 1 Q. B. 972. In view of the finding that the present system of drainage was laid out before the 1st of January, 1856, evidence that the deviation was effected with the approval of the commissioners is unnecessary. Such approval may be presumed to have been given because the work would have been overlooked by the surveyor of the commissioners.

A. Glen, for the respondent.—There being no evidence that the departure from the plan met with the approval of the commissioners it cannot be said that the pipe is a drain for draining a group of houses by a combined operation laid pursuant to the order or direction or with the sanction or approval of the commissioners within the meaning of section 112 of the Act of 1862. It follows that the pipe is a sewer within the meaning of section 250 of the Act of 1855: *Geen* v. *Newington Vestry*, 46 W. R 624, [1898] 2 Q. B. 1. The departure from the plan is a substantial one. There are five houses in the group instead of four, one house having been left out and two added. The departure from the plan is too serious for the fact of

the approval of the commissioners to be presumed. In any case the question whether this departure is material is one of fact for the magistrate.

LAWRANCE, J.—The learned magistrate was right. If the plan deposited with the commissioners had been adhered to, it is clear that the pipe indicated therein as draining the houses Nos. 63, 65, 67, and 69, Arcadia-street would have been a drain within the meaning of the Metropolis Local Management Act. At some time before the 1st of January, 1856, the work was executed, but not in accordance with the plan. The question is whether the pipe as it was actually laid is a drain or sewer. That depends upon whether or not the departure from the plan was sanctioned by the commissioners. In the absence of evidence of their approval, there is authority for saying that the pipe is a sewer. No expression of approval by the commissioners is shown to have been given in regard to the deviation here. The magistrate therefore came to a right conclusion.

KENNEDY, J.—I agree. It is clear that the combined system of drainage of which the pipe in question is a part was not authorized by the order of the commissioners. The combination of houses is different from that authorized, and the difference is a material one, because a greater burden is laid upon the pipe in question than was contemplated by the original plan. No tribunal could hold that the departure from the plan authorized was an immaterial one.

Appeal dismissed.

Solicitors for the appellant, *C. V. Young & Son.*

Solicitor for the respondent, *E. J. Marsh.*

House of Lords.

From C. A. (England). Aug. 6, 1900.

WALTER AND ANOTHER *v.* LANE. (*a.*)

Copyright—Report of speech—"Author"—Newspaper—Copyright Act, 1842 (5 *&* 6 *Vict. c.* 45), *ss.* 2, 3, 16, 18.

Under the Copyright Act, 1842, *the reporter of a public speech has copyright in his report, for he is "author" of such within the meaning of the Act.*

Decision of the Court of Appeal (48 *W. R.* 218, [1899] 2 *Ch.* 749) (Lord Robertson *dissenting*) *reversed.*

This was an appeal from a judgment of the Court of Appeal (the Master of the Rolls, now Lord Lindley, Sir F. Jeune, and Romer, L.J.), dated the 9th of November, 1899, whereby an order of North, J., dated the 10th of August, 1899, was reversed.

The facts are shortly as follows:

The respondent published a book entitled "Appreciations and Addresses by Lord Rosebery," which contained verbatim or nearly verbatim copies of reports of speeches published in the *Times*, and this was done without the consent of the proprietors of the *Times*.

Lord Rosebery made no claim to the copyright in any of the speeches, the reports of which were taken down by reporters in the usual way.

The appellants, who were proprietors of the *Times*, instituted an action in the Chancery Division against the respondent, claiming a declaration that they were entitled to the copyright in these reports, and an injunction to restrain the respondent from infringing such copyright.

The respondent admitted that he had copied the reports published in the *Times*, and that the proprietors of the *Times* had complied with the requirements of the Copyright Act, 1842.

North, J., granted an injunction, but this was reversed by the Court of Appeal.

Joseph Walton, Q.C., and *MacSwinney* (*Henry Terrell, Q.C.*, with them), for the appellants.

Birrell, Q.C., and *Scrutton*, for the respondent.

The House took time for consideration.

Earl of HALSBURY, L.C.—I should very much regret if I were compelled to come to the conclusion that the state of the law permitted one man to make profit out of and to appropriate to himself the labour, skill, and capital of another; and it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour, and capital of others. In the view I take of this case, I think the law is strong enough to restrain what, to my mind, would be a grievous injustice. The law which I think restrains it is to be found in the Copyright Act; and that Act confers what it calls "copyright," which means the right to multiply copies, on the authors of the books first published in this country. That the publication in question—namely, reports of Lord Rosebery's speeches—are simply copies of what was first printed in the *Times* newspaper is not denied. And, further, it has not been, and cannot be, denied that they were originally, as in the *Times*, a sheet or sheets of letterpress, and came within the definition of the Act as a book. The speeches, therefore, and the sheets of letterpress in which they were contained were books first published in this country; and I confess, upon looking at the definition and the right conferred, I am wholly unable to discover why they are not protected by the statute from being pirated by unauthorized persons.

The sole ground, as I understand the judgment of the Court of Appeal, is that in their judgment the producer of a written speech, unless he is the original speaker, cannot be an author within the meaning of the Act. It seems to me that this argument is based upon too narrow and misleading an interpretation of the word "author." In my view, the statute has not meant so to confine it, and I do not understand the explanation the Court of Appeal gives of the application of the word "author" to such publications as directories, red-books, maps, &c. I observe the Court of Appeal uses the word "analogy" as applicable to such questions. To my mind it is no analogy at all. If the maker of a directory, red-book, or a map is an author, one has to analyze what in such cases is the distinction between the author as thus referred to and the author of a spoken speech. The language of the Court of Appeal is: "Each man who himself makes a directory, &c., and publishes it, is the author of what he publishes. The reporter of a speech is not." With great respect to the Court of Appeal, this is allegation, not argument. The judgment goes on to say that "the distinction is all-important," but it does not explain what the distinction is. For my own part I am unable to discover it. A man goes along a street, collects the names, addresses, and occupations of each dweller therein. What is the original composition of which, according to the Court of Appeal, he is the author? The name or the street? The numbers of the street? The names of the dwellers in the several houses? What is the distinction which the Court of Appeal makes in giving copyright to the result of this labour and the reducing it into writing? What is it that makes it an original

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

composition? But, further, where do the words "original composition" come from? If the producer of such a book can be an author within the meaning of the Act, I am unable to understand why the labour of reproducing spoken words into writing or print, and first publishing it as a book, does not make the person who has so acted as much an author as the person who writes down the names and addresses of the persons who live in a particular street. I observe that the Court of Appeal introduces the words "original composition" as if those were the words of the statute; and at another part of the judgment it is said that "The report and the speech reported are, no doubt, different things, but the printer or publisher of the report is not the 'author' of the speech reported, which is the only thing which gives any value or interest to the report." The sentence is a little difficult to construe, but, as I understand it, it means to convey that the thing to which the statute gives protection must be of some value or interest. Again, I am compelled to point out that such words are not to be found in the statute. The producer of this written composition is, to my mind, the person who is the author of the book within the meaning of the statute; and, as I have pointed out, the words "original composer" are not to be found in the statute; and, as I understand, the judgment of the Court of Appeal is entirely based on the thing protected being an original composition in the sense that the person who claims the protection of the statute must not have obtained his words or ideas from somebody else, but must be himself an original author in the sense in which that word is generally used in respect of literary composition.

I have been anxious to confine my views at present simply to the words of the statute, because it appears to me that, once this thing in respect of which the controversy has arisen comes within the language of the statute, it lies on those who deny the existence of the right to show why the protection of the statute does not apply. As I have pointed out, the judgment of the Court of Appeal rests solely on the use of the word "author," and I cannot help thinking that some confusion has been created between two very different things: one the proprietary right of every man in his own literary composition, and the other the copyright—that is to say, the exclusive privilege of making copies created by the statute. If the question here were whether there was the right to publish at all a speech made by someone who did not himself publish it, questions like those determined in this House in *Caird* v. *Sime*, 36 W. R 199, 12 App. Cas. 326, might arise. Whether the speech was delivered so as to give it to all the world and to prevent the original author of it from restraining its publication, is a question with which your lordships have here no concern. Lord Rosebery is not here complaining of the publication of it, nor claiming any proprietary right in the speeches as delivered. The question here is solely whether this book (to use the language of the statute), printed and published and existing as a book for the first time, can be copied by someone else than the producers of it (I avoid the use of the word "author") by those who have not produced it themselves, but have simply copied that which others have laboured to create by their own skill and expenditure.

I cannot help thinking that underlying the argument which has been addressed to us there is something of the contention which was boldly made nearly half a century ago in the case of *MacLean* v. *Moody*, 20 Ct. Sess. Cas. 2nd Ser. 1154, where—relying on the preamble—the advocate argued that the object of the Copyright Act, 1842, was to encourage literary merit; that the intellectual labour constituting authorship was alone thereby protected, and that there could be no authorship without an author. Lord Deas refused to accept such an argument, and expressed the opinion that the Act did not confine the privilege to cases in which there was a known author.

But it appears to me that, although it may be true that a preamble may be a guide to the general objects of the statute, it undoubtedly can neither restrict nor limit express enactment. And though I think in these compositions there is literary merit and intellectual labour, yet the statute seems to me to require neither—nor originality in thought. It is admitted apparently by the Court of Appeal (and indeed insisted on as part of the reasons for their judgment) that the owner of an unpublished manuscript, although not the author of it, acquires copyright in it by first publishing it. And I observe that it is said Lord Rosebery had no copyright in his speech, and, although he could have acquired copyright in it by putting it into writing and printing and publishing it, he did not do so. Here again the implied proposition is that the only person who could gain copyright in his speech is the person who spoke it, and that the word "original" must, by construction, be read into the statute—that the true analogy is the "true and first inventor" of the Patent Laws. I think the analogy is a false one. I do not find the word "original" in the statute, or any word which imports it as a condition precedent or makes originality of thought or idea necessary to the right. But if the analogy were strictly pursued, I think it would not be favourable to the defendant. An importer of a foreign invention is, for the purpose of the Patent Laws, an inventor, and as Lord Brougham said in *In re Berry's Patent*, 7 Moo. P. C. 187, there were "two species of public benefactors—the one those who benefit the public by their ingenuity, industry, and science and invention and personal capability; the other those who benefit the public without any ingenuity or invention of their own by the appropriation of the results of foreign inventions. Now, the latter is a benefit to the public incontestably, and therefore they render themselves entitled to be put upon somewhat if not entirely the same footing as inventors." (An interesting discussion of this question will be found on p. 98 of Wallace and Williamson's Patent Law Cases, just published.) I might paraphrase Lord Brougham's language by asking whether those who preserve the memory of spoken words which are assumed to be of value to the public are not entitled to the analogous merit which Lord Brougham attributes to the importer of foreign inventions.

If I have not insisted upon the skill and accuracy of those who produce in writing or print spoken words, it is not because I think the less of those qualities, but because, as I have endeavoured to point out, neither the one nor the other is a condition precedent to the right created by the statute. That right, in my view, is given by the statute to the first producer of a book, whether that book be wise or foolish, accurate or inaccurate, of literary merit or of no merit whatever.

I must notice one supposed difficulty in this view, very persistently urged at the bar. It is said that in the view I have suggested there would be as many copyrights as reporters. I do not see the difficulty. Each reporter is entitled to report, and each undoubtedly would have a copyright in his own published report. But where is the difficulty? Suppose a favourite view; a dozen artists take each independently his own representation of it; is there any reason why each should not have his own copyright?—or even a photograph, where each photograph is

taken from the same point and, in the same state of the light, would be identical in all respects. There is, of course, no copyright in the view itself; but in the supposed picture or photograph there is. And in truth there is a confusion of thought between the difficulty of proof of the piracy and the existence of piracy. Here, as I have said before, no such difficulty arises, since it is admitted that the report of these speeches is not the result of independent labour, but is taken from the *Times*.

I think the judgment of North, J., was right, and that the only answer sought to be given to it by the Court of Appeal was the restricted use of the word "author," with which I have endeavoured to deal. I therefore move your lordships that the judgment of the Court of Appeal be reversed with costs, and the judgment of North, J., restored.

Lord DAVEY.—The question on this appeal is whether the proprietors of the *Times*, by assignment from their reporter, are entitled to copyright in the reports published in their newspaper of certain speeches delivered by Lord Rosebery on public occasions. Copyright is the right of multiplying copies of a published writing. There is no copyright in a speech although delivered on a public occasion, and, on the other hand, there is no copyright under the statute in a piece of writing until it has been published. There may, indeed, be a common law proprietary right in a speech or lecture. In *Caird* v. *Sime*, Lord Watson said: "The author of a lecture on moral philosophy, or of any original composition, retains a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public." It is not disputed in the present case that the thoughts and words of Lord Rosebery's speeches were communicated by him to the public, and no question is raised as to the existence of any right in the orator.

This case raises only a question of statutory copyright in the *Times* report, and must be decided on the provisions of the Copyright Act, 1842. Now what has the respondent done? He has admittedly copied and republished for his own profit certain sheets of letterpress forming parts of the *Times* newspaper. A sheet of letterpress is a book within the meaning of the Act; and notwithstanding the decision of Vice-Chancellor Malins in *Cox* v. *Land and Water Journal Co.*, 18 W. R. 206, L. R. 9 Eq. 324, I have no doubt that a newspaper is within the Act. In *Walter* v. *Howe*, 29 W. R. 706, 17 Ch. D. 708, Sir George Jessel differed from the Vice-Chancellor, and the latter decision has since been followed. *Primâ facie*, therefore, the respondent has infringed the appellants' copyright in their newspaper. His defence is that the appellants have no copyright in this portion of their published work because it was compiled from, or consisted only of, matters which were *publici juris*. They say that Lord Rosebery was the author of his speech and gave it to the world for any to reproduce who would, and that nobody, therefore, can claim to be the "author," within the meaning of the Act, of a report of his speech. The reporter, they say (with a pardonable jingle), is the reproducer and not the producer of the speech. That is true in a sense; and if the *Times* were claiming a property in the speech itself and seeking to prevent anybody else from publishing any other report of it, the argument would be cogent. But the appellants' claim is of a more modest description. They seek only to prevent the respondent from multiplying copies of their own report of the speech and availing himself for his own profit of the skill, labour, and expense by means of which that report was produced and published. But for the fact that the Court of Appeal thought differently, and one of your lordships agrees with the learned judges, I should say that there is no answer to this claim.

In my opinion the reporter is the author of his own report. He it was who brought into existence in the form of a writing the piece of letterpress which the respondent has copied. I think also that he, and he alone, composed his report. The materials for his composition were his notes, which were his own property, aided to some extent by his memory and trained judgment. Owing to the perfection which the art of shorthand-writing has attained in recent years, memory and judgment bear a less important part in the composition of a report of a speech than was formerly the case. But the question whether the composer has copyright in his report does not seem to me to depend on, or to vary inversely with, his skill in stenography. Nor, as it appears to me, does the fact that the subject-matter of the report had been made public property, or that no originality or literary skill was demanded for the composition of the report, have anything to do with the matter. Again, it is said that the lucidity of diction and perfection of expression which characterize the eminent person named made an exact reproduction of his words a comparatively easy and almost mechanical task. But is it argued that the reporter of the hesitating, half-completed utterances of an inferior speaker might have copyright though the reporter of Lord Rosebery may not? Or does the question of copyright in the report depend on the clearness of thought and speech of the orator? In my opinion, the question must be decided on general considerations, and not on any grounds which are personal either to the orator or to the reporter. Copyright has nothing to do with the originality or literary merits of the author or composer. It may exist in the information given by a street directory—*Kelly* v. *Morris*, 14 W. R. 496, L. R. 1 Eq. 697; or by a list of deeds of arrangement—*Cate* v. *Devon and Exeter Constitutional Newspaper Co.*, 37 W. R. 487, 40 Ch. D. 500; or in a list of advertisements—*Lamb* v. *Evans*, 41 W. R. 405. I think those cases right, and the principle on which they proceed directly applicable to the present case. It was, of course, open to any other reporter to compose his own report of Lord Rosebery's speech, and to any other newspaper or book to publish that report, but it is a sound principle that a man shall not avail himself of another's skill, labour, and expense by copying the written product thereof. To quote the language of North, J., in another case—*Walter* v. *Steinkopff*, 40 W. R. 599, [1892] 3 Ch. 489: "For the purposes of their own profit they desire to reap where they have not sown, and to take advantage of the labour and expenditure of the plaintiffs in procuring news, for the purpose of saving labour and expense to themselves." For these reasons I agree in thinking that the judgment of the Court of Appeal should be reversed, and that of North, J., restored.

Lord JAMES OF HEREFORD.—In this case the appellants as plaintiffs in the suit allege that they are entitled to the copyright in reports which appeared in the *Times* newspaper of certain speeches made by Lord Rosebery, and they seek to restrain the respondent, the defendant in the suit, from republishing such reports. The facts upon which the suit is founded are not in dispute. Lord Rosebery's speeches being of great interest to the public, reporters representing different journals attended meetings to be addressed by him, and took down the words uttered by him. It may be taken that all of the reporters did their best to report Lord Rosebery's words accurately. The reports of these speeches

appearing in the *Times* newspaper seem to represent a high degree of such accuracy. The respondent has copied these reports verbatim and reproduced them. For the purposes of this case it is admitted that the interests of the proprietors of the *Times* newspaper and of the reporter may be regarded as one.

The question therefore to be decided is whether there is any copyright in the reports of speeches made in public with the object that they should be published? The determination of this question depends upon the construction to be placed upon the provisions of the Copyright Act of 1842. It may be taken that the matter published in the columns of a newspaper is a book within section 2 of that Act, but the plaintiffs in the suit have to establish that the proprietors of the *Times* or the reporter are the authors of such book within the meaning of section 3. It is not alleged, and it cannot be said, that there is any authorship in the speech itself; that speech was created by the thought of Lord Rosebery, and published by him to the world when he spoke it. The plaintiffs do not claim copyright in the speech itself; but, as stated by Lord Lindley in the Court of Appeal, the report of the speech is something different from and beyond the speech; and the question to be solved is whether this difference represents a something of which anyone can be regarded as "the author" within the meaning of the Copyright Act. Whilst the Act supplies no definition of the word "author," and whilst it may be difficult for any judicial authority to give a positive definition of that word, certain considerations controlling the meaning of it seem to be established. A mere copyist of written matter is not an author within the Act, but a translator from one language to another would be so. A person to whom words are dictated for the purpose of being written down is not an author. He is the mere agent or clerk of the person dictating, and requires to possess no art beyond that of knowing how to write. The person dictating takes a share in seeing that the person writing follows the dictation, and makes it his care to give time for the writing to be made. But an "author" may come into existence without producing any original matter of his own. Many instances of the claim to authorship without the production of original matter have been given at the bar. The compilation of a street directory, the reports of proceedings in courts of law, and the tables of the times of running of certain railway trains have been held to bring the producers within the word "author," and yet in one sense no original matter can be found in such publications. Still there was a something, apart from originality on the one hand and mere mechanical transcribing on the other, which entitled those who gave these works to the world to be regarded as their authors.

Now what is it that a reporter does? Is he a mere scribe, does he produce original matter, or does he produce the something I have mentioned which entitles him to be regarded as an author within the Act? I think that from a general point of view a reporter's art represents more than mere transcribing or writing from dictation. To follow so as to take down the words of an ordinary, and certainly of a rapid, speaker is an art requiring considerable training, and does not come within the knowledge of ordinary persons. Even amongst professional reporters many different degrees of skill exist. Some reporters can take down the words of a speaker however rapidly he speaks, others less practised or proficient cannot, as the term is, "keep up with" the rapid speaker. Apart from the dealing with the rapidity of speech, there are some reporters whose ears and thoughts and hands never fail them, and who therefore produce reports of complete accuracy. On the other hand, reporters less skilled may be so deficient in this quality of accuracy as to produce reports which certainly tend to perturb the speakers whom they have endeavoured to report. Thus there seems to be a degree of skill in one class of reporters over the other. Again, one reporter may possess knowledge apart from stenography which may confer upon him the power of producing a report not within the capability of another of the same calling. Supposing a speech were delivered in a language little used, such as Persian or Turkish, only a reporter acquainted with such a language would be able to report it. Does the work resulting from such special knowledge mean nothing? The proprietor of a journal may have paid highly for obtaining a special report of this almost unreportable speech. May he not make a claim for protection against a rival journalist who seeks to make equal use of the report thus obtained? It may also be that the report has been obtained under circumstances of peculiar difficulty on the one hand, or of advantageous conditions on the other. Thus if a reporter attended a meeting of anarchists intended to be secret and made public their speeches, or if in former times a man had secreted himself in one of the Houses of Parliament and taken down the words of different speakers, may it not be contended that the reporters were doing something more than merely transcribing? After taking such matters as these into consideration, I have, after some doubt, come to the conclusion that a reporter of a speech under the conditions existing in this case is the meritorious producer of the something necessary to constitute him an author within the meaning of the Copyright Act of 1842, and that, therefore, the judgment of the Court of Appeal should be reversed.

Lord BRAMPTON.—The only substantial question in this case is whether the reporters who furnished to the *Times* the manuscripts containing the reports of Lord Rosebery's five speeches as they were published in that journal were the "authors" of those manuscripts within the meaning of the Copyright Act, 1842. If they were, they were the authors of books within the interpretation clause, section 2, and as such they would have been entitled to the copyrights thereof under section 3, but for the fact that such copyrights have by assignments become vested in the appellants, the proprietors of the *Times*.

The material facts which have led me to the opinion I am about to express are admitted, and may be very briefly stated. On the several occasions when the speeches were delivered, reporters for the *Times* and other newspapers attended by invitation to enable them to compose and write for publication in their respective journals descriptive articles of the occurrences, containing full and accurate reports of the speeches as they were delivered from the lips of the speakers. The reporters who represented the *Times*, with whom alone I have now to deal, were undoubtedly gentlemen of education, great ability, and long and varied experience in the duties of their vocation. They wrote the descriptive parts of their reports from personal observation. The speeches they took down in shorthand, word for word, transcribed them verbatim in longhand, carefully corrected and revised, and punctuated them, so that when they appeared in the columns of the *Times* they might, as perfectly as printed words could do, convey to the readers all that was to be seen or heard upon those occasions. From these reports all that appeared in the *Times* was first published to the world. It is obvious that the preparation of them involved considerable intellectual skill and brain labour, beyond the mere mechanical operation of writing. That the reports so published were "books" within the meaning of the Copyright

Act is undisputed; the great contention throughout the case has been whether the reporters were the "authors" of them; for unless they were they could not acquire any copyright in them, the third section of the Act conferring property in the copyright of a book only upon its author and his assigns.

North, J., before whom the case was first heard, held that although the reporter had no property in the speeches he was entitled to copyright in his report of them. The Court of Appeal reversed his ruling, and in a considered judgment emphatically stated that mere reporters were clearly not authors of what they report, that the Act was passed to protect "authors" not reporters, that a mere publisher of another man's verbal utterances could not acquire a copyright as the author of such publication; and they held "that in order that the first publisher of any composition may acquire the copyright in it he must be the author of what he publishes, or he must derive his right to publish from the author by being the owner of his manuscript, or in some other way." I can find nothing in the Act which compels me to assent to this view. A speech and the report of it are two different things, and the author of the one and the author of the other are presumably two different persons. The author of a speech is the author of language orally uttered by himself. The author of a report of a speech is the author of a writing containing the substance, or the words, of that speech. The speech must precede the report of it. The oral speech is not a "book"; the written report is. The book is the subject of copyright under section 3, and the property in such copyright in a book is in its author.

I am not concerned to-day in considering how and by what means the author of a speech can acquire the copyright and may preserve for himself the sole right to publish in print or in writing a report of it, for at no time has Lord Rosebery, either by word or action, indicated any desire or intention to do so. In making the speeches in question he published them freely, and without placing any restraint upon those who heard him from making whatever use they could lawfully make of his words as they came from his mouth. Of course, if no reporters had been present, or if, though present, none had taken down his lordship's utterances, those utterances must have remained unrecorded, and no question of copyright could have arisen, for there would have been no subject of copyright in existence; but let me suppose that, though unrecorded at the time, one of the hearers, with a peculiarly retentive and accurate memory, had some time afterwards from that unaided memory written a correct and verbatim report of the speeches, would he not have been the author of that report, and might he not have claimed the copyright of it, the product of his own mental effort of memory? Or suppose the speaker had before delivering his speech composed and written out what he intended to say, and in speaking, refreshing his memory as to his intentions by that which he had written, had given oral utterance to every word of it, and then presented his manuscript to a friend as a gift, with permission to publish it as he thought fit, could not that friend claim the copyright of such publication? What real difference is there between a manuscript so obtained and a book made by writing down on the spot the words then freely uttered and given by the speaker to any reporter present who chose to record them expressly for the purpose of publication in the journal he represented? Of course, a person who merely writes an article from the dictation and as the servant of another, can claim no property in what he so writes, for that writing belongs to his employer; but that is not this case. I do not agree that the question of the authorship of a book depends upon the literary quality of it. If a person chooses (and many do) to compose and write a volume devoid of the faintest spark of literary or other merit, I see no legal reason why he should not, if he desires, become the first publisher of it, and register his copyright, worthless and insignificant as it would be. The statute has prescribed no standard of merit in a book as a condition to entitle its author to become the proprietor of copyright in it; and, even if such standard were prescribed, I should think the merits of the book ought to be determined, having regard to the contents of the book itself, without inquiring as to whether any of the component parts of it emanated from the brain of some person other than the author of the book. Of course, if an author of a book is unscrupulous enough to pirate and include in it the protected composition of another, no registration could give him property in that which he had stolen, or protect him against an action for his piracy. In this case the reporter, without encroaching upon the right of anyone, has become the first publisher of "books" containing descriptive reports of the occurrences on the several occasions when Lord Rosebery's speeches were made. Nobody can say that such reports could be complete unless the speeches themselves were incorporated in them in some form or other; and if they were rightfully so incorporated it cannot, I think, be denied that in such report the speech, added to the descriptive passages, formed one book and one book only. True it is that the reporter was not the author of the speech, but he was the composer and author of the book. Without his brain and handiwork the book would never have had existence, and the words of Lord Rosebery would have remained unrecorded save in the memories of the comparatively few who were present on those occasions. In the descriptive passages of his report the language is his own; and although, as regards the speeches, he has given great value to his work by introducing verbatim the language of Lord Rosebery, he was strictly within his rights in so doing, and was clearly acting with the full sanction of his lordship, in order that, by its publication in the *Times*, the thousands of the readers of that journal might be truthfully and accurately informed of those intellectual and interesting utterances of Lord Rosebery which they had not been privileged to hear.

I think, for the reasons I have given, that the proprietors of the *Times* have copyright in the articles and reports in question. I am therefore of opinion that the judgment of the Court of Appeal should be reversed, and the decision of North, J., restored.

Lord ROBERTSON.—I am of the same opinion as the Court of Appeal.

The book published by the respondents against which injunction is sought consists of verbatim reports of certain speeches of Lord Rosebery. Prefixed to each speech there is a short note, explaining the occasion of the speech; but those notes are not taken from the *Times*. All that is taken from the *Times* consists of the words spoken by Lord Rosebery, without addition or subtraction.

Now it is important to observe that the Court of Appeal have not decided, as an abstract proposition, that no report can be copyright of the reporter. There are reports and reports. It may be remembered how, in his reports of the Parliamentary Debates, Dr. Johnson, according to his own avowal, "took care that the Whig dogs should not have the best of it"; and so largely do they bear the impress of the so-called reporter that, in some editions, those Parliamentary Debates are included in Johnson's works. Take another kind of report, not extinct in our own times. Some

extempore speakers do not speak in sentences, but in fragments of sentences; and yet next morning there appears, constructed out of those *disjecta membra*, a coherent and grammatical discussion of the subject. I can conceive cases where in truth the intellectual and literary contribution of the reporter may be as substantial as that of the speaker. But I mention such cases in order to say that we have here nothing of the sort. The case here is a case of shorthand reporting, pure and simple. It so happens that Lord Rosebery's speeches are so conceived and expressed as to require on the part of the reporter nothing but literal accuracy in order to their presentation to the public as literary compositions. In so saying I am in no way disparaging the gifts of the shorthand-writer; and, as the nature of his work is really of the essence of the present controversy, I dwell on it for a moment.

The reporters of the *Times* are educated gentlemen, as are many other practitioners of the art of stenography, while there are reporters less highly equipped in knowledge of literature and history. What is the difference between the educated and the less educated in reporting, let us say, Lord Rosebery? An allusion or a quotation is made by the speaker, more recondite or less hackneyed than those which do daily duty on the platform—the educated recognizes the allusion or the quotation and simply takes it faithfully down; the other reporter misses the point and tries to supply it himself and the passage is blundered. Or a phrase or *nuance* occurs, finer or more exquisite than the parlance of paragraphs; by the one man it is appreciated and exactly taken down, by the other it is rejected as incredible and is supplanted by some banality, foreign to the diction of the speaker but congenial to that of his reporter. Now the inference I draw from all this is that the contribution which education enables the good reporter to make to the speech is of a purely negative kind—he does not interfere, but faithfully acts as conduit. In fact, the merit of the reports now before the House is that they present the speaker's thoughts untinctured by the slightest trace or colour of the reporter's mind.

These observations apply to the stage of taking down in shorthand what the speaker says. The next stage, copying out the notes, is purely clerical work. Now I recognize the skill of the stenographer. I find that, for the reasons which I have mentioned, an educated man is the better qualified to be a faithful reporter. But I fail entirely to see how, in the widest sense of the term "author," we are in the region of authorship. A very striking illustration of the subject is obtained by remembering who, or rather what, is the rival of a good stenographer—it is the phonograph. In reporting the kind of speech of which I am speaking—the speech of allusion and of phrase—the phonograph, which has no literary taste, good or bad, and no intellect, great or small, will record Lord Rosebery's speeches better than the best of reporters. The appellants think that if the owner of a phonograph publishes the speech as taken down by the phonograph he is the author of the report and entitled to copyright. I should have thought (and think) this a *reductio ad absurdum* of the whole argument of the appellants.

When it is remembered that there is no manner of composition, as the term is generally used, even in the sense of arrangement, by a shorthand reporter, I find it difficult to understand what attribute of an author belongs to him. Some of the judicial decisions have indeed applied the words of the Act to very pedestrian efforts of the mind. But although time-tables and furniture catalogues are not great things, there has been structure and arrangement on the part of the maker. I think that the recording by stenography the words of another is in a different region from the making up of a time-table. I do not say it is lower or higher, but in a different plane, because there is no construction. Upon this clear principle I reconcile those decisions with the judgment which I am now supporting. Nor do I consider it legitimate to justify a novel application of the Copyright Act by treating its most extreme applications as if they represented its normal scope. I do not think that a sound method of dealing with any statute. I prefer the tone and the words of Lord Davey in 1894, when, in *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, 43 W. R. Dig. 50, he thought that the preamble of the Act might be usefully referred to for the purpose of ascertaining the class of works it was intended to protect. The word "author," occurring as it does, not in the preamble, but in the enacting section, seems to me to present a criterion consistent with the widest application of the Act to all who can claim, as embodying their own thought whether humble or lofty, the letterpress of which they assert the authorship. The fact that the man who speaks in public is not a competitor with the reporter for copyright has not the slightest effect in altering the intellectual relation of the reporter to the words of the speech, nor does it render less inappropriate the result of holding the statute to confer on the stenographer a reward which has no relation whatever to his art.

For these reasons I am unable to concur in the judgment proposed.

Appeal allowed.

Solicitors for appellants, *Soames, Edwards, & Jones.*

Solicitors for respondents, *Upton, Atkey, & Co.*

Court of Appeal.

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) — Nov. 23, 26.

In re BANK OF SYRIA.
OWEN AND ASHWORTH'S CLAIM.
WHITWORTH'S CLAIM. (*a.*)

Company—Directors—Powers of reduced directorate.

Articles of association provided that four named persons should be the first directors of a company; that the number of directors should not be more than nine or less than three; that continuing directors might act notwithstanding any vacancy; and that the directors might fix a quorum.

Held, that, although the number of directors was reduced to two and no quorum had ever been fixed, the two directors had power to charge the property of the company.

In re Scottish Petroleum Co., 31 *W. R.* 846, 23 *Ch. D.* 413, *followed.*

This was an appeal from the decision of Wright, J. (reported [1900] 2 Ch. 272, 48 W. R. Dig. 35), and raised the important question how far directors reduced in number below the minimum number stated in the articles of association can bind the company.

The Bank of Syria (hereinafter called the company) was incorporated under the Companies Acts, 1862 to 1890. The articles of association so far as material were as follows: "32. The following persons—viz., J. R. Pilling, H. H. Bolton, W. E. Whitworth, and

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

W. Parker, shall form the first council of administration . . . and the said J. R. Pilling shall be the president. 34. The council of administration is invested with full power for conducting the affairs of the company either by its own body or by delegation as may be deemed necessary in the interest of the company. 35. Without prejudice to the general powers conferred by the last preceding clause, and to any other powers conferred by the articles, it is hereby expressly declared that the council shall have the following powers . . . (*f*) to execute in the name and on behalf of the company such mortgages of the company's property (present or future) as they think fit. 38. The number of members of the council shall be not less than three nor more than nine. 42. The continuing council may act notwithstanding any vacancy. 53. The council may determine the quorum necessary for the transaction of business. 55. The council may delegate any of its powers to committees consisting of such member or members of their body as they think fit."

At the date of the transactions mentioned below the members of the council (hereafter called the directors) were reduced in number to two only—namely, Pilling and Whitworth. It was agreed between these two directors and Owen and Ashworth that Owen and Ashworth should lend the company £4,000, and on the 19th of September, 1894, they advanced that sum to the company. The cheque was made payable to Pilling, but the amount was credited to the account of Owen and Ashworth in the books of the company.

By a memorandum in writing under the common seal of the company stated to be "affixed hereto in the presence of Whitworth and Pilling, two members of the council of administration, it was witnessed that Owen and Ashworth had" this 19th day of September, 1894, opened a deposit account with the company in the sum of £4,000 and upwards, in consideration whereof the company agreed to pay interest thereon at £4 per cent., and charged certain unpaid capital of the company to secure the said £4,000.

The facts with regard to Whitworth's claim were that the company had overdrawn an account with Lloyd's Bank, which held certain securities given by the company acting only by Pilling and Whitworth. Lloyd's Bank having demanded payment, Whitworth, being still a director, paid off the amount owing and took a transfer of the securities.

The company having gone into liquidation Owen and Ashworth claimed to prove for the £4,000, but the liquidator rejected the proof on the grounds (1) that the alleged debt was incurred by the company at a time when there were only two directors, and they had no power to charge its uncalled capital; (2) that the £4,000 was not advanced to or for the use of the company; (3) that the lenders had accepted Pilling as their debtor in lieu of any claim they might have had against the company. He also rejected Whitworth's proof on the first ground.

Owen and Ashworth and Whitworth applied to Wright, J., to reverse the decision of the liquidator. The learned judge held that Owen and Ashworth's claim failed on the ground that they took back the money and re-lent it to Pilling, and that Whitworth's claim must be allowed on the ground that the two directors had power to bind the company. It was alleged, but not proved, that the council had passed a resolution fixing the quorum at three.

Jenkins, Q.C., and *Martelli*, for Owen and Ashworth, argued against novation, and that the company was still liable for the loan.

Reed, Q.C., and *P. Wheeler*, for the liquidator, argued that Whitworth being a director was in the position of a trustee, and as assignee with notice took subject to equities: *Bovey* v. *Smith*, 1 Vern. 60, 83.

Lord ALVERSTONE, L.C.J., said: In September, 1894, Owen and Ashworth advanced £4,000 to the company. There is some doubt what actually happened to the money, but on the 19th of September, 1894, Pilling and Whitworth gave to Owen and Ashworth a charge on the property of the company for the amount advanced, to which the seal of the company was affixed in the presence of two directors, and which was binding on the company. [His lordship then referred to the articles of association as above set out, and continued:] It is said that a resolution was passed fixing the quorum at three, but Wright, J., did not think the evidence on this point satisfactory, and, at all events, the business throughout had been conducted by two directors. This, however, does not affect the first appeal, which is covered by the decision in *In re Scottish Petroleum Co.*, 31 W. R. 846, 23 Ch. D. 413, in which article 83 was the equivalent of article 42 in the present case. Such an objection should not, however, bind third parties. Then it was said that there was an agreement with Pilling which amounted to novation, but it is very doubtful whether the document discharged the company, and on all the facts it was impossible to come to the conclusion that the company was discharged.

With regard to Whitworth's claim. The money was in the first instance borrowed from Lloyd's Bank, for which Whitworth became responsible by giving a promissory note, and Whitworth had a right to stand in the shoes of the bank. It is said that Whitworth, being a director, is a trustee, and the case of *Bovey* v. *Smith*, 1 Vern. 60, has been pressed upon us as showing that Whitworth is a trustee and affected with notice; but that case has no application to the present one, and Whitworth is not a trustee in the sense in which that term was used in the case referred to. There was no reason why Whitworth should not have the same rights against the company as his assignors, whose claim he had paid off. The appeal of the liquidator must therefore be dismissed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Appeal of Owen and Ashworth allowed. Appeal of liquidator in Whitworth's claim dismissed.

Solicitors, *R. H. Bentley; Carlisle, Unna, Rider & Heaton.*

From Q. B. Div. (A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Nov. 21.

TAFF VALE RAILWAY CO. *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS AND OTHERS. (*a.*)

Trade union—Action against trade union in registered name—Picketing — Injunction — Trade Union Acts, 1871 *and* 1876 (34 *&* 35 *Vict. c.* 31; 39 *&* 40 *Vict. c.* 22).

An action will not lie against a trade union in its registered name.

Appeal from an order of Farwell, J., sitting as vacation judge.

The action was brought against the Amalgamated Society of Railway Servants, Richard Bell, the general secretary, and James Holmes, the local secretary of the society, for an injunction to restrain them from watching or besetting, or causing to be watched or beset, the Great Western Railway Station at Cardiff,

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

or the works of the plaintiffs or any of them, or the approaches thereto, or the places of residence, or any place where they might happen to be, of any workmen employed by, or proposing to work for, the plaintiffs, or for any purpose except merely to obtain or communicate information, and from procuring any persons who might have or might enter into contracts with the plaintiffs to commit a breach of such contracts; and for other relief.

The plaintiffs took out a summons for an interim injunction until the trial of the action in the terms set out above, and the defendant society took out a summons asking that they should be dismissed from the action upon the ground that an action would not lie against a trade union.

Farwell, J., granted an injunction against the defendants Bell and Holmes, upon the authority of *Lyons* v. *Wilkins*, 45 W. R. 19, [1896] 1 Ch. 811; he also refused to strike out the defendant society from the action, and granted an injunction against them, holding that the action would lie against them.

The defendant society appealed.

Nov. 12.—*Haldane, Q.C.*, and *T. Bateman Napier* (*W. S. Robson, Q.C., S. T. Evans*, and *A. Clement Edwards* with them), for the defendant society.—The Trade Union Acts, 1871 and 1876, have nowhere incorporated a trade union, nor have these Acts authorized a trade union to sue and be sued in its registered name. The Act of 1871 legalized trade unions, whereas before that Act they were illegal associations as being in restraint of trade. When the Legislature wished to incorporate a society it did so in plain language—for instance, by section 21 of the Industrial and Provident Societies Act, 1893, and section 9 of the Building Societies Act, 1874. Moreover, the Legislature, in authorizing a trade union to be registered under section 6 of the Trade Union Act, 1871, took the language from section 6 of the Companies Act, 1862, which authorized incorporation of a company, carefully omitting the words making the company a corporate body. A trade union therefore cannot be sued in its registered name.

They referred to *Withnell* v. *Gartham*, 6 T. R. 388; *Ruck* v. *Williams*, 6 W. R. 622, 3 H. & N. 308; *Whitehouse* v. *Fellowes*, 9 W. R. 557, 10 C. B. N. S. 765; *Mersey Docks Trustees* v. *Gibbs*, 14 W. R. 872, L. R. 1 H. L. 93; *Roberts* v. *Page*, 1 Q. B. D. 476, 24 W. R. Dig. 111; *Rigby* v. *Connol*, 28 W. R. 650, 14 Ch. D. 482; *Wolfe* v. *Matthews*, 30 W. R. 838, 21 Ch. D. 194; *In re Amos*, 39 W. R. 550, [1891] 3 Ch. 159; *Temperton* v. *Russell*, 41 W. R. 321, [1893] 1 Q. B. 435; *Lyons* v. *Wilkins*; *Ellis* v. *Duke of Bedford*, 47 W. R. 385, [1899] 1 Ch. 494.

Sir Edward Clarke, Q.C. (*B. Francis Williams, Q.C.*, and *H. Holman Gregory* with him), for the plaintiffs.—The Trade Union Act, 1871, created a new body. Section 6 authorized a trade union to be registered, section 7 empowered a trade union to hold land, and section 8 spoke of the property of the "trade union." The Act, when looked at as a whole, authorized a trade union to be sued. The vesting of the property of trade unions in trustees was only done for the sake of convenience. A trade union could be proceeded against for penalties: sections 15, 16. The Legislature had created a new body, which acted by an executive committee. A person injured by the unlawful act of that body, whether it was a corporation or not, could ask for the protection of the court, and the court could grant an injunction against that body to restrain it from applying its funds towards the furtherance of that unlawful act. The learned judge was therefore right.

Haldane, Q.C., replied.

Cur. adv. vult.

Nov. 21.—A. L. SMITH, M.R., read the judgment of the court: This is an action brought by the Taff Vale Railway Co. against a trade union in its registered name of "The Amalgamated Society of Railway Servants," and against Richard Bell and James Holmes, officers of the union, for unlawful picketing, and it claims an injunction and other relief, which would include a claim for damages. No question upon this appeal arises as to the competency of the action against Bell and Holmes; the point made is that this action is not maintainable against the defendants, who constitute a trade union, consisting of a great number of persons, in the name of "The Amalgamated Society of Railway Servants." The point is important, for if a trade union can be sued in the manner proposed in this case the funds of the union will be liable to be taken in execution under a judgment obtained against the union in the society's name. Whether this ought to be so or not is one thing, which we have not to inquire into; whether it is so, that is, whether the union can be sued in the manner proposed, is another matter, and this we have to decide. Farwell, J., has held that this action is maintainable against the union in the society's name, and against this judgment it is that the members of the trade union appeal. The learned judge in the early part of his judgment says that which is undoubtedly the truth—namely, that "a trade union is neither a corporation nor an individual nor a partnership between a number of individuals," and in this we entirely agree. There can, in our judgment, be no doubt that at common law the defendants could not be sued in the name in which they are sued in this action any more than a tradesman could sue a defendant in the name of a West End club for goods supplied by him to that club, for the simple reason that the name of a club is not the name of a corporation nor of an individual nor of a partnership, which apart from statute are the only entities known to the law as being capable of being sued. In order, therefore, that this action can be maintained against the defendants in the name of "The Amalgamated Society of Railway Servants" there must be some statute enabling this to be done either by creating the society a corporation, or enacting that it may be sued in its registered name; and this, as the learned judge states—and in this we also agree—depends upon the true construction of the Trade Union Acts—*i.e.*, of the Acts of 1871 (34 & 35 Vict. c. 31) and the Act of 1876 (39 & 40 Vict. c. 22). Now, in considering these Acts, it is in the first place to be pointed out that there is no section empowering a trade union to sue or to be sued in its registered name, nor is there any provision as to constituting the society a corporation so that it might be sued as such. And this is the more remarkable if, as the learned judge holds, it was the intention of the Legislature that a trade union was to be sued in its registered name, seeing that when it was desired that a society should sue or be sued in its registered name the Legislature knew well how in plain terms to bring about such a result. For instance, in the Companies Act, 1862 (25 & 26 Vict. c. 89), by section 6, it is enacted that seven or more persons may be registered, and the section goes on to enact that after registration they shall form an incorporated company, with or without limited liability. The first part of the section is re-enacted in the Trade Union Act of 1871, but the last part about incorporation is pointedly omitted. Again, in the Building Societies Act, 1874 (37 & 38 Vict. c. 42), section 9 will be found as follows: "Every society now subsisting or hereafter

established shall, upon receiving a certificate of incorporation under this Act, become a body corporate by its registered name, having perpetual succession until terminated or dissolved in manner herein provided." Again, in the Industrial and Provident Societies Act, 1893, by section 21 it is enacted: "The registration of a society shall render it a body corporate by the name described in the acknowledgment of registry, by which it may sue and be sued, with perpetual succession and a common seal, and with limited liability; and shall vest in the society all property for the time being vested in any person in trust for the society; and all legal proceedings pending by or against the trustees of any such society may be prosecuted by or against the society in its registered name without abatement." It is true that the Amalgamated Society of Railway Servants is the registered name of the trade union sued, but how does this fact of itself, without more, render the society an entity capable of being sued in that name? The mere registration has no such effect. Farwell, J., does not suggest in his judgment that in the Trade Union Acts he can find any sections in terms authorizing an action against a trade union in its registered name, or that by the Acts trade unions are incorporated. But the learned judge says the Legislature has legalized it—*i.e.*, the trade union—and it must be dealt with by the courts according to the intention of the Legislature. The learned judge says: "Athough a corporation and an individual or individuals may be the only entities known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals, which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents; and such capacity, in the absence of express enactment to the contrary, involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents"—in other words, the liability of being sued in its registered name. It is with regard to this last paragraph, which is the basis of the judgment, that, with all submission, we cannot agree. When once one gets an entity not known to the law, and therefore incapable of being sued, in our judgment to enable such an entity to be sued an enactment must be found either express or implied enabling this to be done, and it is not correct to say that such an entity can be sued unless there be found an express enactment to the contrary. Where in the Trade Union Acts is to be found any enactment, express or implied, that a trade union is to be sued in its registered name? Express there is none, and it is clear that a trade union is not made a corporation, as the Acts we have above referred to show is constantly the case with other societies. That the Legislature has omitted to enact this in the Trade Union Acts of 1871 and 1876 is clear; and in our judgment this has not been omitted by error. That a trade union is legalized by the Act of 1871 we do not doubt, nor does the learned judge; and this Act, together with the Acts of 1875 and 1876, was the charter of trade unions, as I pointed out in *Lyons* v. *Wilkins*; but it is not enacted in the charter that a trade union is to be liable to be sued in its registered name, as contended for by the plaintiffs, so that they may take the funds of the union in execution. Such a liability is not to be found in the Acts, and in our judgment the intention of the Legislature which the learned judge relies on is only to be found in what the Legislature has enacted. Moreover, by section 9 of the Act of 1871 it is expressly enacted that the trustees of a trade union registered under the Act or any other officer of the union who may be authorized to do so by the rules may bring or defend any action in any court of law touching the property of the trade union—a most remarkable section if, as is argued for the plaintiffs and held by the learned judge, the purview of the Act is that a trade union can be sued in its registered name. If this were so, what is the good of this section expressly enabling the trustees or other officer of the union to sue or be sued in respect of property? We can find nothing in the Acts wherefrom the inference is to be drawn that the Legislature has enacted that a trade union can be sued in its registered name; but, by reason of the language of the Acts and what is omitted therefrom, if necessary, we should find the exact contrary. In our judgment, for the reasons above, a trade union cannot be sued, as is now attempted. Sections 15 and 16 only show as regards penalties that the funds of the union may be got at. The cases which are relied on by the learned judge do not effect the question which now arises for decision. They relate to the extent of liability imposed by the Legislature on a body which was either incorporated (*Mersey Docks Trustees* v. *Gibbs*, or empowered to be sued by one of its officers: *Ruck* v. *Williams*, *Whitehouse* v. *Fellowes*. The case of *Temperton* v. *Russell*, referred to during the argument in this court, seems to have been argued and decided upon the assumption that an action such as the present was not maintainable. As there is no statute empowering this action to be brought against the union in its registered name, it is not maintainable against the Amalgamated Society of Railway Servants *eo nomine*, and these defendants must, therefore, be struck out; the injunction against them must be dissolved; and this appeal, as regards these defendants, must be allowed with costs here and below.

Appeal allowed.

Solicitors for the plaintiffs, *Riddell & Co.*, for *Meyrich & Davis*, Cardiff.

Solicitors for the defendant society, *Williamson, Hill, & Co.*, for *Ingledew & Sons*, Cardiff.

Appeal.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) Nov. 15.

BAILEY v. PLANT. (*a.*)

Master and servant—Employer's liability—Accident—Compensation—Enforcement of award—Committal order—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. II., cl.* 8.

A county court judge has jurisdiction to enforce an award under the Workmen's Compensation Act, 1897, *by means of an order of committal under section* 5 *of the Debtors Act*, 1869.

Appeal from an order of the judge of the Crewe County Court under the Workmen's Compensation Act, 1897.

The applicant for compensation was a boy who was injured by an accident while in the employment of the respondent.

The arbitrator appointed under the Workmen's Compensation Act, 1897, awarded the applicant a sum to be paid forthwith, and also 2s. 6d. a week as compensation; and a memorandum thereof was sent to

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the registrar of the county court for the district and was recorded under Schedule II., clause 8, of the Act.*

The weekly payments having fallen into arrear, the applicant applied to the county court judge for a committal order under section 5 of the Debtors Act, 1869.

The county court judge found as a fact that the respondent had had ample means to pay the arrears since they became due, and that, if it were an application founded upon an ordinary judgment of the court, he would have made an order of committal; but he held that a committal order could not properly be described as a mode of enforcing a judgment, it being merely a process for punishing a contumacious debtor. He accordingly held that he had no jurisdiction to make a committal order.

The applicant appealed.

Minton-Senhouse, for the applicant.—The process of committal under section 5 of the Debtors Act, 1869, is not merely punitive in its character; it is substantially civil process in the nature of execution: *Ex parte Dakins*, 16 C. B. 77. [A. L. SMITH, M.R.—What jurisdiction have we to entertain this appeal? How does this case come within the appeal clause in the schedule to the Act of 1897? However, without deciding the point or making a precedent of it, we will hear the appeal.] A memorandum which has been recorded under clause 8 of Schedule II. can be enforced in the same manner as a county court judgment. A committal order under the Debtors Act has always been regarded as a mode of enforcing a judgment. It is a process of coercion to compel the judgment debtor to pay the debt. County court judges have differed upon this point: see *Johnson* v. *Adshead*, Minton-Senhouse's Workmen's Compensation Cases, vol. 2, p. 158. The county court judge had jurisdiction to make the committal order.

He also referred to *Cobham* v. *Dalton*, 23 W. R. 865, L. R. 10 Ch. App. 655; *Stonor* v. *Fowle*, 36 W. R. 742, 13 App. Cas. 20.

The respondent did not appear.

A. L. SMITH, M.R.—We will assume that we have jurisdiction to hear this appeal, though I desire to say that I express no opinion upon the point. The county court judge has held that he has no jurisdiction to enforce the memorandum which has been recorded, by means of a judgment summons—that is, by the process of imprisonment. The question is whether an order of committal under section 5 of the Debtors Act, 1869, is a means of enforcing a judgment in a county court. By clause 8 in Schedule II. to the Workmen's Compensation Act, 1897, a memorandum when recorded stands in the same position for the purposes of enforcement as a judgment of a county court. One mode of enforcing a county court judgment is by issuing execution against the goods of the judgment debtor. Another mode, which is a very common mode, is to coerce the judgment debtor into obeying the order of the court by sending him to prison under section 5 of the Debtors Act, 1869. This latter process is guarded by the condition that the process cannot be put into operation unless the judgment debtor has or has had since the date of the judgment the means to pay the judgment debt. The learned county court judge has, in a very careful judgment, held that the process is merely a process for punishing a contumacious debtor, and is not a means of enforcing a judgment. I will assume that the process is partly punitive. But in my opinion it is also a means of forcing a judgment debtor to obey the judgment of the court by sending him to prison for a term not exceeding six weeks. It is therefore a mode of enforcing a judgment by the coercion of imprisonment, and it is a very usual and common mode of enforcing the payment of small debts in the county court. An order of committal under section 5 of the Debtors Act, 1869, is therefore a means of enforcing a judgment, and this appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. I think that the process by which a judgment debtor can be committed to prison for non-payment of the judgment debt continues to be the same now as it was when the case of *Ex parte Dakins* was decided. I will only read a passage from the judgment of Williams, J., though the other judges expressed similar opinions. That learned judge said: "That satisfies my mind that the commitment is equivalent to an imprisonment under an attachment for non-payment of a debt, or, in other words, that it is substantially civil process." It seems clear to me, when one examines the matter, that the real purpose of the process of committal under section 5 of the Debtors Act, 1869, is to put pressure on the judgment debtor to make him pay the debt. One reason that leads to that conclusion is that the judgment debtor, however contumacious he may be, can always avoid the imprisonment by paying the debt. That, to my mind, shows that the process is not entirely punitive, because it gives the contumacious debtor a discretion whether he will accept the punishment or not. Another matter, which underlies the whole of the criminal law, is that a person who has served the term of his imprisonment thereby purchases his freedom. In the case of a committal under section 5 of the Debtors Act, 1869, by an express provision in that Act, the imprisonment does not operate as a satisfaction or extinguishment of the debt. Therefore the judgment debtor suffers the imprisonment and the offence is left untouched. That seems to me to be another reason to show that the process of imprisonment under the Debtors Act is for the purpose of putting pressure upon the debtor to compel him to pay the debt. It is true that the Legislature has limited the application of this mode of enforcing payment of the debt to the case of contumacious debtors, but when once the process is applied it becomes a mode of enforcing payment of the debt, and is not merely punitive in its character. It is robbed of two of the ordinary elements of punishment—that is to say, the judgment debtor can elect to avoid the punishment, and the serving of the imprisonment does not get rid of the debt. For these reasons I think that the award can be enforced by a committal order under section 5 of the Debtors Act, 1869.

STIRLING, L.J.—I have arrived at the same conclusion, though not without hesitation, because I was impressed by the very careful and able reasoning of the county court judge. I think that to a certain extent the reasoning is well founded. Committal orders under section 5 of the Debtors Act, 1869, are to a certain extent punitive. What is the effect of a memorandum which has been recorded under clause 8 of Schedule II. to the Act? It amounts to a direction to pay the sums awarded. Supposing such a direction were embodied in a county court judgment, it would amount to an order of the court, to which obedience would be due on the part of the person against whom it was made. I think that clause 8

* By Schedule II., clause 8: "Where the amount of compensation under this Act shall have been ascertained . . . a memorandum thereof shall be sent . . . to the registrar of the county court for the district . . . who shall . . . record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment."

intends that all the means which a county court judge has at his disposal for enforcing obedience to an order of the county court shall be available to the person in whose favour the memorandum is recorded. The point at which I part company from the learned county court judge is where he says that a committal order cannot properly be described as a mode of enforcing a judgment. I agree that it is not a process by which the debt is satisfied. But it is a process for enforcing obedience to the order of the court. In my opinion the judge has put too narrow a construction on clause 8.

Appeal allowed.

Solicitors, *Taylor, Hoare, & Pilcher*, for *R. R. Edleston*, Crewe.

Appeal.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) Nov. 14.

FERGUSON *v.* GREEN. (*a.*)

Master and servant—Employers' liability—Accident—Compensation — Building — Scaffolding — Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that, at the time of the accident, the workman was standing on a structure of trestles and boards in one of the rooms of an unfinished house, and was engaged in plastering the ceiling. The arbitrator found that the structure was not a "scaffolding" within section* 7 *of the Act. The county court judge set aside that finding.*

Held, that, though Maude *v.* Brook, 48 *W. R.* 290, [1900] 1 *Q. B.* 575, *showed that such a structure of trestles and boards might be a "scaffolding" within section* 7, *yet the question whether it was a "scaffolding" within the section was a question of fact for the arbitrator, and that his finding was not open to review.*

Appeal from a decision of the judge of the Oldham County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a working plasterer.

The employers, who were master plasterers, had entered into a contract with a building owner to do the plasterers' work in the construction of some cottages.

The cottages had been built by means of external scaffolding, and, the roofing having been completed, the scaffolding had been removed.

The applicant was engaged in the work of plastering the walls and ceilings of the rooms in the cottages. In order to reach the ceilings and higher parts of the walls of one of the rooms he constructed a platform by means of two trestles, across which he placed loose boards. On this platform he stood while he worked, and he placed on the platform a table on which he manipulated the plaster. Finding that the table was unsteady he used a hammer for the purpose of mending it, and while he was doing so a nail flew into his eye and caused him serious injury.

The case was heard by an arbitrator appointed by the county court judge. The arbitrator found that at the time of the accident the applicant was employed in a building which exceeded thirty feet in height, and which was "being constructed"; but he found that it was not being constructed "by means of a scaffolding" within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, and on that ground he held that the case did not come within the Act, and that therefore the applicant was not entitled to any compensation. But he submitted for the consideration of the county court judge the question of law whether it was open to him to find that in this case the construction was not "by means of a scaffolding" within the meaning of the section.

The county court judge reversed the decision of the arbitrator, being of opinion that the question whether the arrangement of trestles and boards was a scaffolding within the meaning of the section was a mixed question of fact and law, and not a pure question of fact as the arbitrator had thought; and that, having regard to the case of *Maude* v. *Brook*, 48 W. R. 290, [1900] 1 Q. B. 575, the arbitrator had misdirected himself on that question.

The employers appealed.

Ruegg, Q.C., for the employers.—The county court judge was wrong in interfering with the arbitrator's finding on a question of fact—viz., that the arrangement of trestles and boards used in this case was not a scaffolding. It is true that in *Maude* v. *Brook*, the arbitrator found that a similar arrangement of trestles and boards was a scaffolding, and the majority of the court (Collins, L.J., dissenting) upheld his award. But the ground of the decision was merely that there was evidence on which he could so find. In *Wood* v. *Walsh & Sons*, 47 W. R. 504, [1899] 1 Q. B. 1009, the arbitrator found that a plank resting on a window-sill and a rung of a ladder was not a scaffolding. The county court judge having reversed his decision, this court restored the award of the arbitrator on the ground that his finding of fact ought not to be interfered with. In *Hoddinott* v. *Newton, Chambers, & Co.*, 47 W. R. 499, [1899] 1 Q. B. 1018, the county court judge found that an arrangement of planks attached to the iron columns of a building was a scaffolding, and the court refused to interefere with his finding. Thus all the decisions are in favour of this appeal, as showing that the court will not interfere with the finding of an arbitrator on the question whether an alleged scaffolding is scaffolding or not, provided only there is any evidence on which his finding can be supported. The county court judge made the mistake of treating *Maude* v. *Brook* as a decision that an arrangement such as was used in this case is, in point of law, a scaffolding within the meaning of the section.

B. G. Wilkinson, for the applicant.—The arbitrator misdirected himself in interpreting the word "scaffolding" as used in the section. He adopted the interpretation put upon the word by Collins, L.J., in *Maude* v. *Brook* instead of that put upon it by the majority of the court.

A. L. SMITH, M.R.—This is an appeal by employers from a decision of a county court judge. The arbitrator found that the arrangement of trestles and boards on which the workman was standing at the time when he met with the accident was not a scaffolding within the meaning of section 7, sub-section 1, of the Workmen's Compensation Act, and he accordingly refused to make an award in favour of the workman. The county court judge has set aside that finding and given his decision in favour of the workman. We have consistently refused, ever since these cases began to come before us, to give any definition in law of the word "scaffolding" as used in this section. We have said that all questions of fact under this Act are to be determined by the arbitrator,

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

and that the only jurisdiction which this court has under the Act is to deal with questions of law, and we have refused to interfere with any finding on a question of fact if there was any evidence to support it. We said that in one of the earliest cases under the Act. Since then there have been three cases, *Wood* v. *Walsh & Sons*; *Hoddinott* v. *Newton, Chambers, & Co.*, and *Maude* v. *Brook*, in each of which we have refused to meddle with the finding of fact of the tribunal below as to whether that which was alleged to be a scaffolding was a scaffolding or not. In *Maude* v. *Brook* the facts were not distinguishable in substance from the facts of this case. An arrangement of trestles and boards was used for the purpose of plastering the ceilings and walls of a room in a house, and the county court judge found that that arrangement was a scaffolding. Rigby, L.J., and I held that there was evidence on which he could so find, and we declined to interfere. Collins, L.J., came to the conclusion that the trestles and boards used in that case afforded no evidence of a scaffolding within the meaning of the Act. In my opinion the county court judge in this case cannot properly overrule the arbitrator's finding on a question of fact if there is any evidence to support it. It is said that the result of our decision is that there are two contradictory findings with regard to exactly similar facts. But it is always possible for different tribunals to arrive at different findings on a question of fact. I think that the arbitrator's decision must stand, and that the appeal must be allowed.

COLLINS, L.J.—I am of the same opinion. The result of the cases is this, that an arrangement of trestles and boards such as was used here and in *Maude* v. *Brook* may come within the legal definition of "scaffolding" as that word is used in the Workmen's Compensation Act, and that whether in any particular case such an arrangement does come within the definition is a question of fact. I myself thought that the question whether a particular arrangement is a scaffolding was not a question of pure fact, but was a mixed question of law and fact, and that an arrangement of this description was not a scaffolding. But it is now settled as law that such an arrangement may be a scaffolding within the meaning of the section. Therefore any arbitrator who now directed himself on the hypothesis that it could not be a scaffolding would be misdirecting himself. In this case the arbitrator has arrived at the conclusion that, as a matter of fact, it was not a scaffolding. It is difficult to see how, on the cases, he could so decide. But I think he was at large to consider, as a question of fact, whether it was a scaffolding or not. It seems to me that the county court judge pressed the decision of this court in *Maude* v. *Brook* too far.

STIRLING, L.J.—I have arrived at the same conclusion. We are bound by the judgment of the majority of the court in *Maude* v. *Brook*. That decides that, as a matter of law, such an arrangement as was used in this case may be a scaffolding, but not that it is necessarily so. That is a question of fact, and is to be decided by the arbitrator in each particular case.

Appeal allowed.

Solicitors for the employers, *W. Hurd & Son*, for *Payne, Galloway, & Payne*, Manchester.

Solicitors for the applicant, *E. A. W. Wragg*, Manchester.

From Chan. Div. (Rigby, Vaughan Williams, and Romer, L.JJ.) — Nov 7, 8.

In re WHITAKER.
WHITAKER *v.* PALMER. (*a.*)

Administration—Voluntary settlement—Insolvent estate—Postponement of voluntary debts—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.

By virtue of section 10 *of the Judicature Act,* 1875, *whatever rules are for the time being in force in bankruptcy with regard to debts provable are to apply in the administration of insolvent estates in the Chancery Division.*

Consequently, voluntary creditors of a deceased insolvent are entitled to rank pari passu *with creditors for valuable consideration, the old rule in Chancery, whereby their claims were postponed, being now abrogated.*

Decision of Cozens-Hardy, J. (*ante, p.* 56, [1900] 2 *Ch.* 676), *confirmed.*

In re Maggi. Winehouse *v.* Winehouse, 30 *W. R.* 729, 20 *Ch. D.* 545, *overruled.*

This was an appeal from a decision of Cozens-Hardy, J. (reported *ante*, p. 56, [1900] 2 Ch. 676).

William A. Whitaker, by a voluntary settlement dated the 1st of August, 1889, covenanted to pay the trustees of the settlement an annuity of £250 during his own life and £5,000 within six months after his death, with interest in the meanwhile, to be held on trust for a lunatic son of the settlor.

The settlor died on the 6th of March, 1898.

At the date of his death there was owing to the trustees of the settlement a small sum in respect of arrears of the annuity and the capital sum of £5,000 and the interest thereon.

The estate of the settlor was insolvent, and the question was whether the amount due to the son's trustees ought to be postponed to debts for valuable consideration.

Cozens-Hardy, J., held that the old rule of the Court of Chancery under which voluntary debts were postponed must be regarded as abrogated by section 10 of the Judicature Act, 1875, and that the trustees must be paid *pari passu* with other creditors.

The creditors for value appealed.

Eve, Q.C., and *E. Ford*, for the appeal.—Section 10 of the Judicature Act, 1875, imports into the administration the bankruptcy rules as regard proof only, and not those as regards payment: *Smith* v. *Morgan*, 5 C. P. D. 337, 28 W. R. Dig. 4; *In re Maggi, Winehouse* v. *Winehouse*, 30 W. R. 729, 20 Ch. D. 545 Though *In re Leng, Tarn* v. *Emmerson*, 43 W. R. 406, [1895] 1 Ch. 652, which was followed by Stirling, J., in *In re Heywood*, 46 W. R. 72, [1897] 2 Ch. 593, may appear inconsistent with these cases, the real ground of that decision was, that there was no debt which was provable in bankruptcy, and consequently there could be none provable in the administration.

Vernon Smith, Q.C., and *S. B. L. Druce*, for the voluntary creditors, were not called on.

Capron, for the executor of William Augustus Whitaker.

RIGBY, L.J.—The question is whether, in the administration of an insolvent estate in the Chancery Division, the old and undoubted rule of the Court of Chancery that creditors for valuable consideration took precedence over those whose debts were not founded upon a valuable consideration must, not-

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

withstanding section 10 of the Judicature Act, 1875, still prevail. In my opinion we cannot so hold.

Section 10 provides, among other things, that the rules for the time being in force in bankruptcy as to debts provable shall apply in the administration by the High Court of the estate of a deceased insolvent, and upon the true construction of these words I think they do not simply deal with the proof of debts. These same rules are to prevail "as to debts and liabilities provable," and I cannot read those words as meaning simply "as to the proof of debts and liabilities." I think they mean that whatever general rules are in force in the Court of Bankruptcy for the time being with regard to debts and liabilities provable shall apply in the administration of insolvent estates in the Chancery Division. Now undoubtedly in bankruptcy (it does not matter how it came about) the rule as to debts and liabilities provable is that all debts and liabilities, whether contracted for value or not, shall rank *pari passu* I think we should be cutting down unduly the plain words of section 10 if in the present case we allow an old rule of the Court of Chancery to override the present rule with regard to bankruptcy. If ever that rule should be altered it would, of course, be a different matter, though I do not suggest that it ought to be altered. But it is now a fixed rule that voluntary debts shall be on an equality with debts for value. If this view conflicts with the decisions in *Smith* v. *Morgan* and *In re Maggi* I can only say that we are not bound by those decisions, and if and so far as it is necessary (which probably means altogether) we must overrule them. The appeal will be dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think that section 10 of the Judicature Act, 1875, is artistically drawn, or that it is very easy to construe. Perhaps that is the reason why the decisions on the section are not very easy to reconcile. I should have thought that the decision of the Court of Appeal in *In re Leng* was absolutely inconsistent with the decision of Fry, J., in *In re Maggi*. But Lindley, L.J., in his judgment in *In re Leng* seems expressly to take the view that the two decisions are reconcilable.

One thing is quite clear, viz., that the section does not mean that in all respects the results of the bankruptcy and the consequent administration of the estate and the results of a death of an insolvent and the consequent administration of his estate are to be absolutely identical. It was long ago decided that, notwithstanding section 10 of the Judicature Act, 1878, you must still apply in bankruptcy only those bankruptcy rules, whether statutory or otherwise, which go to augment the bankrupt's assets as against third persons. So far it is plain that there is intended to be a distinction between bankruptcy and the consequent administration and death followed by administration of the insolvent estate of a deceased. The section itself seems to me to point to an intention that the uniformity (if I may use the expression) shall be limited to some particular subjects, because it says "the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively." This section specifies four heads as to which uniformity is for the future to prevail. And in my view, we have, in construing the sections, to determine what are the limits of the four heads there specified, and then to see whether this rule of administration in Chancery, whereby voluntary creditors were postponed to creditors for value, is still to prevail.

It seems to me that this rule of Chancery administration comes under the first of the four heads—viz., the rule in bankruptcy as to the respective rights of secured and unsecured creditors. In my opinion, if those words were properly read they do not mean, as Fry, J., in *In re Maggi* assumed that they do, only the respective rights of the two classes of creditors as against each other, but that they mean also the respective rights of those two classes *inter se* and there can be no doubt that, as regards the rights of the creditors *inter se* the rule in bankruptcy differed from the rule in Chancery. In bankruptcy, once given a provable debt, all the debts proved were entitled to payment of dividend *pari passu*. In Chancery a voluntary debt might be proved, but as regards payment of dividend it would be postponed to the creditors for value. It seems to me that under section 10 of the Judicature Act, 1875, the right of the creditors *inter se* must now be regulated by the bankruptcy rule and not by the old Chancery rule. For these reasons I agree with Rigby, L.J.

ROMER, L.J.—I also agree. The important words in section 10 of the Judicature Act, 1875, for the purposes of this appeal are, I think, those which provide that the bankruptcy rules "as to the debts and liability provable" shall prevail in the administration of an insolvent estate in the High Court. The section does not say that only the rules as to what debts and liabilities shall be provable at all are to prevail; it speaks of all rules as to debts and liabilities provable.

It appears to me that if there be a rule in bankruptcy that a debt shall be provable, but only in an inferior position to ordinary debts, that would be a rule "as to" that provable debt within the meaning of the section. And so if there be a rule in bankruptcy that certain debts shall be provable, but in a superior position, and equally to my mind if the rule in bankruptcy be that certain debts and liabilities are provable in no superior or inferior position to ordinary debts, but *pari passu* with them, this would be a rule "as to" those debts.

This has, I think, been decided in principle by the Court of Appeal in *In re Leng*, and in my opinion that case cannot properly be distinguished in the way which has been suggested in the present appeal. The case of *In re Maggi* can, I think, no longer be regarded as an authority. The attention of Fry, J., when he decided that case, was not directed to, and he did not in his judgment deal with, those words of section 10 which form the basis of the decision in *In re Leng*, and which form the basis of our present decision.

Appeal dismissed.

Solicitors, *Gamlin, Burdett, & Gamlin*, for *Cotterell & Sons*, Birmingham; *Ridsdale & Sons*, for *Gower & Craven*, Cardiff; *Belfrage & Co.*, for *H. J. Chaldecott*, Dorking.

From Q. B. Div. (A. L. Smith, Vaughan Williams, and Romer, L.JJ.) — June 21, 22; July 3, 1900.

IREDALE AND ANOTHER v. CHINA TRADERS' INSURANCE CO. (a.)

Ship—General average—Sacrifice of freight.

The plaintiffs, the owners of a ship, chartered her to carry a cargo of coals from Cardiff to Esquimault, and insured the chartered freight with the defendants. During the voyage the coals began to heat, and the master

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

decided, for the safety of the ship, freight, and cargo, to jettison part of the cargo and bear up for the River Plate. It was necessary, for the safety of the whole adventure, for the vessel to put into Buenos Ayres, where the coal was surveyed, and was found to be in such a condition that it would have been impossible to have carried it with safety to Esquimault. The vessel abandoned her voyage and returned to the United Kingdom with another cargo, and the chartered freight was wholly lost. While at Buenos Ayres the ship and her cargo—both the portion landed and the portion remaining on board—were in safety, but no part of the cargo could be reloaded and carried with safety to Esquimault.

Held, that there was no general average sacrifice. The bearing up for the River Plate was not a general average sacrifice as regards the cargo, so as to be the subject of a general average contribution. The common danger had ceased when the cargo was sold.

Judgment of Bigham, J., 48 *W. R.* 48, [1899] 2 *Q. B.* 356, *affirmed.*

Appeal from the judgment of Bigham, J. (reported 48 W. R. 48, [1899] 2 Q. B. 356), at the trial without a jury upon the following agreed statement of facts.

The plaintiffs own the iron ship *Lodore*, and by charter dated the 10th of February, 1897, chartered her to load coals at Cardiff for Esquimault at 19*s.* 9*d.* per ton delivered.

By a policy dated the 3rd of March, 1897, they insured the chartered freight thereunder, valued at £1,650, with the defendants, against, *inter alia*, loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight.

The *Lodore* proceeded to Cardiff and there loaded a full cargo of coals, and sailed on the 29th of March, 1897, on the insured voyage.

On the 26th of May, 1897, the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo and to bear up for the River Plate.

About forty tons were jettisoned, and the *Lodore* subsequently anchored in Buenos Ayres Roads on the 29th of May, 1897.

Between that date and the 25th of June, 1897, cargo was from time to time discharged, and various surveys were held upon the coals, and it was found the coals continued hot and would heat still further if the voyage was proceeded with. Accordingly, on the 25th of June, 1897, the coals were condemned and were ultimately sold.

The vessel abandoned her voyage to Esquimault and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

It was necessary for the safety of the whole adventure for the vessel to put in Buenos Ayres as aforesaid, and it was reasonably certain that had she continued on her direct voyage the temperature of the coal would have continued to rise till spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimault. When and while she was at Buenos Ayres the ship and her cargo—both the portion landed and the portion remaining on board—were in safety, but after she reached Buenos Ayres no part of the cargo could have been reloaded and/or carried with safety to Esquimault in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

The policy and charter-party, the protest dated the 11th of August, 1897, and the average statement dated the 15th of March, 1898, with the survey report as therein set out, may be referred to as parts of this special case.

This action, in the defence to which all underwriters interested similarly to the defendants concur, is defended to test the question whether, by way of set-off and deduction from the total loss on the policy, which is admitted, the defendants are entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as shipowners, from the amount due on the policy.

It is not intended to allege or rely on improper condition of cargo as a defence to any claim there may be. The court is to have power to draw all inferences of fact, and the parties agree to leave the adjustment of figures, on such principle as may be laid down, to an average adjuster.

The learned judge gave judgment for the plaintiffs. The defendants appealed.

Carver, Q.C., and *Scrutton*, for the appellants.—There was a general average sacrifice of the coal for the common preservation of all the interests when the ship turned off her course and bore up for the River Plate: *Anglo-Argentine Live Stock and Produce Agency* v. *Temperley Shipping Co.*, 48 W. R. 64, [1899] 2 Q. B. 403. The loss of the freight dates back to that time. The voyage was abandoned when the captain decided to bear up for the River Plate and put into Buenos Ayres. He did so in the hope of saving the freight. This case is distinguishable from *Shepherd* v. *Kottgen*, 26 W. R. 120, 2 C. P. D. 585. There the mast which was cut adrift was evidently worthless at the time. The point raised in the present case was left undecided in *The Knight of St. Michael*, 46 W. R. 396, [1898] P. 30.

Counsel also cited *Pirie* v. *Middle Dock Co.*, 4 Asp. Mar. Cas. 388, 44 L. T. Rep. 426, 29 W. R. Dig. 202; *Columbian Insurance Co.* v. *Ashby*, 13 Peters 331 (American); *Barnard* v. *Adams*, 10 Howard 270 (American); *Attwood* v. *Sellar*, 28 W. R. 604, 5 Q. B. D. 286.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the respondents.—The freight was lost because the heated condition of the coal rendered it dangerous to reship it when at Buenos Ayres. At that time there was no common peril, and consequently there would be no general average sacrifice: *Walthew* v. *Mavrojani*, L. R. 5 Ex. 116, 18 W. R. C. L. Dig. 93.

Counsel also referred to *Job* v. *Langton*, 4 W. R. 641, 6 E. & B. 779; *Svensden* v. *Wallace*, 13 Q. B. D. 69, 32 W. R. Dig. 191; and Carver on Carriage by Sea, p. 399.

Carver, Q.C., in reply.—The captain put into Buenos Ayres for the general safety of all concerned; all that followed was a consequence of his so doing and constitutes a sacrifice. The abandonment of the voyage was a consequence, and so was the sacrifice of the freight.

July 3.—The judgment of the COURT was read by

A. L. SMITH, L.J.—This is an action by shipowners upon a policy of marine insurance by which the defendants underwrote for the plaintiffs the chartered freight of coals, valued at £1,650, upon a voyage from Cardiff to Esquimault in the plaintiffs' ship *Lodore*, and the perils insured against were "loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight."

It is not disputed by the defendants that the chartered freight was lost by reason of the perils insured against within the meaning of the policy (*The Knight of St. Michael*), and that for this loss the defendants are liable to the plaintiffs. But the defendants contend that upon the facts of this case there has been a general average loss which is the subject of a general average contribution payable by

the plaintiffs, and that for the amount of this contribution the defendants are entitled to have credit given to them when they pay to the plaintiffs the amount recoverable under the policy.

The question argued before us was whether, as regards the coal, upon the delivery of which at Esquimault the freight would have become payable, there has been a general average sacrifice which would form the subject of a general average contribution, and, as this was the only point taken or argued, I pass on without observing upon the form in which the question is raised. My brother Bigham has held that the defendants' contention is ill-founded, and they appeal.

It has long since been established that to constitute a general average loss so as to be the subject of a general average two things at least must coexist: (*a*) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship and cargo; (*b*) such sacrifice or expenditure must be made at the time when a common danger to ship and cargo existed, for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general contribution. Bowen, L.J., in *Svensden* v. *Wallace*, 13 Q. B. D., at p. 84, thus expresses himself as to what constitutes a general average sacrifice. He says: "It is essential at the outset to bear in mind two things—the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo." The sacrifice must be "made for the common safety in a time of danger." What the learned Lord Justice here says about a general average sacrifice is only what will be found laid down in many cases and laid down in the textbooks of authority, though clothed in different language.

We have nothing in this case to do with any expenditure, for it is not suggested that there has been any. What we have to consider is whether there has been a general average sacrifice of cargo so as to be the subject of a general average contribution by the owner of ship and freight. It is said by the defendants that there was a general average sacrifice of the coal when the ship turned off her course and bore up to the River Plate, followed, as it was, by an abandonment of the voyage after the ship arrived at Beunos Ayres. To appreciate this argument it seems to me important to consider, first, the position of matters, and what took place when the captain of the ship determined to bear up to the River Plate; and, secondly, what took place after the ship's arrival there. The admitted facts are that upon the 26th of May, 1897, when the ship was on her voyage from Cardiff to Esquimault the coals became heated, and the master decided "for the safety of the ship, freight, and cargo, to bear up for the River Plate." I leave out of consideration the forty tons of cargo which was jettisoned, for no question now arises thereon. I do not doubt that the bearing up under the circumstances above mentioned for the River Plate was a general average act, which would have given rise to a general average contribution if, in consequence of such act, any expenses or loss to the cargo were thereby occasioned. But no question of expenses arises, for none were incurred, and there was no loss to the cargo thereby occasioned. In these circumstances how can it be said that the bearing up for the River Plate was a general average sacrifice as regards the cargo so as to be the subject of a general average contribution? No part of the cargo was in fact sacrificed, and *a fortiori* there was no general average sacrifice so as to be the subject of a general average contribution. For the defendants it was argued that the voyage was abandoned when the captain decided to bear up for the River Plate, but in my judgment it clearly was not. The master bore up for the River Plate and went into Buenos Ayres for the purpose, if possible, of continuing the voyage after he had got the cargo in order. He did not bear up for the River Plate for the purpose of abandoning the voyage. That was wholly foreign to his purpose. The bearing up for the River Plate was no abandonment of the voyage at all, and it is wholly erroneous to say that it was. Now, the ship with the coals on board—other than those jettisoned—arrived at Buenos Ayres on the 29th of May, 1897, and remained there till the 25th of June, 1897, on which day the coals were condemned and ultimately sold. The admission is that "when and while the ship was at Buenos Ayres the ship and her cargo were in safety." The sale of the cargo, which, in my opinion, constituted the abandonment of the voyage, was not a general average sacrifice which forms the subject of a general average contribution, for the common danger had ceased, and the ship and cargo had then been in safety for about a month. The suggestion that the sale of the coal at Buenos Ayres was made for the common safety of ship and cargo to enable the vessel to bring her voyage and the common adventure to a successful issue will not assist the defendants, for, as was pointed out by Bowen, L.J., in *Svensden* v. *Wallace*, a sacrifice for the safety of the common adventure does not constitute a general average sacrifice according to the law of England; nor, indeed, was it argued that it did. What was argued for the defendants was that there had been a general average sacrifice of cargo when the ship bore up for Buenos Ayres, and at that time there was a common danger. I agree that then there was a common danger, but then there was no general average sacrifice of cargo. I am of opinion that there has been no general average sacrifice in this case, and consequently the right to a general average contribution never arose, and that this appeal must be dismissed with costs. I agree with Bigham, J.'s, inference of fact that at Buenos Ayres the coal was hopelessly lost.

Appeal dismissed.

Solicitors, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool; *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

High Court of Justice.

Chan. Div. Buckley, J. — Aug. 3, 7, 8, 1900.

JACOBS v. REVELL. (*a*.)

Vendor and purchaser — Conditions of sale — Specific performance — Misdescription — Compensation — Possessory title.

If what a vendor offers to convey is substantially different from what he offered to sell, he cannot enforce specific performance, and the purchaser is entitled to have the contract rescinded and his deposit paid back.

It is not an invariable rule that a condition excluding compensation for misstatements, only applies to trivial errors; but such a condition cannot be relied on by a

(*a*.) Reported by J. F. WALEY, Esq., Barrister-at-Law.

vendor seeking to force upon the purchaser what he did not contract to buy.

Flight *v.* Booth, 1 *Bing. N. C.* 370, *and the cases on conditions providing for compensation or no compensation, considered.*

On an open contract a possessory title must be shown, not for twelve years only, but for forty years.

Action.

On the 21st of June, 1899, the defendants offered for sale by public auction a property which was described in the particulars as "a valuable freehold residential and building estate adjoining and overlooking Shortwood Common, known as Shortwood House and grounds, . . . the whole covering an area of about 5a. 0r. 26p.," and it was therein stated as follows: "The grounds are well matured and prettily arranged, with selected shady walks through shrubberies bordering the fine sheet of ornamental water on Shortwood Common."

With the particulars was a plan on which the property was uniformly coloured pink up to the margin of the ornamental water, and on the plan was a note that it was "intended for the information of intending purchasers, and to show the position of the property," and although believed to be correct its accuracy was in no way guaranteed. The sale was subject to conditions, clause 5 of which was as follows: "The property is believed, and shall be taken to be correctly described in the particulars as to quantity and otherwise, and is sold subject to all rights of way and other easements (if any) affecting the same, and if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendors to the purchaser in respect thereof." The plaintiff became purchaser at the price of £1,920, and paid a deposit of £192 to the auctioneers, and he and the auctioneers signed a document whereby the plaintiff acknowledged himself the purchaser of the property described in the particulars and delineated in the plan.

The plaintiff in his requisitions on title objected that title was shown to four acres and three roods only, and that no title was shown to a piece of the land adjoining the lake, and these requisitions not being satisfactorily answered, declined to complete the purchase and requested a return of his deposit. This being refused, the plaintiff brought the above action, the object of which was to have the contract rescinded and the deposit of £192 returned. The defendants counterclaimed for specific performance of the contract and payment of the balance of the purchase-money with interest.

At the trial Buckley, J., found that parts of the land coloured pink on the plan, including a strip running along the lake, were not comprised in a deed dated in 1870, which formed the root of title, that the shrubbery was not included, that the acreage of the property was only four acres and three roods, and that a person through whom the vendors claimed, and who had purchased the property in 1870, had lived there till 1897, and had at various times from 1880 to 1884 added the portions above-mentioned by way of encroachment, but that in 1884 or 1885 the local board had notice of what was going on, and had had posts driven into the ground showing the true boundary of the property, which were retained notwithstanding this owner's objections.

Astbury, Q.C., and *R. B. Yardley*, for the plaintiff.—The misdescription is material, and the defendants cannot rely on condition 5.

H. Terrell, Q.C., and *J. Tanner*, for the defendants.—A condition excluding the right to compensation is not to be confined to what is trivial and immaterial: *In re Terry and White*, 34 W. R. 379, 32 Ch. D. 14. [They also cited on this point *Flight* v. *Booth*, 1 Bing. N. C. 370; *Whittemore* v. *Whittemore*, L. R. 8 Eq. 603, 18 W. R. Ch. Dig. 143; Fry on Specific Performance (3rd ed.), pp. 554, 579; and *M'Queen* v. *Farquhar*, 11 Ves. 467.] [BUCKLEY, J., referred to *In re Fawcett and Holmes*, 42 Ch. D. 150, 38 W. R. Dig. 207; and *Astbury* to Dart's Vendors and Purchasers (6th ed.), p. 158.] At any rate the defendants have a possessory title, and are entitled to an inquiry as to title: *Games* v. *Bonnor*, 33 W. R. 64.

Astbury in reply.—*In re Arnold, Arnold* v. *Arnold*, 28 W. R. 635, 14 Ch. D. 270, shows that the misdescription is material. Possession for forty years must be proved under the suggested possessory title: *Douglas* v. *London and North-Western Railway*, 3 K. & J. 173, 5 W. R. Ch. Dig. 83.

BUCKLEY, J.—The plaintiff seeks to have his contract rescinded and delivered up to be cancelled, or in the alternative to have it declared that the defendants have not shown a good title to the estate in accordance with the agreement, and he also asks to have his deposit returned to him. The defendants counterclaim for specific performance of the contract. In *Knatchbull* v. *Grueber*, 3 Mer. 124, 126, where the bill was by a vendor for specific performance with an allowance to the defendant by way of compensation for a part of the estate to which the plaintiff was unable to make a good title, Lord Eldon said, "This court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled to take that which he did not mean to have," and in *In re Arnold, Arnold* v. *Arnold*, 28 W. R. 635, 14 Ch. D. 270, at p. 279, both James, L.J., and Bramwell, L.J., cited that passage and expressed a hope that the court would continue in that course. I have therefore to see what is the contract between the parties, and what, in such an action, are their rights. I am not at liberty to modify the contract.

At the root of the cases of this class is *Flight* v. *Booth*, 1 Bing. N. C. 370. That was an action by a purchaser to recover his deposit—a purely common law action. The principles which the court applied were purely principles of law, and Tindal, C.J., after referring to some of the decided cases as to misdescription, and stating that there was a discrepancy between them, said at p. 377: "We think it is, at all events, a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may be reasonably supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale." [BUCKLEY, J., read the condition in *Flight* v. *Booth* which provided for compensation being allowed for error or misstatement, and continued:] It was therefore a stronger case than the present. Even where there is a condition for compensation one must consider whether the purchaser has got the subject-matter which he agreed to buy. If he does not get what he contracted to buy, he may be entitled to say that he will not have compensation for it. The next case is *Portman* v. *Mill*, 2 Russ. 570, a vendor's suit for specific performance. There was a contract to purchase a farm containing 349 acres or thereabouts, be the same more or less. In fact the farm consisted of so many customary acres, being less than the number of statute

acres stated by 100 acres or upwards. The contract contained a stipulation that the premises should be taken at the quantity stated, whether more or less. It was a clause of no compensation, like that in the present case. Lord Eldon said, at p. 574: "I never can agree that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as is alleged to exist here." Here I touch upon the question as to how far a trivial or substantial error makes a difference. The condition is not confined to trivial errors, nevertheless if you get to a point such as that in *Flight* v. *Booth*, that the purchaser never got what he contracted to buy, the vendor cannot enforce specific performance. The next case, *Whittemore* v. *Whittemore*, was the case of a sale in a suit. The facts were as if the vendor were seeking specific performance. The property was stated in the particulars to contain 753 square yards or thereabouts, and was found to contain only 573 square yards, and the condition provided that compensation should not be allowed in respect of any error, misstatement, or omission in the particulars. It was held that the condition only applied to small errors and did not cover so large a deficiency, and that the purchaser was entitled to compensation.

In a vendor's action to enforce specific performance, if the property which he offers to convey so differs from that which he offered to sell as to present a substantial difference within *Flight* v. *Booth*, the vendor cannot enforce specific performance.

In *Cordingley* v. *Cheeseborough*, 4 D. F. & J. 379, 10 W. R. Ch. Dig. 79, the purchaser sought for specific performance with an abatement of the purchase-money. The contract contained a clause excluding compensation, but the purchaser alleged that he was getting less than he contracted to buy and asked for specific performance with compensation; he wanted to buy. The court decreed specific performance, without compensation. Lord Westbury, L.C., said: "In deciding this question it must be recollected exactly what is the nature of the present suit. It is not the suit of a vendor seeking to enforce a specific performance. It is the case of a purchaser coming for specific performance, but insisting that he is entitled by virtue of the contract to a deduction from his purchase-money." In other words, he was insisting on something which was not in the contract. *In re Terry and White* does not throw much light on the general question. In that case there was a clause excluding compensation, but the purchaser nevertheless asked for compensation. The vendor was not willing to give compensation, and under another condition he annulled the sale, and it was held that he was right in so doing. [His lordship read from the first part of the judgment of Lindley, L.J., the passage beginning with the words "In all actions for specific performance," in the course of which Lindley, L.J., said with regard to the clause excluding compensation, "It was contended that such conditions . . . only applied to comparatively trivial and unimportant errors, misstatements, and misdescriptions. . . . The proposition is only true in certain classes of cases."] The classes of cases to which he there refers are those in which a vendor is seeking to force upon a purchaser what he did not contract to buy. Lindley, L.J., pointed out that *Portman* v. *Mill* was a vendor's action, and Lord Eldon's observations must be taken with reference to such actions, and that in *Whittemore* v. *Whittemore* the purchaser did not seek specific performance, but, on the contrary, resisted it unless compensation was made.

Going back to *In re Arnold*, where there was a condition excluding compensation except such, if any, as the judge in chambers should direct, the property was held to be so substantially and materially different from what was offered for sale that the purchaser was entitled to be relieved of his purchase. The last case to which I will refer is *In re Fawcett and Holmes*, in which there was a clause allowing compensation. It was an appeal by a purchaser from an order of North, J., in chambers overruling objections to title. Lord Esher said, 42 Ch. D., at p. 157: "If there had been no compensation clause the court would have had to deal with the case according to the inherent powers of a court of equity, but here the case is within the terms of a contract into which the parties have entered, and the court must compel the purchaser to fulfil it," and Collins, L.J., referred to *Flight* v. *Booth*.

In that state of the law what I have to look to is this—the purchaser says, as in *Flight* v. *Booth*, "Pay back my deposit and rescind the contract." The vendors then rely on condition 5, but *Flight* v. *Booth*, is an answer to them if the misdescription is substantial. I arrive at the conclusion of fact that the property which the vendors offered for sale was property which they had not got.

The purchaser says that if he had known that those parts of the property were not included in the sale he would not have purchased. Therefore he is right, and, as in *Flight* v. *Booth*, he is entitled to rescind.

Another defence set up was that the vendor had a good possessory title, but that defence fails by reason of what the local board did in 1885. They marked out the true boundaries of the property. Wallace was always entitled to go over the boundaries of his land on to the lake and the common, and when doing so he was not exercising possessory rights. Moreover, this being an open contract so far as these outlying parts are concerned, a possessory title must be shown, not for twelve years only, but for forty years. Under these circumstances the plaintiff is entitled to rescind the agreement, and I order it to be delivered up to be cancelled, and the deposit to be returned with interest at 4 per cent. The defendants must pay the costs of the action, and I dismiss the counterclaim with costs.

Judgment for the plaintiff.

Solicitors for the plaintiff, *F. W. & H. Hiltery.*

Solicitor for defendants, *Aris Tickner.*

Q. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 7.

In re AN ARBITRATION BETWEEN STRINGER AND RILEY BROTHERS. (*a.*)

Arbitration—Award—Umpire functus officio—*Power to remit—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 10, *sub-section* 1.

An umpire made an award in an arbitration which was taken up by one of the parties. The award did not deal with all the questions submitted by the agreement of reference. The umpire thereupon made a second award, which he substituted for the first award.

Held (following Mordue *v.* Palmer, 19 *W. R.* 86, *L. R.* 6 *Ch. App.* 22), *that, after making the first award, the umpire was* functus officio, *and that the second award was therefore bad; but that the court had power, under section* 10, *sub-section* 1, *of the Arbitration Act*, 1889, *to remit the case to the umpire for reconsideration.*

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Application to set aside an award in an arbitration.

By a written submission to arbitration certain questions arising under a lease and an agreement for a lease was referred to two arbitrators, who were empowered to appoint an umpire. The submission embodied the provisions of the first schedule to the Arbitration Act, 1889.

An umpire was appointed. He held a sitting and heard the arbitrators, but the parties had no legal representatives, and a copy of the submission was not given to the umpire. He made an award which was taken up by one of the parties. The award did not deal with all the questions submitted by the agreement and did deal with certain matters which were outside the agreement. This was pointed out to the umpire by the party who had taken up the award. The umpire thereupon, having obtained a copy of the submission, destroyed the award, and made a fresh award in which he dealt with all the questions referred to in the submission, and none other.

Germaine, in support of the application.—After making the first award the umpire was *functus officio*, and had no power to make a second award. It is therefore bad and ought to be set aside: *Mordue* v. *Palmer*, 19 W. R. 86, L. R. 6 Ch. App. 22. The only power of amendment or correction possessed by an umpire is that conferred by section 7 (*c*) of the Arbitration Act, in the case of a clerical mistake or error arising from any accidental slip or omission.

L. Sanderson, for the umpire, against whom a charge of personal misconduct was made.

Roskill, against the application.—It is apparent on the face of the first award that it did not purport to be made under the submission. It is therefore a mere nullity, and the second award stands as the only award made under the submission. But if the court should be of opinion that the second award is bad, then there is power under section 10 of the Act to remit the matter referred, to the reconsideration of the umpire, and this is a case in which the matters should be remitted: *Hooper* v. *Balfour*, 62 L. T. Rep. 646.

Germaine, in reply.—The second award being declared invalid, there is no case which can be remitted to the umpire.

Lord ALVERSTONE, L.C.J.—In this case an award was made by an umpire; an objection to it has been taken of a somewhat curious kind. A copy of the submission to arbitration was not given to the umpire. The umpire, thinking that he had learnt from the statements of the arbitrators what the questions in dispute were, made an award. But the award did not deal with all the matters in issue. The award was taken up by one of the parties and it was pointed out to the umpire that the award was not in accordance with the submission. The umpire then made a second award.

In my opinion the case of *Mordue* v. *Palmer* is a binding authority, showing that after making the first award the umpire was *functus officio*, and that the second award is therefore bad. Section 10, subsection 1, of the Arbitration Act, 1889, enacts, however, that "In all cases of reference to arbitration the court or a judge may from time to time remit the matters referred or any of them to the reconsideration of the arbitrators or umpire." I think that the present case is one in which it is right that the court should exercise the jurisdiction and power conferred by that section. The case will therefore be sent back to the umpire for his reconsideration.

With regard to the allegation against the umpire of personal misconduct it is now admitted that there is no foundation for that allegation.

KENNEDY, J.—I entirely concur.

Case remitted.

Solicitors, *Robbins, Billing, & Co.; J. E. & H. Scott*, for *George H. Lewis*, Blackburn; *Williamson, Hill, & Co.*, for *Marsden & Marsden*, Blackburn.

Q. B. Div.
(Lawrance and Kennedy, JJ.) Oct. 31.

YATES v. TERRY. (*a*.)

County court—Practice—Garnishee summons—Attachment of debt—Attachment of part of a debt—Balance in hands of garnishee—County Court Rules, ord. 26a, r. 3; Form 156a.

A garnishee summons issued by a county court attaches the whole of the moneys owing or accruing due from the garnishee to the judgment debtor, and an assignment by the judgment debtor of the balance of such moneys over and above the amount of the judgment debt is therefore invalid.

Rogers v. Whiteley, [1892] *A. C.* 118, *followed.*

Appeal from the decision of the judge of the Liverpool County Court.

On the 20th of February, 1900, the respondent was ordered by the Palatine Court of Liverpool to pay £50 1s. 6d. to Henderson.

On the 22nd of February a garnishee summons was served upon the respondent in an action brought by Jones against Henderson in the Liverpool County Court, in which Jones had recovered judgment for £37 18s. 4d.

The summons was in accordance with Form 156a of the County Court Forms, 1889.

On the 23rd of February notice was given to the appellant of an assignment by Henderson to the respondent of £16 17s. 8d. out of the sum due to Henderson.

On the 15th of March a second garnishee summons was served on the appellant in respect of a judgment, the amount of which, together with that in respect of which the first garnishee summons was served, exceeded the amount of the appellant's debt to Henderson. Thereupon the appellant paid the whole £50 1s. 6d. into court.

The respondent afterwards brought an action on the assignment to recover from the appellant the sum of £12 3s. 2d., the balance of the money which would have been in the appellant's hands over and above the judgment debt, in respect of which the first garnishee summons was obtained.

The learned county court judge gave judgment for the plaintiff.

Form 156a of the County Court Forms, 1889, is as follows: "Whereas the plaintiff at a court holden at on the day of 18 , obtained a judgment [or an order] against C. D., of , for [or for payment of] the sum of for and costs, which judgment [or order] remains unsatisfied. And whereas the plaintiff, having filed an affidavit stating that you are indebted to the said C. D., you are hereby summoned to appear at a court to be holden at on the day of 18 , at the hour of in the noon, to show cause why an order should not be made upon you for the payment of the amount of the said judgment [or payable under the said order], or so much thereof as shall

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

equal the amount of the debts due and owing and accruing from you to the said C. D.

"And take notice that from and after the service of the summons upon you all such debts are attached to answer the said judgment [or order], and that if you shall pay the said debts to the said C. D., or otherwise dispose of them, you will be liable to be committed for contempt."

Ord. 26, r. 3, of the County Court Rules provides that the summons shall, when served on the garnishee, "bind in the hands of the garnishee all debts due, owing, or accruing from him to the debtor liable under the judgment or order."

Cuthbert Smith, for the appellant.—The assignment on which the respondent based his claim was bad because the first garnishee summons bound the whole of the moneys in the hands of the garnishee (see *Rogers* v. *Whiteley*, [1892] A. C. 118, 40 W. R. Dig. 184), in which case it was held that a garnishee order *nisi* attached all debts owing and accruing due from the garnishee to the judgment debtor in the hands of the garnishee as banker, and that the garnishee was therefore right in dishonouring cheques which the judgment debtor drew on the balance over and above the amount of the debt. So here as long as the first garnishee summons remained unsatisfied the appellant could not have paid the respondent, and he was right in disregarding the notice of assignment.

Segar, for the respondent.—The case of *Rogers* v. *Whiteley* is not in point, because the terms of the garnishee summons in use in the county court are not identical with the terms of the garnishee order *nisi* in use in the High Court, to which that case related. The words "all such debts" in the attachment clause of the summons meant so much of the debts due and accruing from the garnishee as were sufficient to satisfy the judgment debt.

LAWRANCE, J.—The learned county court judge was wrong. The terms of the county court garnishee summons and the High Court garnishee order *nisi* are in effect the same. The case is therefore governed by *Rogers* v. *Whiteley*.

KENNEDY, J.—I think the appellant acted rightly in not paying the balance over and above the amount of the first judgment debt to the respondent. I think that this is so because I cannot distinguish the county court summons from the High Court order *nisi*, and because we are accordingly bound by *Rogers* v. *Whiteley*.

Appeal allowed.

Solicitors for the appellant, *Abbott & Co.*, for *Bielby & Welby*, Liverpool.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Yates & Co.*, Liverpool.

Court of Appeal.

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) — Dec. 3.

In re WELLBORNE. (*a*.)

Solicitor—Costs—Taxation at instance of cestui que trust*—Bill paid by trustees more than twelve months previously—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 39, 41.

Section 41 *of the Solicitors Act*, 1843, *has a general application, and refers to all modes of taxation previously specified in sections* 37 *to* 40.

The court, therefore, has no power to the order taxation under section 39 *more than twelve calendar months after payment.*

Decision of Kekewich, J. (48 *W. R.* 375, [1900] 1 *Ch.* 857), *reversed.*

This was an appeal from a refusal of Kekewich, J., to discharge an order for taxation of costs made in chambers.

On the 16th of January, 1900, L. D. Bowditch, who was a beneficiary under the will of her father and entitled to one moiety of his residuary estate, applied by summons in chambers for an order that a bill of costs which had been paid by the trustees of the will to their solicitors in November, 1896, might be referred to taxation. Kekewich, J., in chambers, on the 5th of March, 1900, having looked into the bills and being of opinion that some of the items appeared to be extravagant, made an order under section 39 of the Solicitors Act, 1843, referring the bill to taxation. A motion was then made to the court on behalf of the solicitors to discharge the order. Kekewich, J., held that the power of the court under section 39 was discretionary and not controlled by section 41 and refused the motion with costs. From this decision the solicitors now appealed.

P. O. Lawrance, Q.C., and *Stallard*, for the solicitors.

Warrington, Q.C., and *O. L. Clare*, for the beneficiary.

Lord ALVERSTONE, L.C.J., said there was considerable doubt in this case, and it was very difficult to say what was the true meaning of sections 37 to 41 of the Solicitors Act, 1843. Looking at section 41 there was reasonable doubt as to whether it was of general application to all the preceding sections or only applied to sections 37 and 38. There was a good deal to be said in favour of both views. With regard to the authorities there was, on the one hand, a continuous series of decisions beginning with *In re Downes*, 5 Beav. 425, before Lord Langdale; and on the other there was the case of *In re Drake*, 22 Beav. 438, which seemed to limit the section, and the opinion of Fry, L.J., in *In re Chowne*, 52 L. T. Rep. 75, 33 W. R. Dig. 63. Whatever might be the true meaning of sections 37-41, if construed strictly and now for the first time, a continuous course of decisions for the last fifty years and upwards commencing with *In re Downes* had laid down the practice not to order the taxation of a solicitor's bill of costs if twelve calendar months had elapsed since the payment, and that practice could not now be disturbed except by express legislation. The appeal must therefore be allowed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Solicitors, *Wellborne & Son; Chester & Co.*

Appeal.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Nov. 14.

HATHAWAY v. ARGUS PRINTING CO. (*a*.)

Master and servant—Employers' liability—Accident—Compensation — Continuous employment — Weekly earnings—Contract to work two days in the week—Casual earnings from same employers—Earnings from

(*a*.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

other employers—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1).

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the applicant entered into a contract of employment with his employers to work for them on two days in every week at certain wages. He was injured by an accident in the course of such employment in the third week of his service. On the other days of each week he was free to work as he pleased; sometimes he did casual work for the same employers, sometimes he did work for other employers.*

Held, that the applicant's contractual employment was continuous employment, and that his "average weekly earnings" within the meaning of the First Schedule to the Act were the wages he received weekly under his contract of employment, and that he was not entitled to have taken into account either the earnings he received from other employers or the earnings he received for casual work for the same employers.

Appeal from an award of the deputy-judge of the City of London Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation entered into the service of the employers as a printer's cutter on Thursday, the 1st of March, 1900. By the agreement of employment he was to work for them on Thursday night and Friday night in every week at the wages of 8s. 8d. for each night. The employment was to be determinable by a week's notice. Under this agreement he worked for them on Thursday and Friday nights, the 1st and 2nd of March, and again on Thursday and Friday nights, the 8th and 9th of March, and again on Thursday night, the 15th of March. On the morning of Friday, the 16th of March, he met with an accident in the course of his employment.

During the rest of each week he had been free to work as he pleased. On some days he had worked for the same employers, when they had work to give him; on other days he had worked for other employers.

His average weekly earnings from casual work for the same employers were 14s. His average weekly earnings from other employers were 8s. 8d.

The deputy-judge held that the applicant's "average weekly earnings," within the meaning of Schedule I., par. 1 (*b*), of the Workmen's Compensation Act, were 17s. 4d.—*i.e.*, the weekly wages which he earned under his agreement with the employers. He accordingly made an award for a weekly payment of half that sum—viz., 8s. 8d.

The applicant appealed, and there was a cross-appeal by the employers.

Minton-Senhouse, for the applicant.—The amount for the weekly payment awarded ought to be increased. The deputy-judge ought, in calculating the applicant's average weekly earnings, to have taken into account his weekly earnings from casual work for the same employers. *Price* v. *Marsden & Sons*, 47 W. R. 274, [1899] 1 Q. B. 493, shows that it is not necessary that all the earnings which are taken into account should have been received in respect of the same kind of employment or under the same contract of employmett. The deputy-judge ought also to have taken into account the applicant's weekly earnings from other employers.

He referred also to *Williams* v. *Poulson*, 16 Times L. R. 42; *Chandler* v. *Smith*, 47 W. R. 677, [1899] 2 Q. B. 506; *Jones* v. *Ocean Coal Co.*, 47 W. R. 484, [1899] 2 Q. B. 124; and *Small* v. *McCormick*, 1 Ct. Sess. Cas., 5th series, 883.

Arthur Powell, for the employers.—The applicant is not entitled to any compensation, as he does not bring himself within the Act at all. The Act only applies to workmen who have been in continuous employment with the same employers for at least two weeks: *Lysons* v. *Andrew Knowles & Sons* (*Limited*), 48 W. R. 408, [1900] 1 Q. B. 780. Here the applicant was not in continuous employment with the same employer. At any rate he was not in such continuous employment for two weeks.

He cited also *Appleby* v. *Horseley Co. and Lovatt*, 47 W. R. 614, [1899] 2 Q. B. 521.

A. L. SMITH, M.R.—This is an appeal by a workman, who complains that a weekly payment which has been awarded to him under the Workmen's Compensation Act is not enough. The award was made on the basis of his average weekly earnings being 17s. 4d., which was the sum he received weekly under a contract of employment. He says that other weekly sums received by him ought to have been taken into account—viz., 14s. earned from the same employers for casual labour, and 8s. 8d. earned from other employers. I may sweep away this last contention at once. We have already said that earnings received from masters other than those in whose employment the man was injured cannot be taken into account.

The applicant here had a firm contract with his masters to work for them on Thursday night and Friday night in every week for 8s. 8d. a night. The accident happened on the Thursday night or Friday morning of the third week. The county court judge thought that the applicant's average weekly earnings consisted of the aggregate of the two sums of 8s. 8d. It is said on the part of the employers that the county court judge ought not to have awarded the applicant any compensation at all. It is argued that, in order that a workman may be brought within the purview of the Act, it is necessary that he should be in the employment of his master for two weeks. We have said that. In *Lysons* v. *Andrew Knowles & Sons* we held that a workman is not within the Act unless he has been for at least two weeks in the employment of the employer in whose service he sustained the injury for which he seeks compensation. But we held that on this ground only, that by section 1 of the Act the workman is to be compensated in accordance with the schedule, and by the schedule the compensation is to be based on the man's average weekly earnings, and unless a case is brought within the schedule it does not come within the Act at all, and it is impossible to ascertain a man's weekly earnings unless there are at least two weeks to average. No one has ever said that it was necessary for the workman to be employed every day of the two weeks. In my opinion, if there were a contract to employ a man for two days a week during four weeks, there would be no difficulty in ascertaining the average weekly earnings. And I see no difficulty in ascertaining the average weekly earnings in this case. But then the employers say that the employment must be continuous. We have so held, but why was this employment not a continuous employment? There was a continuing contract for work from week to week. It seems to me that here there was no break in the continuity of the contracted service. I therefore think that the county court judge was right in taking into account the weekly earnings of 17s. 4d.

Then the applicant says that there ought also to be taken into account the wages which he received from his masters for casual service. Was that casual service continuous employment? In my opinion there was no continuity about it. Neither do I think that casual jobs can be added on to contractual service so as to get continuous employment. I think that the

county court judge was right, and that this appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. So far as regards the applicant's employment on two days in each week there is no doubt that he comes within the Act. He is not taken out of the Act by reason of any inability to apply the schedule to this case. There were two weeks over which his weekly earnings can be averaged. During those weeks he was in the employment of the same employers, though the contract of employment was only to work for two days in each week.

Then there is the other point, whether casual labour for the same employers can be brought in to swell the average amount of his weekly earnings. In my opinion his casual labour cannot be said to be work done in the same employment. We have said that where a workman has been in the service of the same employer with intervals, he is not necessarily entitled to have the whole period taken into account, and that it is for the court to ascertain whether he has been in the same employment during the whole period, and that the employment must be continuous. Was this continuous employment? It does not follow because the intervals are short that it is the same employment. I think that there must be some *nexus* supplied by a contract express or implied, and that in the absence of such *nexus* mere casual attendances do not constitute continuous employment. The work in question was given to the applicant on casual engagements, and was not part of his contractual employment. I do not think it was part of the same employment so as to enable us to take it into account in averaging his weekly earnings.

STIRLING, L.J.—I have come to the same conclusion. We must follow the previous cases, and apply them to the present case. Here the applicant worked for his employers for two days in every week for more than two weeks under a contract of employment. There is nothing to exclude him from being entitled to compensation according to his average weekly earnings under that employment. Then there is the question whether earnings received by him from the same employers on other days may not be taken into account in computing the compensation. It has been held that the earnings to be taken into account must have been received in the service of the same employers. I have a difficulty in seeing why casual earnings received from the same employers may not be included, but I do not disagree with my learned brethren on this point.

Appeal dismissed, and cross-appeal dismissed.

Solicitors for the applicant, *Griffith & Gardiner.*

Solicitors for the employers, *W. Hurd & Son.*

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) Oct. 30.

In re J. L. YOUNG MANUFACTURING CO. (LIMITED). YOUNG *v.* J. L. YOUNG MANUFACTURING CO. (LIMITED). (*a.*)

Practice—Evidence—Interlocutory affidavits—Hearsay evidence—Grounds of "information and belief"—Omission to state such grounds—Costs—Rules of the Supreme Court, 1883, *ord.* 38, *r.* 3.

(*a.*) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

Interlocutory affidavits containing statements of the deponent's "information and belief" must in all cases state the sources of such "information and belief," in accordance with the provisions of ord. 38, *r.* 3, *otherwise they will be regarded by the court as inadmissible as evidence, and the cost of their preparation, so far as relates to such statements, must be borne by the party responsible for them.*

This was an appeal from an order of Stirling, J., refusing to admit the claim of one, Ashford, to be considered a debenture-holder in the J. L. Young Manufacturing Co. (Limited).

The order was made in the course of an ordinary debenture-holders' action, in which the usual inquiries had been directed to be taken in chambers as to who were the debenture-holders in the company.

The master found against Ashford's claim, and this finding was approved by Stirling, J. From this order Ashford now appealed, and it appeared that the affidavits used on either side before the master and in the court below contained statements made on the "information and belief" of the deponents, without indicating, as is enjoined by ord. 38, r. 3, of the Rules of the Supreme Court, 1883, the sources of such information and belief.

Ord. 38, r. 3, enacts as follows: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay . . . shall be paid by the party filing the same."

E. H. Coumbe, for the appellant.

E. H. Martelli, for the respondent.

Lord ALVERSTONE, L.C.J.—The case is of general importance upon the admissibility of affidavit evidence. In my opinion some of the affidavits in this case are wholly worthless and not to be relied upon. In several instances the deponents make statements on their "information and belief," without saying what the source of their "information and belief" is. In my opinion so-called evidence on "information and belief" ought not to be looked at at all unless the court can ascertain its source, or unless it is corroborated by someone who can speak from his own knowledge. If such affidavits are made in future, it is as well that it should be understood that they are worthless, and ought not to be received as evidence in any shape whatever.

RIGBY, L.J.—At the present day, in utter defiance of ord. 38, r. 3, solicitors are in the habit of filing affidavits in which the deponent speaks of what he believes, without, however, giving the slightest intimation of the source whence he has got his information. Now every affidavit of that kind is utterly irregular; and, in my opinion, the only way to reform such irregularity is for the judge, in every such case, to direct that the costs of the affidavit, so far as it relates to matters of mere "information and belief," shall be paid by the person responsible for the affidavit. Personally, I should be ready to give such a direction in any such case. The point is extremely important, for though I frequently find affidavits stuffed with irregular matter of this sort, and though I have protested again and again, yet no alteration takes place. The truth is that the drawer of this affidavit thinks he can obtain some improper advantage by putting in such statements, but I never pay the slightest attention myself to affidavits of the kind, whether they be used on interlocutory or final applications.

VAUGHAN WILLIAMS, L.J.—With regard to affidavits of the sort before us, it is not quite a sufficient or satisfactory remedy to throw upon the party upon whose behalf they are put forward the liability of paying the costs. The more satisfactory remedy is one which I am aware is difficult, if not impossible, to apply as the law now stands. That remedy would be that nobody should pay for such affidavits at all, and that the solicitor who has drawn such affidavits, and made copies of them, and so forth, should be left out of pocket thereby.

RIGBY, L.J.—Vaughan Williams, L.J., has gone rather further than I did just now, but I entirely concur with what he has said.

Solicitors, *F. E. Paynter; D. A. Romain.*

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) July 3, 4, 20, 1900.

RHYMNEY RAILWAY CO. *v.* BRECON AND MERTHYR TYDFIL RAILWAY CO. (*a.*)

Contract—Breach—Remedy—Conduct determining contract—Damages.

To enable one of two parties to a contract to treat the contract as at an end there must either be an express repudiation of the contract by the other party thereto or such a failure of performance going to the root of the contract as to justify the conclusion that the other party no longer intends to be bound by the contract.

Where the main part of a contract has been performed and little remains to be done under it, failure to perform that little does not justify the other party to the contract in treating it as at an end; but the proper remedy is in damages.

This was an appeal from a decision of North, J.

The facts are fully stated in the judgment of Lord Alverstone, M.R., and it is enough to say here that the action was brought by the plaintiffs to obtain a declaration that an agreement made between themselves and the defendants in the year 1864 was no longer subsisting or binding upon them.

The defendants maintained that the agreement was still subsisting and demanded an account under one of its clauses.

North, J., held that the agreement was at an end.

The defendants appealed.

Baggallay, Q.C., Hon. E. C. Macnaghten, Q.C., and *Sargant,* for the appellants.—On the facts the plaintiffs have elected to treat this agreement as existing and must be bound by their election. Then, as a matter of law, the agreement has never been repudiated by the defendant company so as to justify the plaintiffs in treating it as at an end: *Clough* v. *London and North-Western Railway,* 20 W. R. 189, L. R. 7 Exch. 26; *Freeth* v. *Burr,* 22 W. R. 370, L. R. 9 C. P. 208; *Mersey Steel and Iron Co.* v. *Naylor,* 32 W. R. 989, 9 App. Cas. 434; *Surplice* v. *Farnsworth,* 7 Man. & Gr. 576; *Johnstone* v. *Milling,* 34 W. R. 238, 16 Q. B. D. 460.

Cripps, Q.C., H. Bompas, E. Moon, and *E. S. Robertson, contra.*—The defendants cannot rely on the contract when they have repudiated the only obligation in it which binds them. Their argument really is that they are free from the agreement while the plaintiffs are bound by it.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

They referred to *Bradford* v. *Williams,* 20 W. R. 782, L. R. 7 Exch. 259, and *Panama and South Pacific Telegraph Co.* v. *India Rubber, Gutta Percha, and Telegraph Works Co.,* 23 W. R. 583, L. R. 10 Ch. App. 515.

Macnaghten, Q.C., replied.

Cur. adv. vult.

July 20.—Lord ALVERSTONE, M.R., delivered the following judgment of the court: This is an appeal from North, J., who has decided in favour of the plaintiffs, the Rhymney Railway Co., in an action whereby the plaintiffs seek to obtain a declaration that an agreement of the year 1864 made between themselves and the defendants, the Brecon and Merthyr Tydfil Junction Railway Co., should be treated as determined. The defendants, by their defence, allege that the agreement is still binding and ask that an account may be taken under one of its clauses. The facts are partially stated in the judgment of North, J., but it will be necessary to restate them in some detail in order that the grounds of our judgment may be clearly understood. Prior to the year 1864, the plaintiffs, the Rhymney Railway Co., were in possession of a line of railway running from the neighbourhood of Rhymney, on the west side of the Rhymney Valley, to Caerphilly, with a branch to the west to join the Taff Vale at the Walnut Tree Junction. The defendants, the Brecon Co., were in possession of a line of railway running also from the neighbourhood of Rhymney down the east side of the Rhymney Valley to Newport by way of Machen, with a branch from Machen to Caerphilly, and also of a line running northwards from a point called Deri through Dowlais to Brecon and Merthyr. The plaintiff company had a branch from Bargoed to join the defendant company's line at Deri. This was substantially the position of the two companies in the year 1864. In the session of that year both companies were in Parliament desiring to construct certain railways, and particularly a railway from Caerphilly to Cardiff; the Brecon Co. also proposing to construct a line from a point on their then existing line due north of Caerphilly to Caerphilly. Under these circumstances the heads of the agreement of 1864 were made out and confirmed by section 23 of the Rhymney Railway Act, 1864. The main provisions of that agreement may be summarized as follows: Clauses 1, 2, 3, and 4 contemplated the construction of various lines by the Brecon and Rhymney railway companies respectively to the north of Rhymney, and a line from a point on the Brecon Co.'s line to Caerphilly. None of these lines have been constructed. Clauses 5 and 6 provided that the defendants, the Brecon Railway Co., should withdraw their scheme for constructing a line from Caerphilly to Cardiff, and that the plaintiffs should give the defendants running powers for through traffic from the terminus of the defendants' Caerphilly branch to the plaintiff company's station at Adam-street, Cardiff. Certain restrictions were imposed upon the user of these running powers. By clause 7 an alteration was made in the position of a junction between the defendants' line and the line of the plaintiffs, and the defendants were given running powers over the substituted junction and portion of the line of the Rhymney Co. to Bargoed to a point to which they had already running powers communicating by way of Deri with their own line. By clause 10 the plaintiffs gave the defendants running powers over their line between the end of the defendants' Caerphilly branch and Walnut Tree Junction subject to certain restrictions as to the traffic for which these running powers should be used. Clause 11 was in the following terms: "After the opening of the Caerphilly and Cardiff line, the receipts arising from

the traffic carried on between the New Tredegar works and Cardiff shall as between New Tredegar and Caerphilly be divided in equal proportions between the two companies after the deduction of 30 per cent. for working expenses, the mileage proportion between Caerphilly and Cardiff to belong exclusively to the Rhymney Co., the Brecon Co. being allowed working expenses on the portion carried by them." Clause 17, on which the plaintiffs found their claim, is as follows: "Except as herein mentioned neither company shall either directly or indirectly seek any new line from one side of the valley to the other to take away the traffic of either company." In pursuance of the agreement embodied in the heads of agreement the defendants withdrew their Bill for making an independent line from Caerphilly to Cardiff, the line of the plaintiffs was constructed and the new junction near Bargoed station referred to in clause 7 was also carried out. The works referred to in clauses 1, 2, and 4, were never constructed. At the time of the making of this agreement the connection across the valley between the plaintiffs' railway and the New Tredegar works already existed. Both parties appear to have acted on the agreement down to the year 1898, when the circumstances giving rise to this action arose. Some further communications had been made from the Rhymney line on the western side of the valley to some new collieries opened up on the eastern, but it was agreed that these lines crossing the valley were constructed independently by landowners, and the case was conducted throughout on the basis that from 1864 down to 1898 both parties had abstained from any breach of the agreement. In the year 1896 the Barry Railway Co., which had about the year 1885 established docks and connecting railways running north from Barry, a port a few miles to the westward of Cardiff, obtained powers to construct a railway to join the line of the plaintiffs at Penrhos, and in the session of 1898 the Barry Co. were again in Parliament proposing to join the line of the defendants on the eastern side of the valley near Bedwas with another junction from the new projected line to the line of the Rhymney Co. at Aber. The Bill was introduced in the House of Commons, but prior to its consideration before a private Bill committee in that House the heads of agreement were made between the defendants and the Barry Co. which formed the foundation of the alleged breach by the defendants in respect of which the plaintiffs founded their right to treat the agreement of 1864 as at an end. These heads of agreement were dated the 26th of April, 1898. Under them the defendants agreed to withdraw two railways which they were seeking power to construct for the purpose of making connection between their own line and that of the plaintiffs in the neighbourhood of Caerphilly, and the Barry Co. granted to the defendant company running powers over the Barry Co.'s proposed new line from its junction with the defendants' railway near Bedwas to its junction with the plaintiffs' railway near Aber. The agreement contained certain terms as to how the traffic to Barry was to be carried which are not material for the purpose of the present question. The Barry Co.'s Bill, which was introduced in the House of Commons, was opposed in committee on preamble by the plaintiffs, their opposition being founded upon, among other grounds, the rights which they had obtained under the agreement of 1864. Upon the preamble being declared proved, the plaintiffs did not appear upon clauses in the House of Commons. The Chairman of the Committee, in their absence, inserted clause 9 of the Barry Railway Act, 1898, apparently for the protection of the plaintiffs. The terms of the heads of agreement between the Brecon and the Barry companies, dated the 26th of April, were made known to the plaintiffs in the course of the passage of the Barry Co.'s Bill through the Committee of the House of Commons. Upon the Barry Co.'s Bill being, in the ordinary course, referred to a Committee of the House of Lords, the plaintiffs again opposed the preamble, and, upon the preamble being passed, proposed an amendment to clause 9 of the Bill which would have enlarged its scope so as to have brought within its protective provisions traffic from other places besides the New Tredegar works. We have referred to these proceedings in Parliament because they were made the ground of a contention raised by the defendants that the plaintiffs had so acted as to preclude them from now saying that they could treat the agreement as determined. In the month of July, 1898, the plaintiff company informed the defendant company that they considered that the agreement of 1864 had been broken, and would be treated by them as determined, and in November of the same year they gave formal notice in writing to the defendant determining the said agreement. Upon the case coming before North, J., he held that the action of the defendants in connection with the proposed new line of the Barry Co. in the session of 1898 was not only a breach of article 17, but was such a breach as entitled the plaintiffs to treat the agreement thenceforward as at an end.

Before considering the main questions which arise in the action it would be well to dispose of the preliminary point which was raised by the defendants—viz., that the action of the plaintiffs during the passage of the Barry Co.'s Bill through Parliament was such as to preclude them from treating the agreement as determined. We are clearly of opinion that nothing was done by the plaintiff company to prevent them from raising the case which they brought before North, J. The action which they took in Parliament was action against the Barry Co. in order to protect their rights, and, on failing to obtain such protection as they considered sufficient, they were, in our opinion, clearly entitled to resort to any further remedies which were open to them as between themselves and the defendants.

The main questions, however, which arise for decision are the following. It is contended on behalf of the defendants that their action in the year 1898 did not constitute a breach of the 17th clause of the agreement of 1864; and, secondly, that, even if it was a breach, it was not such a breach as entitled the plaintiff company wholly to determine and put an end to their obligations under the agreement. North, J., has found that the action of the defendant company did amount to a breach of clause 17 of the agreement, and in this judgment he was, in our opinion, right. It was contended on behalf of the defendants, in support of their argument on this point, that the agreement of 1864 was intended to be an agreement whereby the traffic on the east side of the valley was to be treated as traffic of the defendants, and the traffic on the west side as traffic of the plaintiffs. To a certain extent this may be the result of clause 17 of the agreement, but we are clearly of opinion that among the traffic which was intended to be protected in the interests of the plaintiffs was the already existing traffic from the new Tredegar pits to Cardiff by way of the plaintiffs' line, and that a scheme which proposed to take that traffic and divert it from Cardiff to another competing port by means of a line from one side of the valley to the other would be a new line to take away the traffic of the plaintiff company.

There remains the question whether the breach of

the agreement by the Brecon Co. is such as entitles the Rhymney Co. to treat the agreement as an at end, or whether their remedy is one for damages only. After the best consideration we can give to the matter, we are of opinion that the breach was not one entitling the plaintiffs to determine the agreement, but that they must seek their remedy in damages. It will be well to consider in the first instance what conduct on the part of one party to a contract justifies the other party in treating it as at an end. If there is a distinct refusal by one party to be bound by the terms of a contract in the future, the other party may, in our opinion, treat the contract as at an end: see *Withers* v. *Reynolds*, 2 B. & Ad. 882; *Hochster* v. *De La Tour*, 1 W. R. 469, 2 E. & B. 678; see the judgment of Lord Blackburn in the *Mersey Steel and Iron Co.* v. *Naylor*. Short of such refusal, we think the true principle to be deduced from all the cases is that you must ascertain whether the action of the party who is breaking the contract is such that the other party is entitled to conclude that the party breaking the contract no longer intends to be bound by its provisions. This part of the rule was laid down by Lord Blackburn in the same judgment, where he says the rule of law is that where there is a contract between two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." It was contended by Mr. Cripps, on behalf of the plaintiffs, that, however little remained to be performed by the defendants, if it was to be gathered from the facts that they did not intend to fulfil their obligations to perform that part the plaintiff company were justified in treating the agreement as wholly determined. We think this goes too far. The result would be that, although all the main provisions of an agreement might have been performed, however trivial the breach was, the person complaining of the breach could treat it as going to the root of the contract. That this is not the true view of the law is, we think, to be deduced from another passage in the same judgment of Lord Blackburn, in which he says: "I repeatedly asked Mr. Cohen whether or not he could find any authority which justified him in saying that every breach of a contract, or even a breach which involved in it the non-payment of money which there was an obligation to pay, must be considered to go to the root of the contract, and he produced no such authority. There are many cases in which the breach may do so; it depends upon the construction of the contract." The same view of the law was expressed by this court in the case of *Johnstone* v. *Milling*. That was a case of the breach of one of the covenants of a lease, and in dealing with the principle to which we have referred, Cotton, L.J., said: "It must be taken, therefore, that the law is that when one party has done an act which amounts to a wrongful renunciation of the contract, and the other has acted upon it as such, there is a cause of action in respect thereof, but, when the other has not done so, then both the parties, as well as he who has attempted to renounce the contract as he who asserts its existence, are entitled to the benefits of its provisions. The Divisional Court in the present case treated the statements made by the plaintiff as a renunciation of the contract within the doctrine I have mentioned. I cannot say I think they were right in so doing. But, assuming that they were, I can find no case which shows that the doctrine in question applies to the renunciation of one particular covenant or stipulation in a contract such as a lease, which contains many. And as at present advised, I am not favourably impressed with the view that the doctrine would apply to the case of a lease where the tenant cannot, in consequence of the refusal by the landlord to perform a particular covenant, put an end to the entire contract. But, however that may be, we have first to arrive at the conclusion that there was a renunciation of the contract."

It remains to apply these rules of law to the facts in the present case. It is not contended that there was an express refusal by the defendants to be bound by the provisions of the agreement. What is said is that their conduct amounts to a breach of clause 17 entitling the plaintiffs to determine the contract. Now, to apply the test laid down by Lord Blackburn, it cannot be said that any breach of clause 17 goes to the root of the whole agreement and defeats the substantial consideration for it. In our opinion, the main object of the agreement of 1864, so far as the plaintiffs were concerned, was to get rid of the defendants' proposed competing line from Caerphilly to Cardiff, which by clause 5 the defendants undertook to withdraw, and in consideration of which withdrawal the defendants obtained running powers both to Cardiff and to Walnut Tree Junction. A further provision, not in our opinion unimportant, was the grant of running powers to the Brecon Co. under clause 7. We think this view is further supported by the provisions of article 11. If the defendants had obtained their own route from Caerphilly to Cardiff, traffic might have been carried from the new Tredegar works to Cardiff wholly on the line of the defendants, in which event they would have secured the whole of the rate for themselves. The agreement provides that although such traffic will be carried to Cardiff entirely by the plaintiffs and never touch the defendant company's line at all, the defendants are to share in the receipts (after deducting working expenses) due to the portion of the transit from the new Tredegar pits to Caerphilly. In our opinion the provisions of the agreement show clearly that clause 11 was part of the consideration paid by the plaintiffs for the abandonment by the defendants of their independent route from Caerphilly to Cardiff. If we could have found on the construction of the agreement that clauses 11 and 17 depended the one upon the other —that is to say, that the consideration for clause 17 was the granting of the share of the receipts under clause 11—we should have been prepared to hold that a breach by the defendants of their obligation under clause 17 justified the plaintiffs in refusing to fulfil their obligation under clause 11. But looking at the whole agreement and its main provisions we think it would be wrong to hold that clauses 11 and 17 are so mutually dependent, and, therefore, that the plaintiffs are justified in withholding payment under clause 11 simply on the ground that there has been a breach of clause 17. We may point out that the consequences of holding the agreement at an end might be very serious. The defendants' running powers from Caerphilly to Cardiff and Walnut Tree Junction would be gone, and although it is said that they have not hitherto been largely used, still they may be of great value; but, in addition, the running powers over the portion of the plaintiffs' substituted line south of Bargoed station would also be gone, and this forms part of the route of the Brecon Co. to their own line north of Deri. For the above reasons we are of opinion that the decision of North, J., holding that the plaintiffs were right in putting an end to the agreement, cannot be supported, and, that the defendants

are entitled to have a declaration that clause 11 is binding on the plaintiffs, and to have an account taken thereunder. A subordinate question was raised as to interest, which has not been argued before us, and if any difference arises it should, we think, be raised on the taking of the account. The plaintiffs are entitled to a declaration that the action of the defendant company did constitute a breach of the agreement, but until the line of the Brecon Co. is opened they would not be entitled to recover any damages in respect of that breach. Each party to pay their own costs in the court below, but the defendants are entitled to the costs of this appeal.

Solicitors, *Beale & Co.; Bompas, Bischoff, & Co.*

High Court of Justice.

Chan. Div.
Byrne, J. } Nov. 23, 27.

FOSTER *v.* NEW TRINIDAD LAKE ASPHALT CO. (LIMITED). (*a.*)

Company — Capital — Appreciation of assets — Ultra vires*—Payment of dividend out of assets — Debt written off as bad subsequently paid with interest.*

A new company purchased the assets of an old company, and there was included in such assets a debt (then considered valueless) due to the old company from a third company, and secured by promissory notes. For some time the debt due on the notes was treated as of no value in the new company's annual accounts. Ultimately the debt was paid in full.

Held, on motion for injunction by a shareholder, that the company ought to be restrained from distributing the amount so paid as dividend except with reference to the other business or assets of the new company.

This was a motion on behalf of debenture-holders and a shareholder in the defendant company to restrain the application, in or towards payment of a dividend of the principal of a certain debt recently paid to the defendant company by another company called the New York and Bermudez Co.

In the year 1894, an American company (referred to in the affidavits as the old Trinidad Asphalt Co.) acquired the stock and bonds of the New York and Bermudez Co., and also a debt of 100,000 dollars due from the latter company, secured by promissory notes.

In 1897, the defendant company, which was an English company, purchased the property and assets of the old Trinidad Asphalt Co., including the debt, from the New York and Bermudez Co., which was then considered valueless.

On the 31st of December, 1899, the New York and Bermudez Co. gave to the defendant company new promissory notes for 127,000 dollars, being the amount of the debt of 100,000 with accrued interest then due.

This 127,000 dollars was subsequently paid off, and the defendant company through their directors proposed, without reference to the business or assets of the defendant company, to treat the whole of that sum, amounting to £26,258 16s. in English currency, as assets available for dividend and to distribute the same accordingly.

Levett, Q.C., and *Cassel*, for the motion.

Mulligan, Q.C., and *J. I. Stirling*, for the defendants.—Apart from special circumstances, appreciation of capital may be treated as profit. In this case there is nothing in the memorandum or articles of association to constitute such special circumstances. We are dealing here with assets or actual capital as distinguished from nominal or share capital. The test is that, apart from mere nominal capital, if the amount of the actual capital is amply sufficient to secure creditors, then any appreciation of assets in excess of that sufficiency may be available for dividend: *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198, 40 W. R. Dig. 38; and *Dent* v. *London Tramways Co.*, 16 Ch. D. 344, 29 W. R. Dig. 42.

BYRNE, J.—I treat this as a motion on behalf of a shareholder seeking to restrain an *ultra vires* payment. I have not now to consider whether or not the amount in question may properly be brought into the next profit and loss account, but simply whether or not the amount may be divided as a profit without regard to the present value of the total capital assets, and whatever the result of the year's trading may be. No question is raised as to so much of the sum as represents interest, the point at issue being as to the amount representing principal of the debt. There is no doubt that the debt formed part of the assets originally purchased by the defendant company, and, as such, part of its original capital assets; but it is agreed that as the debt was not regarded or treated as an asset of any value upon the purchase, and as it has not appeared in the former balance-sheet as part of the assets of the company, and as the only entry in relation to it in the books of the company is a journal entry carrying the notes to a profit and loss account, it ought to be regarded as a windfall in the nature of an unexpected profit and as divisible accordingly amongst the shareholders. I cannot accept this view. Although the agreement for sale does not enumerate the debt or notes in question, the schedule which purports, according to its reading, to be a statement of the assets and liabilities of the old Trinidad Asphalt Co., contains this item; that schedule is, as appears by clause 1 of the agreement, an enumeration of matters and things which the vendor warranted to be included in the property sold or the equivalent in value thereof. Some of the items mentioned in the schedule may have been over-valued, some under-valued, and, no doubt, fluctuations in value of the assets have supervened, but the amount of this debt is a distinct item of the property purchased which has since been realised by payment. It appears to me that the amount in question is *primâ facie* capital, and that I have no evidence which would justify me in saying that it has changed its character because it has turned out to be of greater value than had been expected. It was urged for the defendant company that the amount applied in payment of the debt was money earned by the New York and Bermudez Co. by favour of the defendant company, and represents a profit which would otherwise have been earned by the defendant company; and, furthermore, that such money might have been applied by the New York and Bermudez Co. in payment of a dividend on the shares in that company, in which case the defendant company, as owning 9,842 shares out of a total of 10,000 in that company, would have received the greater portion as income. I am unable to follow this argument, as I do not see how, for the purposes of the present motion, I can have regard to the fact that some other course of dealing by the debtor company would have left the debt still outstanding, and would have produced more income for the defendant company. I think I ought to grant an

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

injunction, until judgment or further order, to restrain the defendants from distributing the 100,000 dollars as dividend, without reference to the other business or assets of the defendant company. I must not, however, be understood as determining that this sum, or a portion of it, may not properly be brought into profit and loss account, or be taken into account in ascertaining the amount available for dividend. That appears to me to depend upon the result of the whole account for the year. It is clear, I think, that an appreciation in total value of capital assets, if duly realised by sale or getting in of some portion of such assets, may, in a proper case, be treated as available for purposes of dividend. This, I think, is involved in the decision in the case of *Lubbock* v. *British Bank of South America*, cited with approval by Lord Lindley in *Verner* v. *General and Commercial Trust*, [1894] 2 Ch. 239, at p. 265, where he says: "Moreover, when it is said, and truly, that dividends are not to be paid out of capital, the word 'capital' means the money subscribed pursuant to the memorandum of association, or what is represented by that money. Accretions to that capital may be realised and turned into money, which may be divided amongst the shareholders, as was decided in *Lubbock* v. *British Bank of South America*." If I rightly appreciate the true effect of the decisions, the question of what is profit available for dividend depends upon the result of the whole accounts fairly taken for the year, capital as well as profit and loss, and although dividends may be paid out of earned profits in proper cases, although there has been a depreciation of capital, I do not think that a realized accretion to the estimated value of one item of the capital assets can be deemed to be a profit divisible amongst the shareholders without reference to the result of the whole accounts fairly taken.

Solicitors, *W. H. Paterson; Ashurst, Morris, & Crisp.*

Chan. Div.
Cozens-Hardy, J. } Nov. 20.

In re LEEDS GRAMMAR SCHOOL. (*a*.)

Lands Clauses Acts—Charity—Compulsory purchase of lands—Payment into court—Costs of investment—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 76, 80.

Where a corporation acquired, under the provisions of the Lands Clauses Consolidation Act, 1845, *compulsory powers for the purchase of lands owned by a charity—the legal estate in the lands being vested in the official trustee—and after arbitration deposited the purchase-money in court,*

Held, that the corporation must pay the costs of the investment of the purchase-money.

On the 15th of November, 1898, the Corporation of Leeds gave notice to treat for the purchase of lands belonging to the Leeds Grammar School. The legal estate in the property was vested in the official trustee of charity lands. After some preliminary negotiations the matter was referred to arbitration, the governors of the school appointing one arbitrator and the corporation appointing the other. As a result of the arbitration the sum of £37,000 was agreed upon as the value of the property, and on the 1st of June, 1900, the Board of Charity Commissioners directed the official trustee to concur in the conveyance. A dispute arose between the parties as to whether the purchase-money ought to be paid into court, but subsequently, on the 11th of July, 1900, it was lodged in court. The governors of the school now petitioned for an order for the investment of the £37,000. The corporation objected to pay the costs of the investment on the ground that the official trustee, who, with the concurrence of the Charity Commissioners, could have given a good discharge, had refused to do so. The corporation also maintained that the money had been paid into court under section 76 of the Lands Clauses Consolidation Act, 1845, and not under section 80.

Leigh Clare, for the corporation, said that the corporation was not liable to pay the costs of investment as there had been a wilful refusal to receive the money on the part of the official trustees within the meaning of section 80 of the Land Clauses Act, 1845.

Vernon Smith, Q.C., and *Austen Cartmell*, were not called upon.

COZENS-HARDY, J.—In this case the governors of Leeds Grammar School owned certain property which the Corporation of Leeds desired to acquire. Notice to treat was given by the corporation, and subsequently the matter went to arbitration. The governors appointed one arbitrator, and the corporation another, and the sum of £37,000 was awarded. The bare legal estate was outstanding in the official trustee of charity lands, and the conveying parties were the official trustee and the governors. There is in the conveyance a recital of an order of the Charity Commissioners directing the official trustee to concur in the conveyance, and a recital of the payment into court of £37,000 for the lands taken from the Leeds Grammar School, and "trustees without power of sale" and the governors "conveyed and confirmed" the property.

Under these circumstances it is the ordinary case of persons under a disability conveying, with the concurrence of persons having the legal estate, at a price not less than that fixed upon by arbitration. It is said that the £37,000 was tendered to the official trustee, and that he refused to accept it, but the governors did not refuse, and section 80 does not apply.

It is simply the ordinary case of the conveyance of an equitable interest and getting in a legal estate from trustees. I must order the corporation to pay the costs under the Act.

Solicitors, *Paterson, Snow, Bloxam, & Kinder*, for *J. C. Atkinson*, Leeds; *Vincent & Vincent*, for The Town Clerk, Leeds.

Chan. Div.
Farwell, J. } Nov. 13, 14.

BORLAND'S TRUSTEE v. STEEL BROTHERS (LIMITED). (*a*).

Company—Articles of association—Restriction on transfer of shares—Perpetuity—Fraud on bankruptcy law.

The rule against perpetuities does not apply to personal contracts.

A provision in the articles of association of a com-

(*a*.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(*a*.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

pany that a shareholder who was not a manager or assistant should sell his shares to a manager or assistant at a price to be assessed in a particular way is not invalid. A bonâ fide *provision in the articles of association that a person shall sell his shares is not obnoxious to the bankruptcy law.*

This was an action by the trustee in bankruptcy of Mr. Borland, a member of the defendant company, asking for a declaration that the company was not entitled to require the transfer of any of the seventy-three shares which, before the bankruptcy, stood in the name of Mr. Borland, and that the articles 50 to 58 inclusive and any other of the defendant company's articles of association which purported to give the company the right were void; and for an injunction to restrain the defendants from calling for, enforcing, or effecting a transfer of all or any of the seventy-three shares at a price not greater than the par value of such shares, or at any other price than the actual market value of such shares.

The defendant company was formed in 1890 to acquire the business of Steel Brothers & Co., East India merchants, in which the bankrupt Mr. Borland was a partner. The capital of the company at its incorporation was £400,000 in 4,000 shares of £100 each. At the date of the incorporation Mr. Borland had £20,000 capital in the business.

In the year 1897, by a special resolution confirmed on the 11th of June new articles of association were adopted by the company to the exclusion of the then existing articles. By the new articles the original capital was divided into preference and ordinary shares. Of the 3,200 shares already issued 1,600 (upon which £100 per share had been paid up) were to be preference shares, and 1,600 (upon which £80 per share had been paid up) were to be ordinary shares.

The bankrupt received in exchange for his original shares 160 preference and eighty ordinary shares.

Article 47 provided that as regards all the ordinary shares (specified in a certain table) each of the respective then holders thereof (of which Mr. Borland was one) should be entitled to continue to hold the shares then held by him or any of them until he should die or voluntarily transfer the same or become bankrupt.

Article 49 provided that no share should, save as therein provided, be transferred to any person not being a manager or assistant, so long as any manager or assistant should be willing to purchase the same at the fair value.

"Managers or assistants" were defined by the articles to be persons receiving remuneration from the company for managing or assisting to manage the business of the company at home or abroad otherwise than as a director.

By article 50, in order to ascertain whether any manager or assistant was willing to purchase a share, the proposing transferor was to give a transfer notice to the company, specifying the sum which he fixed as the fair value, and such transfer notice was to constitute the company the transferor's agent for the sale of the share to any manager or assistant at the price so fixed.

By article 53 the price fixed as the fair price was in no case to exceed the par value of the share—*i.e.*, the amount paid up *plus*, in the case of an ordinary share, a certain sum representing certain additions on account of the reserve fund and interest, &c.

Article 57 provided that on any manager or assistant ceasing to be such, or on his death or bankruptcy, he must, on receiving certain notice, transfer his shares.

Article 58 provided that in every case where ordinary shares were held by a person not being a manager or assistant, the directors might at any time give to such person notice requiring him forthwith to transfer his shares, and unless he should give a transfer notice within fourteen days he should be deemed to have given such notice in accordance with the articles, and to have specified the par value as defined by article 53 as the fair value of the shares.

Mr. Borland had parted with all his preference shares, and he still held 73 ordinary shares. He was adjudicated bankrupt on the 22nd of February, 1900, and on the 7th of March notice was served upon his trustee in bankruptcy requiring him to transfer his shares in accordance with the articles. It was stated that the par value of the shares would be about £8,000, whereas, as the plaintiff alleged, the real value of them would, having regard to the prosperity of the company, be about £34,000.

Jenkins, Q.C., and *Cozens-Hardy*, for the plaintiffs, contended that the articles of association were invalid, on the ground that they restricted the free transfer of the shares, that they constituted a fraud on the bankruptcy laws, and that they transgressed the rule against perpetuities.

Upjohn, Q.C., and *Ashworth James*, for the company, contended that the articles were valid, and that the nature of the shares rested on a contract between the shareholders.

FARWELL, J., in giving judgment, said: The company is what has been called a private company, and it took over the business of the firm of Steel Brothers & Co., and was incorporated in 1890 in the first instance. The original articles contained provisions different to those which have been adopted by the special resolutions confirmed on the 11th of June, 1897. The articles are of a somewhat curious nature, and on the evidence it appears that they were rendered necessary by the nature of the business of the company. The company carried on business as merchants and commercial agents and rice millers in Burmah and London.

The articles had been altered in order to give the working shareholders a substantial share of the profits, which were large but fluctuating, varying as they had from £51 per share to £2 12s. 6d. The arrangement was considered necessary for the carrying on of the business, and no want of *bona fides* was imputed. The scheme was that the shares should not be retained by non-working shareholders, but be held by those who took an active part in the business.

His lordship then referred to the articles, and said that the effect of article 58 was that at any time the company might call on an ordinary shareholder, not being a manager or assistant, to sell his shares to a manager or assistant at a price to be assessed in a particular way. It was said that a provision which compelled a man to sell for all time at a particular price and to particular persons was bad, because it was repugnant to absolute ownership and tended to perpetuity. That was applying to modern company law principles which were wholly inapplicable to it. It involved a misconception of the nature of a share. A share was the interest of the shareholder in the company measured by a sum of money for the purpose (*inter alia*) of dividend, but also qualified by the contract entered into by all the shareholders *inter se*. The contract contained in the articles was one of the incidents of the share. His lordship then referred to the case of *New London and Brazilian Bank* v. *Brocklebank*, 30 W. R. 737, 21 Ch. D. 302, and said that the argument as to perpetuity which was put forward here would, if sound, have been applicable in that case, but it was put on the ground that the shares were subject to the conditions of the contract as incident to them. But

it was said that the rule against perpetuity was transgressed. In his lordship's opinion the rule against perpetuity did not apply to personal contracts. If authority were necessary it was to be found in the case of *Witham* v. *Vane*, reported in Challis on Real Property, App. V.; and an even stronger case was that of *Walsh* v. *Secretary of State for India*, 11 W. R. 823, 10 H. L. Cas. 367. A stronger instance of a perpetuity attaching to a personal liability, if it existed, could not be found than in that case. It was a novel suggestion that the rules of perpetuity had anything to do with personal contract.

Then it was said that it was a fraud on the bankruptcy law. As to that his lordship would take the law to be as stated in *Ex parte Jay*, 28 W. R. 449, 14 Ch. D. 19, at p. 25, where James, L J., said: "The principle of those decisions is this—that a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to someone else and be taken away from his creditors is void as being a violation of the policy of the bankrupt law." Here all the shares were subjected to the same conditions. But it was said that the last words of clause 47 constituted a fraud on the bankruptcy law and rendered the particular provision void. His lordship did not think so. In the absence of *mala fides*, and the contract being a fair one equally binding upon all who came under it, there was nothing obnoxious to the bankruptcy law in a provision which said that a man should sell his shares. On the question of price his lordship thought, upon the evidence, that the parties had agreed on a mode of ascertaining the value of the shares which seemed to be fair. Upon this point he referred to *Whitmore* v. *Mason*, 10 W. R. 168, 2 Joh. & Hem. 204, at p. 216, where Wood, V.C., said: "Where there is a *bonâ fide* intention to secure the going on of the concern, by the other parties handing over to the creditors all that the creditors ought to take, I cannot conceive there is any fraud on the bankruptcy laws." That expressed his lordship's view, and he held that in this case there was no fraud on the bankruptcy laws.

The action was dismissed, with costs.

Solicitors, *Cox & Lafone; Waltons, Johnson, Bubb, & Whatton.*

Chan. Div. }
Farwell, J. } Nov. 7, 9.

In re POPE.
SHARP *v.* MARSHALL. (*a.*)

Will—Accumulations of surplus income—Trust void for perpetuity—Investment of accumulations—Income of investments—Persons entitled—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98.)

A testator, in 1865, *left real property to his trustees upon trust in their absolute discretion to apply the whole or part of the income arising therefrom for the benefit of his daughter F. during her life, and after her decease to hold the property, with any surplus or accumulation of unapplied income, upon trusts for her children, and in default upon the trusts declared as to the residue of his whole estate which were for the benefit of his three daughters in equal shares for the life of each, and then for their children, with remainders over.*

His daughter F. was of weak intellect, and from 1865 *till her death in* 1900 *was maintained by the trustees, who now had a fund of* £2,700, *representing surplus accumulations of the income for her maintenance. Upon a summons to determine who were entitled to the fund,*

Held, (1) *that the trust for accumulations was void after the expiration of* 21 *years from the death of the testator, so that the surplus rents and profits from* 1886 *formed part of the capital and residue;* (2) *that such surplus was not to be treated as income, and to go to the tenants for life of the residuary estate, but was to fall into the* corpus *of the residuary estate.*

In re Phillips, Phillips *v.* Levy, 28 *W. R.* 340, 49 *L. J. Ch.* 198, *disapproved;* Crawley *v.* Crawley, 7 *Sim.* 427, *and* O'Neill *v.* Lucas, 2 Keen, 313, followed.

This was an originating summons taken out by the present trustees of the will of Roof Pope, deceased, who died on the 8th of November, 1865. By his will made the 21st of August, 1865, the testator devised to his trustees two freehold houses upon trust to receive the rents and profits thereof as the same became due, and, after certain deductions, to pay and apply the residue, or such part thereof, in such manner and in such sums and at such times as his trustees should in their absolute discretion think proper, for the benefit of his daughter Frances Pope for the term of her natural life, and after her decease to stand seised of the said hereditaments, with any surplus or accumulation of rents that might not be paid to or applied for the benefit of the said daughter, upon certain trusts for her children, and in default as thereinafter mentioned. And he devised and bequeathed to his trustees all the rest, residue, and remainder of his estate and effects whatsoever, whether real or personal and wheresoever situate, upon trust to pay the rents and income thereof unto his three daughters, Frances, Elizabeth, and Florence, in equal shares, for and during the term of the natural life of each, and from and after the decease of any or either of them upon trust for their children, with remainders over.

Sarah Pope, the wife of the testator, survived him, and died on the 27th of December, 1891. At the date of his death the children of the testator then living were: (1) Elizabeth (the wife of Thomas King Pyrke), who died on the 25th of September, 1871, leaving nine children, of whom the defendant George Lyde Pyrke was one; (2) Roof, who died on the 2nd of January, 1897, leaving no lawful issue; (3) Florence (the wife of Ebenezer Marshall), who died on the 20th of January, 1886, leaving two children, of whom the defendant Frederick Pope Marshall was one; (4) Frances, who died on the 13th of June, 1900, a spinster and intestate. Mary Ann, another daughter of the testator (the wife of George Tifoot Lyde), predeceased him on the 1st of October, 1855, leaving one child only, the defendant Arthur Lyde. The daughter Frances was of weak intellect, and from the testator's death in 1865 down to her death in 1900 the trustees for the time being of the will made an allowance for her maintenance out of the income arising from the two freeholds. The trustees had accumulated the surplus income arising from those properties, and it was now represented by railway stocks of the value of £2,500, in addition to the sum of about £200 in cash. Various claims to the said accumulations were made, as follows: (*a*) the defendant Marshall, as the surviving child of Florence Marshall (his sister Florence Kate Marshall having died on the 1st of December, 1900, an infant and unmarried), contended that the accumulations belonged to him as having passed with the devise

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

of the properties to him in remainder; (*b*) the defendant Pyrke, as one of the residuary legatees, contended that the accumulations fell into and formed part of the testator's residuary estate; (*c*) the defendant Lyde, either, as one of the next-of-kin of the testator, contended that the accumulations were not disposed of by the will, and that the testator died intestate in respect of them; or alternatively, as one of the next-of-kin of the late tenant for life, contended that the accumulations formed part of the estate of the said Frances Pope, deceased, on the ground that the testator gave her the entire income of the two freehold properties for her sole use and benefit, limited only by the discretion of the trustees of the will as to the amount necessary from time to time to be expended upon her.

FARWELL, J., held, on the earlier questions of the summons, that the trust for accumulation was void after the expiration of twenty-one years from the death of the testator, so that the surplus rents and profits as from 1886 formed part of the capital and residue. His lordship then gave leave for the summons to be amended by asking whether the whole or any part of the £2,700 ought to be treated as income and go to the tenants for life of the residuary estate, or as forming part of the capital of such residuary estate.

Hatfield Green, for the trustees.

Jenkins, Q.C., and *M. Romer*, for the defendant Marshall.

Capron, for the heir-at-law of the testator.

Butcher, Q.C., and *E. G. Kimber* argued the added question for the residuary legatees.—This is not a disposition within the Thellusson Acts (39 & 40 Geo. 3, c. 98), and the fund in question does not belong to the tenants for life, but is a part of the *corpus* of the residue: *Crawley* v. *Crawley*, 7 Sim. 427, and *O'Neill* v. *Lucas*, 2 Keen, 313.

F. Cassel, for the defendant Lyde.—If it does not go to the tenants for life, the accumulation is in effect repeated: Malins, V.C., in *In re Phillips, Phillips* v. *Levy*, 28 W. R. 340, 49 L. J. Ch. 198.

Cur. adv. vult.

FARWELL, J.—This summons is to be treated as amended by raising the further question suggested by Mr. Cassel, which, if it had not been for authority, I should have thought was really unarguable. The testator here devises two freehold houses specifically, and he directs the income of these two houses to go, to the extent to which his trustees thought fit, for the maintenance of a daughter of unsound mind, with an accumulation of the residue. I have already held that the accumulation of that residue is bad beyond twenty-one years. From that period the surplus rents fall into residue. The question is now raised (inasmuch as the residuary property of the testator is given to trustees upon trust to convert all excepting lands and houses, and to invest and pay the income to the tenant for life with remainders over) whether the surplus income, which is so let loose and falls into the residue by reason of the Thellusson Act, is to be paid to the tenant for life of the residue as income, or is to be invested by the trustees and the income only to be paid to the tenant for life. In my opinion it is reasonably clear that the tenant for life under this will gets the income only. I cannot adopt the suggestion of Mr. Cassel that lands and houses include these surplus rents let loose by reason of the Thellusson Act after the twenty-one years. It is very much, as Mr. Butcher has put it, as if it were an estate *pour autre vie* that is given to the trustees on trust to convert. They have not in fact converted it, but they have received and retained the whole of the funds down to the present time, or since 1886, when the twenty-one years expired.

So far as the authorities go, it has been held by Vice-Chancellor Shadwell in *Crawley* v. *Crawley*, and by Lord Langdale in *O'Neill* v. *Lucas*, that the income so let loose does not—under circumstances such as the present of the residue being given to the tenant for life with remainder over—belong entirely to the tenant for life, but it is a portion of the *corpus* of the residue, and is to be treated as such by way of investment. All the text-books, so far as my attention has been called to them, down to the last edition of Theobald, treat those cases as settling the law; but Mr. Cassel has referred me to a decision of Vice-Chancellor Malins, which happens to be last in point of date—viz., *In re Phillips, Phillips* v *Levy* (1880), where he decided exactly the contrary. He there expressed his opinion as follows: "Where the income of a particular fund is directed by a testator to be accumulated for more than twenty-one years from his death, and the residue of the personal estate is given to A. for life, with remainder over, the income of the particular fund and of the accumulations forms, after the twenty-one years, part of the income of the tenant for life, and does not fall into the capital of the residue." I have, therefore, got a clear decision of Vice-Chancellor Malins on the particular point, directly in the teeth of the two earlier authorities; but Mr. Butcher has pointed out, and I think rightly pointed out, that there were two questions in that case, and the second question to which the head-note was directed was not really necessary to the decision of the case, because the point never arose. As far as I can see, it appears to me that there never was any such fund, but I am bound to deal with the decision as I find it; and if it stood by itself I should probably feel bound to follow it, although it is not actually binding on me technically. But when I find that the Vice-Chancellor is overruling in fact *Crawley* v. *Crawley* and the case before Lord Langdale, *O'Neil* v. *Lucas*, which was not cited to him, and when the reason he gives for overruling *Crawley* v. *Crawley* is that he does not understand that it decides this particular point, when to my mind, with all respect, it seems to me it was the very point decided in *Crawley* v. *Crawley*, I feel at liberty to consider the judgment and to see whether the reason given is one which satisfies my mind, because, in the state of the authorities, I think I am entitled to form my own judgment. Now, the reason given by Malins, V.C., is this: "To say, as Mr. Wood" (who argued the case) "does, that although you cannot go on accumulating beyond the twenty-one years, you may, after that period, go on investing, and that the widow is only to have the interest of the investment, is what I cannot agree to. To go on investing the income" (after twenty-one years) "is, to all intents and purposes, to go on accumulating; but the Thellusson Act says that the accumulations shall stop at the end of twenty-one years. To my mind the accumulations necessarily stop at the end of twenty-one years. They then fall into residue." Apparently, so far as I am able to follow it, that means that you accumulate, within the meaning of the Thellusson Act, if you do not direct the income, as it is received, to be invested and accumulated; but if you direct the income to be invested, and the income of these investments to be paid to a tenant for life, you do not accumulate. The preamble of the Act is, "Whereas it is expedient that all dispositions of real or personal estates, whereby the profits and produce thereof are directed to be accumulated, and the

beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained." Then it goes on to enact "that no person shall by any deed or will" (I am reading it shortly) "settle or dispose of any real or personal property so and in such manner that the rents, issues, profits, or produce thereof shall be wholly or partially accumulated for any longer term," and so on. Now, I have referred to Dr. Murray's great dictionary under the head "accumulate," and I think that his definition of "accumulate" accords with what is, I confess, my own view of the meaning. Under "accumulation," the second definition is, "The action or process of growing into a heap or large amount; *spec.*, the growth of a sum of money by the continuous addition of the interest to the principal." If that is the true definition, and it appears to me to be so, I really do not understand what Vice-Chancellor Malins meant by saying that investing and paying the income to a tenant for life and not accumulating it, is accumulating within the meaning of the Thellusson Act. With every respect to the memory of the late Vice-Chancellor, I am wholly unable to follow that case, but I shall follow the two earlier authorities, which I think are sound, and declare that this goes (you will amend the summons by putting in the question) in the way I have stated.

I think the better plan will be—I understand there will be no difficulty—to ascertain the sums that from year to year were actually retained by the trustees as not required for the daughter of unsound mind, and the investments in which they were put, so as to get the actual income which the tenant for life would have been entitled to receive, if this decision had been given in 1886, and then the net result will be that she will get that sum. I do not think I can give compound interest or give any interest.

Solicitors, *Trinder & Capron*, for all parties.

Chan. Div. }
Buckley, J. } Nov. 14, 15.

In re BLACKPOOL MOTOR CAR CO. (LIMITED). HAMILTON AND OTHERS *v.* BLACKPOOL MOTOR CAR CO. (LIMITED) AND BARRON. (*a.*)

Company — Winding up — Surety — Fraudulent preference—"Creditor"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

A surety being a person who can prove in respect of his contingent liability is a creditor within the meaning of section 48 *of the Bankruptcy Act*, 1883, *and consequently a transaction which, if between a company and one of its ordinary creditors, would, under section* 164 *of the Companies Act*, 1862, *and section* 48 *of the Bankruptcy Act*, 1883, *be void as a fraudulent preference, is also void for the same reason when between the company and its surety.*

This was an action upon a deed of indemnity given by the defendant company to the plaintiffs in respect of obligations which the latter had incurred for it.

The company was being wound up, and the defence was that the deed was a fraudulent preference.

The defendant company was incorporated in July, 1897. The plaintiffs were four out of its six directors. Shortly after its formation, more money being wanted to carry on the business, the directors applied to the company's bankers for an overdraft to be allowed. This the bank refused to do unless the directors made themselves personally responsible for the repayment. In the result the four plaintiffs, by deed dated the 20th of December, 1897, entered into a joint and several covenant to guarantee to the bank, in an amount of not more than £500, the due repayment of sums owing to it from the company. Under this guarantee the bank advanced £300 to the company.

On the 7th of December, 1898, a deed was entered into between the company and the plaintiffs, whereby the company agreed to indemnify them against all demands made upon them in respect of their guarantee to the bank of the 20th of December, 1897, and charged all its property as a security for the indemnity.

At the date of this deed the company were unable to pay their debts as they became due from their own money.

On the 16th of December, 1898, the company, being in financial difficulties, went into voluntary liquidation, and the defendant Barron was appointed its liquidator.

The bank pressed for payment of the overdraft, and took legal proceedings, and the plaintiffs were compelled to satisfy the claim. They now brought this action upon the deed of the 7th of December, 1898, claiming a declaration that they were entitled to be indemnified by the company, and that the indemnity was a first charge upon the property of the company. They alleged that they had entered into the guarantee of the 20th of December, 1897, upon the faith of an oral agreement made by or on behalf of the company in August, 1897, that the company would indemnify them in respect of it. The defence was that there was not any such previous agreement, and that the deed of the 7th of December, 1898, was a fraudulent preference.

H. Terrell, Q.C., and the *Hon. M. M. Macnaghten*, for the plaintiffs.—Even if there were no antecedent agreement, the deed would not be a fraudulent preference under section 164 of the Companies Act, 1883, incorporating section 48 of the Bankruptcy Act, 1883, as the latter section only applies where there is the relation of debtor and creditor between the parties to the transaction: *Ex parte Kelly & Co., In re Smith, Fleming, & Co*, 27 W. R. 830, 11 Ch. D. 306; *Ex parte Stubbins*, 29 W. R. 653, 17 Ch. D. 58; *Ex parte Taylor, In re Goldsmid*, 35 W. R. 148, 18 Q. B. D. 295; *Sharp* v. *Jackson*, [1899] A. C. 419. The section consequently does not apply to a transaction between principal and surety: *In re Mills*, 5 Morr. 55. 36 W. R. Dig. 15; *In re Warren*, 48 W. R. 523, [1900] 2 Q. B. 138. If *In re Paine, Ex parte Reed*, 45 W. R. 190, [1897] 1 Q. B. 122, decides the contrary, it has been overruled by *In re Warren*, and is opposed to the earlier cases. [BUCKLEY, J., referred to *In re Wincham, &c., Co., Poole's case*, 26 W. R. 823, 9 Ch. D. 322.]

Tindal Atkinson, Q.C., and *R Storry Deans*, for the defendant company.—A surety can prove in respect of his contingent liability, and consequently he is a creditor within section 48: *In re Paine, Ex parte Reed; Ex parte Delmar, In re Herepath & Delmar*, 38 W. R. 752, 7 Mor. 129.

BUCKLEY, J.—I conclude, as a matter of fact, that there never was any binding arrangement between the company and the plaintiffs before the deed of the 7th of December, 1898, that the plaintiffs

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

should have a security of that kind; that the plaintiffs did not enter into their guarantee upon the faith of any such security being given them; and that the charge given by the deed of the 7th of December, 1898, was given with a view to prefer them over the other creditors of the company. Apart, then, from the question of law raised, I hold that deed was void as a fraudulent preference. But it is said that it is not so, because section 48 only applies to transactions where the parties are persons standing to each other in the relation of debtor and creditor, and that these directors were not creditors of the company but only sureties, who had not at the date of the deed in question paid anything, and could not have sued the company; and that "creditor" in that section does not mean a person who can merely prove in respect of a contingent liability. The case of *Ex parte Reed, In re Paine*, seems to me exactly in point, and decides that a surety is a creditor within the section.

The cases of *In re Mills* and *In re Warren* only go to show that where the payment is made to a person whom it was not sought to prefer you cannot recover by way of fraudulent preference against the person whom it was sought to prefer. The cases of *Ex parte Kelly & Co., In re Smith, Fleming, & Co.; Ex parte Stubbins; Ex parte Taylor, In re Goldsmid*, and *Sharpe* v. *Jackson* are all cases where the relation of trustee and *cestui que trust* existed. In *Ex parte Kelly & Co., In re Smith, Fleming, & Co.*, the court considered the bank as a trustee of the £2,000 sought to be recovered. The others were cases where the payment was made to replace trust funds improperly appropriated by the trustee. None of these cases have any bearing upon the question I have to decide. The cases of *Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514, 41 W. R. Dig. 16, 193, and *Ex parte Delmar, In re Herepath & Delmar*, show that although these directors had paid nothing under their guarantee at the date of the indemnity, still their contingent liability could be the subject of a suit.

I hold that the plaintiffs were creditors of the company within section 48, and that the deed of the 7th of December, 1898, was void as a fraudulent preference.

Judgment for the plaintiffs.

Solicitors, *Barton & Pearman*, for *J. H. Armitage*, Leeds; *Vincent & Vincent*, for *John Bowling & Sons*, Leeds.

Chan. Div. } Aug. 4, 1900.
Stirling, J. }

In re CHAYTOR. (*a.*)

Settled land—Mining lease—Tenant for life impeachable for waste—Open mines—Proportion of rent to be set aside as capital money—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *s.* 11.

A tenant for life entitled to work mines, whether the power arises from the terms of the settlement or from the circumstance that the mines are open, is—in the absence of any expression to the contrary in the settlement—not impeachable for waste within the meaning of the Settled Land Act, 1882, *s.* 11, *and is liable to set apart only one-fourth of the rent under a mining lease as capital money.*

Originating summons.

The question raised by this summons was whether, as regards open mines, a tenant for life, who, by the terms of the settlement, was not made unimpeachable for waste, was to be treated as not impeachable for waste in respect of the minerals got from those mines within the meaning of the Settled Land Act, 1882, s. 11, so that upon a lease of such mines one-fourth only of the rent should be set aside as capital money under the Act.

The summons was taken out by Sir William Chaytor, who was tenant for life under the will of Mr. Henry Chaytor, deceased, dated the 16th of June, 1897, of certain estates in the county of Durham which contained minerals.

The summons first asked for a declaration that certain mines forming part of the settled estates agreed to be leased by Sir William Chaytor under an agreement dated the 30th of March, 1899, were opened mines.

This was a question of evidence, and his lordship came to the conclusion that two of the mines, called the Busty and Brockwell seams, had been worked by the testator and were opened mines, while as to another, the Victoria seam, it was admitted that it had never been worked, and it could not therefore be treated as open.

The next question was whether one-fourth part only of the rent to be reserved under the lease to be granted under the above-mentioned agreement ought to be from time to time set aside as capital money arising under the Settled Lands Acts.

The Settled Land Act, 1882, s. 11, provides as follows: "Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside as capital money arising under this Act, part of the rent as follows—namely, where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

The question was whether as regards open mines the tenant for life was impeachable for waste within the Act.

Upjohn, Q.C., and *Fisher Williams*, for the tenant for life.

N. Pearson, for the trustees.

STIRLING, J., after stating the facts, said: A tenant for life under a settlement may have a title to work mines for his own benefit by virtue of a power conferred on him by the settlement. A tenant for life may work open mines although power so to do is not conferred by the settlement: the title to do so is, however, derived from the intention of the settlor, inferred from the use made of the property previously to the settlement. This is well explained by Lindley, L.J., in *In re Ridge, Hellard* v. *Moody*, 34 W. R. 159, 31 Ch. D. 504, at p. 508, where he said: "As between a tenant for life and remainderman, money paid by a lessee as the price of land won, or carried away and sold by the lessee in the shape of minerals, stones, or bricks, is always treated as capital, and not as income, unless the settlor has expressed an intention to the contrary by making the tenant for life unimpeachable for waste, or by some other expression; or unless at the time of the settlement the mines and minerals let were open, in which case an intention to the contrary is inferred unless such inference is inconsistent with the language of the settlement." And in *Dashwood* v. *Magniac*, [1891] 3 Ch. 306, 40 W. R. Dig. 275, Bowen, L.J., said: "Cases in which the usufructuary is allowed to treat minerals as annual fruits or produce of the soil are common to ancient and

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

modern jurisprudence. The open mine is an instance, beginning in the Roman, but familiar already to the English law as far back as the reign of Edward III. It is important, however, to observe that the open mine does not constitute an arbitrary exception to real property law. It is merely an instance of the application of a well-known principle of construction in virtue of which grants of mineral land are given such force and effect as is reasonably necessary to carry out the obvious intentions of the grantor. The grantor was absolute master of his property, and could carve the lands which were the subject of his grant into such estates and interests as he pleased. It is, therefore, from his presumed will and intention that the results in the case of the open mine follows." A tenant for life, entitled to work mines, may, in my judgment, be properly described as not impeachable for waste in respect of the minerals got from such mines, whether the power arise from the terms of the settlement or from the circumstance that the mines are open. Now section 11 of the Settled Land Act, 1882, prescribes that when the tenant for life is impeachable for waste in respect of minerals three-fourth parts of the rent, and otherwise one-fourth part, shall be set aside as capital money under the Act. It is contended that in order that the tenant for life may not fall under the description of "impeachable for waste in respect of minerals" he must be expressly declared by the settlement to be unimpeachable for waste. That is not the language of the Act; but it is said to be the proper construction of it by reason of the generality of the language "in respect of minerals," not "such minerals" or "the minerals." The word "minerals" cannot, however, mean any minerals whatsoever; some limitation must be put upon it; and the choice seems to be between minerals comprised in the settlement and minerals the subject of such a lease as is contemplated by section 11. The latter seems to me the more natural interpretation. It is said, however, that this construction gives no effect to the words in the early part of the section—"whether the minerals leased are already opened or in work or not." It is a sufficient answer, in my judgment, that these words serve to remove any doubt which in their absence might arise as to whether the section was meant to apply to opened mines. I think that, at all events, the language of the section admits of the two interpretations which I have mentioned. In considering which ought to be adopted regard may be paid to the consequences of adopting one or other of them. If the tenant for life must be made expressly unimpeachable for waste in order to obtain the benefit of section 11 then a distinction is drawn between an express authority and an implied authority to commit waste, for which I have been unable to discover any solid foundation. Moreover, under the provisions of the Settled Estates Act, 1877 (40 & 41 Vict. c. 18) (an Act which is still in force and to which tenants for life may have recourse) mining leases may be granted (though for a shorter term than under the Settled Land Act) upon the condition that only one-fourth of the rent is set aside as capital; and I am again unable to discover why such a difference should exist according as one Act is resorted to or the other. On the whole I think that the preferable view is that the tenant for life in this case is under an obligation to set apart one-fourth and not three-quarters of the rent as capital money.

Solicitors, *Tarry, Sherlock, & King*, for *Trotter, Bruce, & Trotter*, Bishop Auckland.

Chan. Div. Kekewich, J. } May 15, 1900.

In re BOND.
PANES *v.* ATTORNEY-GENERAL. (*a.*)

Will — Intestacy— Settlement — Trustee — Crown — **Escheat—Bona vacantia—***Settled Land Act,* 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 22 (5).

A testator gave a life interest in all his property, which included freeholds, to his wife. The will contained no gift over or residuary devise or bequest. The trustees of the will were appointed by the court trustees for the purposes of the Settled Land Act.

The tenant for life subsequently sold some of the freehold property, and at her death money resulting from the proceeds of sale remained in the hands of the trustees. On the death of the tenant for life it was duly found that the testator had no heir-at-law or next-of-kin.

On the trustees claiming a beneficial interest in the moneys arising from the proceeds of sale,

Held, that such moneys belonged to the Crown as bona vacantia.

Summons.

E. V. C. Bond, who died on the 19th of January, 1882, by his will dated the 25th of February, 1879, declared his will to be as follows: "Whatever property I may possess at the time of my decease shall be enjoyed by my dear wife Ann Bond during her life, and I appoint the Rev. Prebendary W. W. Bowley and Mr. John Panes executors and trustees of this my will."

There was no remainder over on the death of the wife, and no residuary devise or bequest.

On the 8th of November, 1888, John Panes and R. W. Gibbs, the two then trustees of the will, were, on the application of Ann Bond, appointed by the court trustees for the purposes of the Settled Land Act, 1882, of the settlement created by the will.

At the time of his death the testator was owner of certain freehold property, which was, in 1889 and 1892, sold by Ann Bond under the provisions of the Settled Land Act, 1882, and the proceeds of the sales, amounting to about £1,900, were now in the hands of the trustees, and had not been re-invested in land.

Ann Bond, the testator's widow, died on the 6th of August, 1895.

On the 17th of November, 1899, upon the application of the trustees, a certificate was granted by the master certifying that no person had come in and established a claim to be the heir-at-law or next-of-kin to the testator, and that the time for advertisement for such purposes had expired.

This summons was taken out by the trustees, John Panes and R. W. Gibbs (since deceased), to which the Attorney-General was defendant, asking for a declaration that John Panes and the legal personal representative of R. W. Gibbs were beneficially entitled to the capital moneys arising from the sales under the Settled Land Act of the testator's freehold property together with all accumulations of income.

Warrington, Q.C., and *O. Leigh Clare*, for the plaintiff.—The trustees are entitled to retain the money now in their hands. The Crown cannot claim by escheat, because in order to do so the money would have to be reconverted into land, and the Crown has no equity enabling it to do this: *Taylor* v. *Haygarth*, 14 Sim. 8; *Walker* v. *Denne*, 2 Ves. Jun. 170; *In re Burgess* v. *Wheate*, 1 Eden 177. In the last-named case

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

the judge did not consider at p. 189 the exception which was subsequently laid down in *Taylor* v. *Haygarth*. *Cradock* v. *Owen*, 2 W. R. 319, 2 Sm. & G. 241, is in our favour. *Barclay* v. *Russell*, 3 Ves. 424, was a different case from the present one. That only decided that the goods of a dissolved corporation having no owner belonged to the Crown. Here the legal estate is in the hands of trustees, and the doctrine of *bona vacantia* does not apply to an equitable estate. *Middleton* v. *Spicer*, 1 Bro. C. C. 201, was also a different case from the present one. That was a case of proceeds of sale of leasehold property. *Dyke* v. *Walford*, 5 Moo. P. C. 434, is also not in point. The same remarks apply to *Cunnack* v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679, and *In re Higginson and Dean*, 47 W. R. 285, [1899] 1 Q. B. 325. Then by section 22 the money in the hands of the trustees is land, and it cannot therefore be claimed as *bona vacantia*. The concluding words of the section only mean that as between the next-of-kin and the heir-at-law the money would go to the heir-at-law.

Ingle Joyce (*Sir R. Finlay, A.G.*, with him), for the Crown.—This is a claim by the trustees to retain a money fund of which there is no beneficial owner. Such a claim has never been heard of before. The trustees have never had any interest in land. They are merely trustees under the Settled Land Act for holding the proceeds of sale. The money is, in fact, 1,900 golden sovereigns without an owner, to which, consequently, the Crown is entitled as *bona vacantia*. The cases cited are really in favour of the Crown. It is a mere money fund, and is only land notionally under section 22 of the Settled Land Act. There is no authority for the trustees to retain it, because there is no *cestui que trust*, or for limiting *bona vacantia* to what has always been pure personalty in the hands of the testator. We admit that we cannot claim by escheat, but we do claim as *bona vacantia*.

KEKEWICH, J.—What the court has to deal with here is a fund consisting of the proceeds of sales of land sold under the Settled Land Act of 1882. Mr. Ingle Joyce says that the sales are not good as regards the Crown, and that, though the Crown is willing to confirm them, he must not be understood to admit that they are good as against the Crown. For my part I am not prepared to assent to the argument and to say that they are not good. There is a legal devise here to the tenant for life, and nothing further; consequently, trustees having been appointed under the Settled Land Act, as at present advised, it seems to me that the tenant for life must have been able to give a good title to the purchasers, and I think she has done so. The point, however, has not been argued here, and I must not be taken to have given an express decision upon it, but it seems to me that the sales must be good both against the Crown and against anybody else. The result, therefore, is that the land has been converted into money, which is liable to be reconverted into land — that is to say, anyone interested, under the settlement, is entitled to have it reconverted to land, and, consequently, it devolves as land.

The trustees were appointed simply for the purposes of the Settled Land Act, and received the money for those purposes; they had no estate or interest in land whatever. They say, however, "The money belongs to us because it is equivalent to land, and being land the Crown cannot get the money by escheat without reconversion, and there is no equity or power on the part of the Crown to reconvert," and that latter proposition is conceded by both parties, and there can be no question about it. But the real difficulty, to my mind, arises from the Act itself, which provides (Settled Land Act, 1882), by section 22, sub-section 5, "Capital money arising under this Act while remaining uninvested or unapplied, and the securities on which any investment of any such capital money is made shall, for all purposes of disposition, transmission, and devolution, be considered as land"; and then the section proceeds to say, "and the same," *i.e.*, the capital money, not the land, "shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement"; and the words "under the settlement" under section 2, sub-section 8, of the Act comprehend undisposed of estate expectant on the determination of the estate for life. The result here is that, the tenant for life being dead, the money is held in trust for the testator's right heir. And as there is no right heir of the testator, that seems to me to let in immediately the claim of the Crown, without any question of necessity or obligation to reconvert. The Crown claims it in its present state—*i.e.*, as money, and says: "You shall not reconvert it at all; it belongs to the Crown." That seems to me to be quite in agreement with the cases cited in argument, including the case of *Taylor* v. *Haygarth*, on which Mr. Warrington especially relied. In that case there was a direction to sell, which makes it an entirely different case from the present one, where there is no direction to sell.

Here the money is in the hands of trustees as money until reconverted into land, and the Crown, instead of requiring it to be reconverted, requires the money itself as *bona vacantia* belonging to the testator's right heir, and, in default of such right heir, to the Crown. I decide, therefore, in favour of the Crown.

Solicitors, *Meredith, Roberts, & Mills*, for *Baker & Co.*, Weston-super-Mare; *Hare & Co.*, for *The Solicitor to the Treasury*.

Q. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 16, 21.

SAUNDERS *v.* WHITE.
BIGGS, *Claimant.* (*a.*)

Bill of sale—Statutory form—True ownership—Two grantors — Chattels belonging to each grantor in severalty—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 5, 7, 9.

A bill of sale by way of security for the payment of money was given by two persons as grantors, of whom each was the owner of some only of the chattels comprised in the bill.

Held, that the form of a bill of sale in the schedule to the Act of 1882, *does not contemplate a bill of sale being given jointly by two independent owners of chattels, and that the bill of sale was void as not being in accordance with that form.*

Appeal of the claimant from the decision of the judge of the Wandsworth County Court on an interpleader issue between the plaintiff (the judgment creditor) and the claimant under a bill of sale.

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The bill of sale was dated the 3rd of May, 1900, and was made between Joseph W. White and Emily his wife as grantors and Samuel T. Biggs as grantee in consideration of the sum of £80 lent by Biggs to the two grantors. The security given was an assignment of furniture, some of which, on the evidence, belonged to the husband and some to the wife.

The bill contained covenants by the husband and wife and each of them, among other things, that they would punctually pay the principal together with interest by four equal monthly payments of £20 each, and contained certain other agreements which are not material.

Lastly it contained a proviso in accordance with the form in the schedule to the Act of 1882, that the chattels should not be liable to seizure for any cause other than those specified by section 7.

The county court judge decided in favour of the judgment creditor and against the claimant on three grounds—first, that the bill of sale was not in accordance with the form in the schedule to the Act of 1882; secondly, that the grantors were not the true owners; and thirdly, that the consideration was not truly stated.

The facts as to the consideration (upon which the court differed from the county court judge) are stated in the judgment.

Mattinson, Q.C., and *Firminger*, for the claimant.

Duke, Q.C., and *Atkin*, for the plaintiff.

The arguments sufficiently appear from the judgment.

Cur. adv. vult.

Nov. 21.—The judgment of the COURT (Lord ALVERSTONE, L.C.J., and KENNEDY, J.) was delivered by

Lord ALVERSTONE, L.C.J., who, after stating the contents of the bill of sale, and the decision of the county court judge, as above set out, said: It would be convenient to dispose of the last point first, as we are of opinion that in this respect the learned judge was wrong. The evidence was that, the £80 having been paid by the clerk of the grantee to White and his wife, the clerk, after the transfer was complete, said to the claimants, "You ought to pay our costs," and thereupon the sum of £13 11s. 6d. costs was paid by the grantors. If such payment was not made in pursuance of some antecedent agreement it would not invalidate the bill of sale. We are clearly of opinion on the evidence before us that there was no antecedent agreement, and that, if that had been the only objection, the bill of sale must be held to be valid.

The question, however, which has been raised by the first two points is one of very great general importance, whether two persons who are not in partnership, and who are not jointly possessed of the goods, but each possesses a part of them, can join in giving a bill of sale, and whether the bill of sale so given is valid, having regard to the provisions of the statute. We are of opinion that the decision of the learned county court judge is right, and that this bill of sale cannot be supported. The cases have decided that the bill of sale must be in substance or substantially in the form in the schedule, by which we understand that no departure is allowed from the form in the schedule which is not merely verbal or immaterial, but which substantially affects the rights and obligations purported to be given to, and imposed upon, the respective parties: see among other cases *Ex parte Stanford*, 34 W. R. 507, 17 Q. B. D. 259; *Kelly & Co. v. Kellond*, 36 W. R. 363, 20 Q. B. D. 569. The question is whether a bill of sale given in form by two grantors who are not jointly interested in the goods, but are each owner of part, does depart in substance from the form given in the schedules. We are of opinion that the learned county court judge was right in deciding that it did. The Bills of Sale Act, 1882, uses throughout the word "grantor" in the singular, and there is no definition of the word "grantor." According to the Interpretation Act, 1889, the singular would include the plural unless the contrary intention appears. In this case, however, we are of opinion that it is not possible to hold that the Legislature contemplated a bill of sale being given jointly by two independent persons.

Among other grounds it is necessary to consider the application of section 7. The form of the bill of sale given in the schedule provides that the chattels shall not be liable to seizure in any case other than those specified in section 7 of the Act of 1882. This proviso is, of course, of the substance of the matter. When we turn to the provisions of section 7 it is difficult, if not impossible, to see how they could be practically carried into effect in the case of two grantors independently interested. It would be necessary in that case to read the word "grantor" in sub-sections 1 to 5 sometimes as referring to one and sometimes including both, and sub-section 2, which gives as one of the causes for taking possession "if the grantor shall become bankrupt," would be in many cases wholly incapable of application, and the argument that any such difficulty might be met by the proviso does not seem to us any answer to the substantial objections which could be raised.

Further, as was pointed out in the course of the argument, any other view might give rise to serious difficulties under section 12. That section prohibits the granting of a bill of sale for less than £30. If a bill of sale given by two persons in the position of these grantors is good, several persons each possessed of goods might join together to obtain a loan of small sums amounting in the aggregate to over £30. It was suggested in argument that the opinion of Lord Esher, M.R., in *Melville v. Stringer*, 32 W. R. 390, 13 Q. B. D. 392, at p. 399, conflicted with this view, and no doubt the language there used does support the view that persons might agree to join together to borrow or lend a sum of money. But the point was not necessary for the decision of that case and no opinion to the same effect was expressed either by Bowen, L.J., or Fry, L.J. We are not, of course, expressing any opinion as to what might be the effect of a bill of sale given by partners, but for the reasons we have given we are of opinion that the bill of sale given in this case was invalid and the decision of the county court judge should be affirmed.

Appeal dismissed.

Solicitors for the claimant, *Biggs, Roche, Sawyer, & Co.*

Solicitors for the plaintiff, *Willets & Sandford.*

Court of Appeal.

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) Dec. 4.

In re MCCALLUM.
MCCALLUM *v.* MCCALLUM. (*a.*)

Limitation Statutes—"Concealed fraud"—Real Property Limitation Act, 1833 (3 *&* 4 *Will.* 4, *c.* 27), *s.* 26—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *s.* 1.

"Concealed fraud," to bring into operation section 26 *of* 3 *&* 4 *Will.* 4, *c.* 27, *must be the fraud of the person setting up the statute or of his predecessor in title.*

The section does not apply where neither the person sued nor his predecessors in title were party or privy to the fraud at the time when it was perpetrated.

This was an appeal from a decision of Kekewich, J. dated the 14th of February, 1900. It raised a question as to the construction of section 26 of the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27), which provides that "in every case of concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud shall be deemed to have first accrued at and not before the time at which such fraud shall or, with reasonable diligence, might have been known or discovered."

In 1884 General McCallum and his wife and daughter, the plaintiff in the action, were residing at Cheltenham in a house known as Linden House (the subject-matter of the action), which was the property of the general. By a voluntary deed dated the 3rd of September, 1884, the General conveyed the house in fee to his wife, and by a voluntary deed dated the 30th of September, 1884, the wife conveyed the house to the daughter. The wife, however, from the first concealed the deed of conveyance to the daughter and the fact of its execution, and in February, 1886, without the knowledge of the daughter, she put the two conveyances in an envelope, which she closed and sent to Mr. J. C. Asprey, a London solicitor (not the solicitor who had been concerned in the preparation and execution of the deeds). At the same time she sent him a letter instructing him to keep the envelope unopened until she required it, and after her death still to retain the envelope for her daughter until her father's decease, after which it was to be given to her provided she was not then the wife of a certain person therein named, a proviso which did not come into operation. The letter concluded by stating that for the present she did not want her daughter to know where the papers were. Mr. Asprey obeyed these instructions, and the envelope was delivered to the plaintiff after her father's decease, when she for the first time became aware of her title to the property. The wife died on the 18th of November, 1888. After her death General McCallum continued in occupation of the house until some time before his death, when he left it and received the rent. There was no evidence that he ever knew that the daughter was entitled to the house. He died on the 25th of August, 1899, having by his will devised all the residue of his property to the defendant, who was his niece. Linden House was not specifically mentioned in the will, but the defendant assumed that it passed as belonging to the General, and retained the title-deeds (other than the two conveyances) and refused to account for the rents received by her. On the 19th of October, 1899, the daughter commenced this action to recover possession of the house. The defendant pleaded the Statute of Limitations. Kekewich, J., held that the conduct of the mother in wilfully keeping from the plaintiff the knowledge that she was entitled to the property amounted to a concealed fraud within the statute and that the statute did not begin to run until after the death of the mother, and he therefore held that the plaintiff was entitled to possession.

The defendant appealed.

The appeal was heard on the 29th of October last.

Renshaw, Q.C., and *St. John Clerke* were for the defendant.

Warrington, Q.C., and *Martelli,* for the plaintiff.

Lord ALVERSTONE, L.C.J., in the course of his judgment, said: The question is whether the right of the plaintiff to recover possession of the house in this action is barred by the Statute of Limitations. Upon the facts I come to the conclusion that there was, on the part of the mother, a concealed fraud within the meaning of the 26th section of the Statute of Limitations (3 & 4 Will. 4, c. 27). I think the mother intentionally concealed from the daughter that she had given her the house with the intention that the deed of conveyance should not become known to her except in certain events. In my opinion, however good was the motive which prompted her action, this was a concealed fraud within the meaning of the 26th section. I further find, however, that the General was no party to the fraud. I draw the conclusion from the facts that he had forgotten all about the conveyance of the 3rd of September, 1884, and there is no evidence that he ever knew of the execution by his wife of the deed conveying the house to the plaintiff. I further find that he remained in possession of the house or dealt with it as his own down to the time of his death. The question then arises whether or not the statute had run against the plaintiff or whether the concealed fraud by the mother can be prayed in aid as an answer to the possession of General McCallum and the defendant. I am of opinion that in order to prevent the operation of the statute the fraud contemplated by the 26th section must be the fraud of the person setting up the statute or someone through whom that person claims. I think that this is the construction which I should have put upon the section if I had no other opinion to guide me. I read the words "may have been deprived by such fraud" as meaning to point to the action of the person who is seeking to rely upon the statute; but when the state of the law prior to the passing of the Act is considered, and the opinions of the judges since that date are regarded, I do not think it is possible to come to any other conclusion. As I understand, the old jurisdiction exercised by the court of equity rested upon the fact that the conscience of the party who was setting up possession as against the title of the true owner was affected so that he ought not to be allowed to avail himself of the lapse of time. This is the reason given by the Lord Chancellor of Ireland in *Hovenden* v. *Annesley,* 2 Sch. & Lef. 607, at p. 634, and when Kindersley, V.C., in *Petre* v. *Petre,* 1 W. R. 139, 362, 1 Drew. 371, at p. 397, was considering the meaning of the same 26th section, he says these words: "It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold." This passage was quoted

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

verbatim in the second edition of Lord St. Leonards' Real Property Statutes, p. 98. It may be said, of course, that these statements of the law are not exhaustive, but I cannot think that such judges would have used the words they do—namely, "by means of such concealment enables him to enter and hold"—if they had contemplated that this section of the statute was dealing with cases of the fraud of third persons (through whom the person in possession does not claim), of which fraud the persons claiming under the statute were wholly innocent. Similarly in the case of *Willis* v. *Earl Howe*, 41 W. R. 433. [1893] 2 Ch. 545, at p. 552, Kay, L.J., approves of the passage already cited from *Petre* v. *Petre*, and adds these words: "But the word 'concealed' seems to indicate that there were facts known to the person who enters and designedly concealed by him from the real owner—which facts, if known, would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is not only the knowledge but the concealment of those facts." And, lastly, in the case of *Thorne* v. *Heard*, 42 W. R. 274, [1894] 1 Ch. 599, at p. 604, Lindley, L.J., in the Court of Appeal states the principle of the law in the way I have indicated and refers to the authorities above mentioned; and Lord Davey, in the House of Lords, 44 W. R. 155, [1895] A. C. 495, at p. 506, uses language which, though it was uttered with reference to another statute, in my opinion lays down the principle of construction that we ought to apply to this Act, an Act only laying down a uniform rule as to the length of time which must have elapsed since possession taken in order to oust the true owner. For these reasons I come to the conclusion that the plaintiff's title is barred by the Statute of Limitations and that this appeal ought to be allowed.

RIGBY, L.J., read a judgment differing from that of the majority of the court, and holding that the decision of Kekewich, J., was right. His lordship said: The main contention before us has been that because the defendant and her alleged predecessor in title were personally ignorant of any fraud down to the time when, but for fraud, the statute would have run, the defendant is entitled to hold as against the plaintiff. A doubt also has been suggested whether the plaintiff was deprived of her land by the fraud. [His lordship read the part of 26th section quoted above and continued:] These words appear to me not to be open to any doubt as to their meaning. They are applicable to every case of a concealed fraud which deprives the owner. Their generality is limited only by the proviso which forms the rest of the section in favour of *bonâ fide* purchasers for value without notice at the time of the purchase. This has no application (as there has been no case of purchase) to this case, though it may serve to rebut certain suggestions that have been made, in my judgment, without foundation as to the construction of that part of the section which is directly applicable. It is indeed difficult to see how an exception or proviso (in opposition to an equitable rule) in favour of innocent volunteers which has been set up in this action and negatived by Kekewich, J., can be implied side by side with the express proviso in favour of *bonâ fide* purchasers for value which only affirms the pre-existing equitable rule. [His lordship then stated the facts, and continued:] It cannot be questioned that the scheme planned and carried out by the wife was a fraud upon the plaintiff. The wife wished, notwithstanding the conveyance to the plaintiff, to retain to herself a certain control over the property, and the scheme was contrived and intended to secure upon her death a life estate to her husband, and this scheme succeeded. By her contrivance her husband continued to hold possession until his death. That the fraud was a concealed fraud is plain from the above statement, and that it could not have been discovered by reasonable diligence is also plain. Was it a fraud that deprived the plaintiff of her land? By that fraud, and from no other cause, she was kept out of possession and enjoyment during the whole of her father's life. There is no evidence that the father knew anything of the conveyance to the plaintiff, and we must assume that he did not. But suppose that he had at any time been told of the daughter's title, as an honest man he could not have joined in the concealment of it from her, otherwise he would have become *particeps criminis*. There is no reason to suppose that he would have tried to do so, but, if she had become aware of her right, she might at any time before October, 1896, have recovered possession by action of ejectment, to which there could have been no defence. The fraud, therefore, and the concealment thereof were the sole and efficient cause of the deprival. The alternative that the plaintiff might have been deprived by the father's continuing in possession appears to me inadmissible. That did not deprive her of her land, but at most of the possession of it. The Statutes of Limitation give no title whatever to trespassers or squatters before the determination of the time limited by the statute for bringing any action or suit, upon which determination section 34 applies and extinguishes the right of the true owner. As to a suit in equity, section 26 must determine what the time is—that is to say, twenty (now twelve) years from the discovery of the fraud. Trespasser the father was, and trespasser he remained after 1896, as well as before. In the judgment of the Court of Appeal (James and Mellish, L.JJ.) in *Vane* v. *Vane*, 21 W. R. 252, L. R. 8 Ch. App. 383, pronounced by James, L.J., there occurred the following passages: "It was, indeed, attempted to be argued that, as the plaintiff's right was a clear legal right which became vested in him at his father's death, with no legal bar or impediment to prevent his taking possession of or recovering the estates, and the defendant's possession originating in a mere trespass, being, in point of law, mere squatting on the property, this court would not interfere." And a little further on he says: "We are of opinion that the law gives no special privilege to the length of squatting possession. It must always be borne in mind that in all questions under the Statute of Limitations this court has nothing to do with the nature, origin, or duration of the defendant's possession, but simply whether the plaintiff has or has not proceeded in due time after the accruer, or that which is to be taken to be the accruer, of his right of suit. An estate may have been enjoyed as a fee simple estate for generations through any number of devolutions or dispositions, or may have been held by squatters successively for many years, without creating any bar to the proceedings of a rightful owner under a title newly accrued. And there is not, in our judgment, in this respect any difference whether the accruer is on the determination of a previous estate or on the discovery of a concealed fraud." The law he laid down, as to the discovery of a concealed fraud giving, as it were, a new right in equity, coincides with what was said again and again by Lord Redesdale (when Lord Chancellor of Ireland) in the course of his judgment in *Hovenden* v. *Annesley*. I have carefully reperused the judgment in that case, and I find nothing in it inconsistent with the judgment which I am now pronouncing. It is true that in commenting on *Booth* v. *Warrington*, 1 Bro. Parl. Cas. 455, he uses the expression "the conscience of the party being so affected that he ought not to be allowed to avail himself of the lapse of time." It is true also

that in that case Booth (the defendant) was himself the perpetrator and concealer of the fraud. But Lord Redesdale cannot reasonably be interpreted as implying (he certainly does not say) that in no case can a defendant be bound in conscience unless he knew of the fraud at the time of its perpetration, or afterwards before the statute created a legal bar. The important time to consider is when a suit is brought by the rightful owner to recover the property. If the defendant then knows, as he must do on the fraud being established by evidence, that he and all persons through whom he claims have held entirely by virtue of the fraud, it is (to use the expression of Lord Redesdale) against conscience for him to claim the continued benefit of the fraud. [His lordship then referred to and commented on *Huguenin* v. *Baseley*, 14 Ves. 273; *Scholefield* v. *Templer*, 7 W. R. 353, Johns. 155, and on appeal 7 W. R 635, 4 De G. & J. 433, and other authorities, and continued:] It was, therefore, well established by authoritative decisions binding on the Court of Appeal, and not to be questioned here, that, independently of the Real Property Limitation Act, 1833, a suit in equity might have been brought at any time in a case of concealed fraud, notwithstanding that the person sued, and those through whom he claimed as predecessors in title, had not been party or privy to the fraud at the time when it was perpetrated. It would be strange, indeed, if a statute intended for the limitation of actions and suits relating to real property should be found to contain such a substantive alteration in the law as a change, when the Act came into force, of the fundamental principles on which suits in equity in cases of fraud were theretofore tried. It has, however, always been treated as clear that no change in the substantive principles of equity was intended by the Act. [After a further reference to the facts of the case, his lordship continued:] The appellant construes section 26 so as to exclude all cases in which the defendant by himself or his predecessors in title were not before the discovery of the fraud party or privy to it. No decided case has been cited in which this construction has been adopted and made the ground of decision. If such a case were produced we should have to consider whether it was binding on us sitting as a Court of Appeal. *Obiter dicta* of text writers and judges, not always correctly appreciated, have alone been relied upon. With regard to these it is sufficient to say that no *dicta* of text writers or judges, however eminent, if contrary to fixed principle or the words of a statute, can have the force of an amending Act of Parliament, or absolve us from the duty of ourselves applying the principle or construing the Act. All the *dicta* relied upon depend more or less on the explanation of concealed fraud given by Kindersley, V.C., in *Petre* v. *Petre*, 1 Drew. 371, at p. 397. That explanation, treated as referring to the circumstances of that case, cannot be questioned. Treated as applying to all cases, whatever their circumstances, it becomes a mere *dictum*, and one that is irreconcilable with the doctrine of *Huguenin* v. *Baseley*. There is no reason why the Vice-Chancellor, who certainly was not ignorant of what the Court of Appeal called in 1859 a well-established principle, should have meant it to be so treated. All such *dicta* must be interpreted, and, if necessary, limited, so as to accord with the fixed principle or the statute in question. One danger of treating such *obiter dicta* as authorities is that, if stated only in general terms, one may be applying them to circumstances which the authors never had in mind. In other words, we may be treating as exhaustive what the authors intended only to apply to special circumstances. All the *dicta* relied upon might be explained and brought into accordance with the whole line of authorities by interpreting "fraud by him or his predecessors" and similar phrases as including fraud properly imputable to him or them whether originally or at the trial. This might, without legal inaccuracy, be treated as fraud by him or them. *Thorne* v. *Heard*, was a case in which the construction of the statute of 1833 did not come into question, directly or indirectly. It depended solely on the question whether, under the Trustee Act, 1888, the trustees were party or privy to a fraud so as to bring them within the language of the exception contained in the Act. In my judgment, the appeal ought to be dismissed.

VAUGHAN WILLIAMS, L.J., agreed with the judgment of the Lord Chief Justice. In his opinion a concealed fraud to bring into operation section 26 of 3 & 4 Will. 4, c. 27, must be the fraud of, or in some way imputable to, the person who invoked the aid of the Statute of Limitations. After discussing the authorities, his Lordship said that upon the facts he thought that they were all agreed, first, that the possession of the General was not the possession of his wife, at all events after her death; and, secondly, that neither the General nor the defendant was privy to the fraud of Mrs. McCallum. He therefore thought the appeal should be allowed. His lordship then proceeded as follows: I wish to add one word about Mrs. McCallum. I think that quite consistently with the evidence she may have been innocent of moral fraud. She may well have supposed that the conveyance to her daughter was of no effect until she communicated the fact of the conveyance to her daughter or delivered it to someone to hold for her. I am not sure that the fact that she did not disclose to her daughter the conveyance which she had executed to her would constitute concealed fraud if she honestly supposed that the conveyance was of no effect. I think I ought to say that I am by no means satisfied that she was guilty of a fraud. Taking the view which I do of this case, it is unnecessary to determine whether she was guilty of concealed fraud within the meaning of section 26, but I should hesitate to come to that conclusion.

Solicitors, *J. W. Asprey; Field, Roscoe, & Co.*, for *Bubb & Co.*, Cheltenham.

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Nov. 24.

In re RENDELL.
WOOD *v.* RENDELL. (*a.*)

Administration—Intestacy—Domicil—Person authorized to take out administration—Distribution.

The widow (who lived abroad) of an intestate authorized W. to take out letters of administration of the intestate's estate in this country. W. got in all the estate, and after paying debts had a sum in hand.

Held, that W. was the proper person to distribute the estate among the next-of-kin.

Thomas Rendell died intestate in England on the 5th of May, 1899, leaving a widow and children abroad him surviving. He was a domiciled Englishman, and was possessed of personal property situate entirely in England. On the 20th of July, 1899, the

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

widow gave a power of attorney to the plaintiff in this country to take out letters of administration, and administration was consequently granted to him as attorney for the widow on the 4th of September. No administration was taken out elsewhere, and the widow was not the administratrix abroad. The plaintiff, after paying all debts, had the sum of £1,300 in hand. The object of the summons was to determine whether the plaintiff should pay over the assets to the widow or distribute them himself among the next-of-kin.

F. Douglas, for the plaintiff.—The principle of *De La Viesca* v. *Lubbock*, 10 Sim. 629, is not applicable to the present case, as there is no general administrator abroad.

T. L. Wilkinson, for the defendant, referred to *Chambers* v. *Bicknell*, 2 Hare 536, and *In re Dewell, Edgar* v. *Reynolds*, 6 W. R. 404, 4 Drew. 269.

COZENS-HARDY, J.—This is no doubt a case of importance. I am dealing here with a gentleman who has been constituted administrator, and has made the usual declarations. Administration was granted to him, it is true, as the nominee of the widow (who is in the United States), but any moment she comes here and applies for administration she will have it. She is not the legal personal representative of the intestate in the United States, so it is immaterial to consider the question of domicil. She can, therefore, only claim because she is beneficially entitled to a share. There is no portion of the property for which she can give a good receipt. Can I hold that it is right for her to hand over the property to the next-of-kin? I think the observations of Kindersley, V.C., in *In re Dewell, Edgar* v. *Reynolds* are common sense. The money cannot be handed over to the widow, but must be distributed among the next-of-kin by the plaintiff.

Solicitors, *Atkinson & Dresser*.

Chan. Div.
Cozens-Hardy, J. } July 3, 1900.

BRIGHT v. RIVER PLATE CONSTRUCTION CO. (LIMITED). (a.)

Arbitrator—Counsel—Disqualification—Bias.

Counsel habitually employed by the solicitors of one of the parties to an arbitration, is not disqualified from acting as arbitrator merely on that account.

An agreement was entered into in August, 1899, between the River Plate Construction Co. (Limited), Messrs. Capel, stockbrokers, and the plaintiff Bright relative to certain tramway concessions in Buenos Ayres. Under the agreement all matters in dispute were to be referred to the sole arbitration of Mr. K., a barrister, or of some person nominated by him. On the 13th of June the question whether an action brought by one of the parties to the arbitration should be allowed to proceed was raised by a motion, and the motion was dealt with on the assumption that the arbitration should go on. Several appointments before K. followed

The plaintiff now moved to restrain further proceedings before the arbitrator, on the ground that K. was a gentleman at the bar who had constantly been employed by the solicitors for the River Plate Construction Co., and it was necessary for him as arbitrator to review the conduct of a representative of the solicitors. No charges whatsoever were made against K. When he was originally named it was perfectly well known to plaintiff's solicitors that K. was habitually employed by the solicitors of the River Plate Construction Co., but the plaintiff was told that he had not been employed in this particular matter. K. now declined to act further as arbitrator, but for the purpose of costs the judge's decision was taken whether or not the motion was proper.

Sir Edward Clarke, Q.C., and *Coldridge*, for the motion, said plaintiff was justified in trying to stop the proceedings before the arbitrator as affairs had taken a new aspect, and the arbitrator might be embarrassed.

Eve, Q.C., Hume Williams, Q.C., and *MacSwinney*, for the River Plate Construction Co. and Messrs. Capel.—There must be a reasonable probability that the tribunal would be biassed, and the plaintiff admits by his pleadings that there is no such probability in this case.

Counsel referred to the following cases: *Beddow* v. *Beddow*, 26 W. R. 570, 9 Ch. D. 89; *Eckersley* v. *Mersey Docks and Harbour Board*, [1894] 2 Q. B. 667, 43 W. R. Dig. 8; *Jackson* v. *Barry Railway Co.*, [1893] 1 Ch. 238, 41 W. R. Dig. 6

COZENS-HARDY, J., stated the facts, and proceeded: It is suggested that Mr. K. has close connection with defendants' solicitors as counsel. It is important to remember that it is not alleged that Mr. K. is unfit or biassed. He was chosen with the consent of both parties. I must adopt the principle laid down in *Eckersley* v. *Mersey Docks and Harbour Board* and in *Jackson* v. *Barry Railway Co.* I must refuse the motion, and refuse it with costs.

Solicitors, *Bennett & Co.; Norton, Rose, Norton, & Co.; Gedge, Kirby, & Millett.*

Chan. Div.
Farwell, J. } Nov. 3, 6.

MULLER v. TRAFFORD. (a.)

Landlord and tenant—Underlease—Covenant by sublessee on obtaining extension from freeholder to grant new lease—Covenant running with land—Perpetuity—32 Hen. 8, c. 34, s. 2.

A covenant by an underlessee to grant a new lease on obtaining an extension from the freeholder is not strictly a covenant running with the land, and is not an exception from the rule against perpetuities.

The statute 32 Hen. 8, c. 34, s 2, applies to a reversion which is vested in the covenantor at the time he enters into the covenant.

Held, that a person who was an assignee of an underleesee, and who had acquired a new lease from the freeholder, was not bound by the covenant to grant a new lease entered into by the underlessee.

This was an action for specific performance of a covenant contained in an underlease dated the 25th of June, 1851, and made between Daniel Austin of the first part, Thomas Golding of the second part, and Eden Fisher of the third part. Daniel Austin held the property demised from a man called Andrew Reid under an indenture of lease dated 29th of December, 1804. Andrew Reid held under a lease from Sir Charles Morgan.

The underlease contained a covenant in these terms:

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

"In case the said Daniel Austin shall obtain from the said Sir Charles Morgan, his heirs or assigns, any extension of the term for which the said Daniel Austin now holds the ground and premises hereby demised with other hereditaments and premises from the said Andrew Reid under a certain indenture of lease bearing date of 29th day of December, 1840, that then and in that case the said Daniel Austin, his executors, administrators, or assigns, shall and will within three calender months next after such extension being obtained at the cost in all things of the said Eden Fisher, his executors, administrators, and assigns, grant unto him, the said Eden Fisher, his executors, administrators, and assigns, a new lease of the said ground and premises hereby demised for such extended term as will include the term then unexpired of the term hereby granted, and the further term less ten days which may be granted to the said Daniel Austin by the said Sir Charles Morgan, his heirs or assigns. And the said Eden Fisher doth hereby for himself, his executors, administrators, and assigns, further covenant to and agree with the said Daniel Austin, his executors, administrators, and assigns, that he, the said Eden Fisher, his executors, administrators, or assigns, shall and will accept such new lease and execute a counterpart thereof, and that such new lease and counterpart shall be prepared by the solicitor of the said Daniel Austin, and shall contain the same covenants as are herein contained, save only that the actual rent to be reserved and made payable shall be £9 a year instead of £7 10s. hereby reserved, such further or last-mentioned yearly rent to commence and become payable from the quarter-day next following that from which the same Daniel Austin, his executors, administrators, or assigns, shall obtain such extension or term from the said Sir Charles Morgan, and shall be paid and payable on the days and times and in manner hereinbefore mentioned for payment of the rent hereinbefore reserved and made payable, and also shall contain such further and other covenants and provisoes as may be required by such further lease from the said Sir Charles Morgan to the said Daniel Austin, his heirs, executors, administrators, or assigns."

Daniel Austin died in 1854, and Eden Fisher in 1892. In October, 1892, the executors of Eden Fisher assigned the underlease to the plaintiff. The defendant was an assignee of the premises for the residue of the term originally granted to Daniel Austin, and subsequently, upon surrendering his interest in that term, obtained from the freeholder a new lease of the premises subject to the underlease of 1851.

C. E. Jenkins, Q.C., and *D. M. Kerly*, for the plaintiff.

Upjohn, Q.C., and *Percy Wheeler*, for the defendant, referred to *Brereton* v. *Tuohey*, 8 Ir. C. L. Rep. 190; *Kent* v. *Stoney*, 9 Ir. Ch. Rep. 249; *Coey* v. *Pascoe*, [1899] 1 Ir. 125.

FARWELL, J., in giving judgment, said: The first question is one of construction. It will be observed that all this depends on the condition precedent, that "in case the said Daniel Austin shall obtain," and so on. He was an underlessee, so far as Sir Charles Morgan was concerned, and the proviso in terms is confined to Daniel Austin. There are phrases which have been pointed out to me, and the last of them, no doubt, is of considerable force, which was, that Daniel Austin may possibly have intended to include his executors, administrators, or assigns. On construction, if it rested on that alone, I should be of opinion that Daniel Austin meant Daniel Austin alone. It is a matter which I quite feel that other people may very easily come to a different conclusion upon, but when a draftsman or a lessor draws a lease in this form, and uses the term Daniel Austin in this way, "in case the said Daniel Austin shall obtain from the said Sir Charles Morgan, his heirs or assigns," it appears to me he had, in the very sentence with which he commenced, the distinction present in his mind between the one person he mentions and the representatives of that person after his death. When he deals with Sir Charles Morgan, he mentions the heirs and assigns. When he deals with Mr. Daniel Austin, he mentions him and him alone, and I do not think I should be justified in adding to the words "Daniel Austin" the words "his executors, administrators, or assigns"; and here I should have to add the word "assigns," for executors and administrators would not do alone. Apart from any question of construction depending merely upon the words, I think the draftsman was well advised, and probably intended to limit this to Daniel Austin himself, because, for the reasons which I am about to give on the other points, I think he could not properly have given this option by way of condition precedent to Daniel Austin, his executors, administrators, and assigns, without limiting it so as to avoid infringing the rule against perpetuity. On construction, therefore, I should be in favour of the defendant.

Now, the next point is this, that it is said that this is a covenant running with the land. If it be a covenant running with the land, then no question of perpetuity would arise. A covenant to renew has been held for at least two centuries to be a covenant running with the land. I am not prepared to say that this is a covenant to renew. A covenant to renew is a technical term well understood. This is a covenant that in case the underlessee gets from somebody else, not his landlord, and therefore no renewal, but gets from somebody else a further term leaving out of sight the lessor altogether in this particular underlease and the term vested in him; if he gets from the freeholder, whose estate extends beyond and has no connection with the estate of the underlessee, a further term, then he will do certain things. Now, if this is a question of technicality, or a technical rule only, and it has been laid down that contracts for renewal properly so called, are contracts running with the land, and are not, therefore, within the rule of perpetuity, then I say it is not a covenant for renewal strictly so called, and I should not extend what is an anomaly to a case which is not strictly a covenant for renewal.

But supposing that were not so, and that this is to be considered a covenant for renewal, then in my opinion covenants running with the land are free from any taint of perpetuity by reason of the nature of those covenants. A covenant running with the land we all know; and leaving out of sight those particular characteristics which are necessary to make a covenant run with the land, I assume, for the purpose of this construction, that this is of such a nature as to make it a covenant running with the land, and that being so, the covenant runs with the land, it being annexed to the land.

I might take the description of it given by Collins, L.J., in *Rogers* v. *Hosegood*, 48 W. R. 659, [1900] 2 Ch. 388, or perhaps I might cite from my own judgment, which, as it was adopted by the Court of Appeal, I may properly do. I say, "The accurate expression appears to me to be that the covenants are annexed to the land and pass with it in much the same way as title deeds." That is adopted by the Court of Appeal as correct, and the same phrase, "annexed to the land," is used by Collins, L.J., in delivering the judgment of the court. He then goes on to say, after referring to the cases,

"These observations, which are just as applicable to the benefit reserved as to the burden imposed, show that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land."

Perpetuity has no application to covenants which run with the land because they are so annexed to the land as to create something in the nature of an interest in the land. As between lessor and lessee, therefore, the lessee accepts and the lessor grants something which is more or less, according to the point of view from which you look at it, than the actual term or interest granted. It is a term subject to something and with the benefit of something. It is a reversion subject to something and with the benefit of something, and those two somethings are annexed to, and form part of, the land in such a sense that the doctrine of perpetuity has no application. But then, says Mr. Jenkins, as between landlord and tenant it depends upon the construction of the statute, and I agree it does, because I think I may assume it is settled law that at common law covenants run with the land, but not with the reversion.

So far as the statute is concerned it depends really on the statute of 32 Hen. 8, c. 34. The point is, what is the meaning of the section which gives the like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, taking any gift or grant with covenants as to reversion of the land and hereditaments sold. If I am right in the view I have taken that the doctrine of perpetuity does not apply to covenants running with the land it is obvious that the reversion means the reversion which the lessor has in him at the date at which he grants the lease, or to use Collins, L J.'s, expression, "in the inception of the dealing between the parties." If that is so, then all I have to see is, whether Daniel Austin had, at the time he entered into this covenant, such an interest as could possibly be bound so as to give effect to the covenant which he entered into. In my opinion he clearly had not, nor was it intended, on the terms on the face of the deed itself, that it should take effect out of any interest he then had, because it is "in case he should obtain from the freeholder," with whom he had no privity, any extension of term which he, Daniel Austin, then held from Andrew Reid, the intermediate lessee. It is obvious, therefore, that the contract did not contemplate in its terms any dealing with the reversion then vested in Daniel Austin so far as giving effect to this particular covenant out of it. Moreover, so far as that is concerned, although I have no English authority exactly in point, the Irish cases which have been cited are absolutely on all fours; and, although they are not binding upon me, the Court of Exchequer Chamber which delivered the judgment in the case of *Brereton* v. *Tuohey* was an exceedingly strong court, and I respectfully express my assent to the reasoning in that case. The head-note is this: "A covenant for perpetual renewal entered into by a person holding a limited interest in lands does not bind the estate beyond that interest, and therefore if his assignee acquires the inheritance it is not bound by the covenant."

It appears to me, on the authority of the Irish cases, and also on principle, that this is a case of such a sort that the statute does not apply, because the covenant runs with the reversion which is vested in the covenantor at the time he enters into the covenant. That appears to me to be plainly the meaning of the Act of Parliament. It is true, so far as I can discover, no one has yet decided the point in England, but I do not think I need hesitate in expressing my opinion because it has not hitherto been decided.

This renders it unnecessary for me to consider the other grounds suggested by Mr. Upjohn, as to whether, assuming I was against him on these points, I could hold he was an assign within the meaning of the covenant. It is not necessary for me to consider that, and of course it is not necessary for me to consider the other points as to whether Daniel Austin himself would be liable, because the defendant is neither Daniel Austin nor his executor or administrator, and, therefore, if it be a mere personal covenant, as I hold it is, he is in no way bound by anything Daniel Austin may have contracted to do.

The action will be dismissed with costs.

Solicitors, *Wollacott & Son; Carlisle, Unna, Rider, & Heaton.*

Chan. Div. } Nov. 2, 8.
Wright, J. }

In re NORTH-WEST ARGENTINE RAILWAY CO. (LIMITED). (*a.*)

Company—Winding up—Assets—Distribution.

The articles of association of the A. Co. made no provision as to the distribution of its assets on winding up. The A. Co. made an agreement to sell its business and property to the C. Co. in part consideration of the transfer of certain of the C. Co.'s stock to the shareholders of the A. Co. There were two classes of shareholders of the A. Co.—preferred and deferred. The A. Co. gave notice to its shareholders calling a meeting for the purpose of passing a resolution to carry out this agreement. Both the agreement and the resolution made no mention as to the distribution of this stock between the two classes of shareholders. With the notice calling the meeting, the secretary of the A. Co. sent out a circular saying that at the wish of the C. Co. the stock would be distributed between the preferred and deferred shareholders in certain proportions, and not pro rata. *The resolutions were carried, but not unanimously, certain shareholders voting against them and some refraining from voting.*

Held, that it was impossible to make an order affecting all the shareholders collectively; that an inference could not be drawn that all parties had agreed on a principle of distribution not in accordance with the legal rights of the two classes of shareholders in a winding up; and that the liquidator must distribute the stock in accordance with the legal rights of the shareholders.

Summons by the voluntary liquidators for directions as to the distribution of the assets of the company.

The company was registered in 1886 under the Companies Acts, 1862 to 1883, with a capital of £550,000 divided into 55,000 shares of £10 each, of which 35,000 were preference shares and the other 20,000 were deferred shares. All the shares were issued and were fully paid up, or credited as fully paid up. The articles of association were silent as to how the assets of the company were to be distributed among the shareholders in the event of the company being wound up.

By an agreement dated the 20th of July, 1899, and made between the North-West Argentine Railway Co. (Limited) (hereinafter called "the Argentine Co."), and the Cordoba Central Railway Co. (hereinafter called "the Cordoba Co."), it was agreed that the Cordoba Co. should take over all the undertaking and property of the Argentine Co. Part of the consideration was that the Cordoba Co. should pay the costs and expenses of winding up the Argentine Co., and that £310,000 Cordoba Central Railway Income Debenture Stock (Central Northern

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

Section) was to be distributed among the holders of the preferred and deferred shares of the Argentine Co., such stock to be accepted by the shareholders in full satisfaction and discharge of their rights and interests in the undertaking agreed to be transferred. The agreement was expressed to be made upon the conditions (1) that all necessary resolutions had been passed by the shareholders of the Argentine Co., and (2) that all necessary resolutions had been passed and consents obtained from the stockholders of the company and others. The agreement made no mention as to the proportions in which the £310,000 stock was to be divided between the preferred and deferred shareholders. On the 17th of July, 1899, the secretary of the Argentine Co., by order of the directors, gave notice to the shareholders of an extraordinary general meeting for the 10th of August, when the subjoined resolutions would be proposed, and, if passed by the required majority, would be submitted for confirmation as special resolutions at a second extraordinary meeting to be subsequently called. The first resolution was to the effect that the agreement between the two companies for the transfer in exchange for the £310,000 stock "be and is hereby approved, and that the directors be and they are hereby authorized to carry the same into effect accordingly." The second resolution was "That with a view to the distribution among the shareholders of their proportion of the purchase price provided for by the said agreement in manner therein provided, the company be wound up voluntarily," and then proceeded to name the proposed liquidators.

The secretary also sent out the following circular with the notices:

"Sir or Madam,—In pursuance of the expression of opinion given by the shareholders at the annual general meeting, held on the 17th of May last, the board have sealed and exchanged the *ad referendum* agreement providing for the transfer of this company's undertaking and assets to the Cordoba Central Railway Co. (Limited), provided the approval of this company's debenture-holders and shareholders is obtained to the terms of transfer. I enclose herewith a notice convening an extraordinary general meeting to consider the proposal, and also send an epitome of the agreement, so that you may have time to consider the terms of the transaction before the meeting. I shall be happy to produce a full copy of the agreement to you here, should you desire to inspect it. You will observe that the purchase consideration to the shareholders is £310,000 Cordoba Central Income Debenture Stock, which, at the wish of the Cordoba Central Railway Co. (Limited), is to be distributed among the shareholders in the following proportions—viz., £210,000 to the preferred shareholders, and £100,000 to the deferred shareholders."

At the meeting it was pointed out that £210,000 was more than the proportion to which the preferred shareholders were entitled, and that the amount should be £197,000 to the preferred and about £112,000 to the deferred, both classes taking share and share alike. The resolutions were put and carried, but not by a two-thirds majority.

Another extraordinary meeting was called for the 29th of August, when a resolution similar to the first mentioned above was carried. A circular was sent with the notice, which said that the 35,000 preferred shares were to be exchanged for £210,000 Cordoba Stock, and the 20,000 deferred shares for £100,000 stock, and went on to say of the deferred shares that they "have equal capital rights with the preferred shares, and, looking at the strength of their legal position, the apportionment of £100,000 income bonds appears to afford a fair settlement of their claims."

The Argentine Co. afterwards passed resolutions to voluntary wind up.

The liquidators now took out an originating summons under section 138 of Companies Act, 1862, for directions as to the proportions in which the £310,000 was to be distributed between the two classes of shareholders.

Whinney (*Swinfen Eady, Q.C.*, with him), for the liquidators.

Jenkins, Q.C., and *Kirby*, for the preferred shareholders.—The shareholders had full notice both from the circulars and what was said at the meetings as to the way in which it was proposed to distribute the £310,000 stock, and the court may draw the inference that both classes assented. The court may infer that the shareholders have arrived at a different manner of distribution to the way prescribed by the articles: *Somes* v. *Currie*, 1 K. & J. 605, 3 W. R. Ch. Dig. 76; *In re Beeston Pneumatic Tyre Co.*, (1898) W. N. 34. Here the articles are silent as to the distribution, and the shareholders' position is regulated by law, but when they have allowed their position to be changed without objecting, the court may infer that they have consented.

Eve, Q.C., and *Peterson*, for the deferred shareholders.—The resolution says nothing as to how the £310,000 stock is to be distributed. Even if a term can be implied distributing the stock in the way suggested, the resolution cannot bind the minority to take less than they are legally entitled to: *Griffith* v. *Paget*, 25 W. R. 523, 5 Ch. D. 894; *Simpson* v. *Palace Theatre*, 69 L. T. Rep. 70. *In re Beeston Pneumatic Tyre Co.* was decided on a different state of facts.

Jenkins, Q.C., in reply.—The inference to be drawn here is that the shareholders consented.

Cur. adv. vult.

NOV. 8.—WRIGHT, J.—There is no doubt that in this case the resolution for adopting the agreement with the Cordoba Co. would not have been passed but for the positive representation contained in the Argentine Co.'s circular that the stock which is in question was to be distributed in the manner therein suggested. The words were: "You will observe that the purchase consideration to the shareholders is £310,000 Cordoba Central Income Debenture Stock, which, at the wish of the Cordoba Central Railway Co. (Limited) is to be distributed among the shareholders in the following proportions—viz, £210,000 to the preferred shareholders and £100,000 to the deferred shareholders" On the faith of that representation a sufficient number of the preference shareholders either voted for the resolution or abstained from voting against it; and, as against those who adopted and took the benefit of that representation, effect ought if possible to be given to it. It seems, however, impossible on the present application to make an order or declaration affecting the shareholders collectively. In *Somes* v. *Currie* and in *In re Beeston Pneumatic Tyre Co.* there were facts from which an inference was drawn that all the parties concerned had agreed upon a principle of distribution. In the present case there is no room for such an inference. The resolution did not purport to give effect to the representation; it was not unanimously passed; the majority had no power to bind the minority in this respect; not much more than half of the shareholders were represented at the meeting; and no consent or equity can be suggested as against the dissentients or the absentees. But then it is argued that individual deferred shareholders who took part in supporting the resolution are bound by the representation contained in the company's circular. It is difficult to see the ground of the contention. The circular was not theirs; they

made no representation, collectively or individually, nor would it be practicable to discover by an inquiry which of the deferred shareholders who voted had any knowledge of the representation. If there is any remedy, I think it must be in another court or by a different proceeding—a proceeding against the company or the directors or to set aside the resolution. The liquidator must give to the resolution as it stands its legal effect, unless the resolution itself can be set aside. It has not been suggested that anyone wishes it to be set aside, nor could any proceedings for that purpose have much prospect of success, for the transfer to the Cordoba Co. has been completed, and no equity arises as against them. All that I can do is to sanction some delay in the distribution of the stock so as to give an opportunity to the preferred shareholders to ask for consents from individual shareholders to the distribution of the assets, so far as their individual interests are concerned, according to the scheme suggested in the circular; and an opportunity to consider whether any other proceedings can be taken with any prospect of success.

His lordship declared that the stock was to be distributed among the shareholders according to their legal rights.

Solicitors, *Slaughter & May; Ward, Bowie, & Co.; E. A. Leadam.*

Q. B. Div.
(Lawrance and Kennedy, JJ.) Oct. 31.

JONES *v.* DAVIES. (*a.*)

Bastard — Summons against putative father—Married woman living with her husband — Bastardy Laws Amendment Act, 1872 (35 *&* 36 *Vict. c.* 65), *s.* 3.

A married woman is not entitled to a bastardy summons against the putative father of a bastard child born to her during wedlock if, at the time of her application, she is living with her husband.

Case stated by justices of Cardiganshire.

On the 28th of February, 1900, Hannah Jones, the appellant, preferred an information against David Davies, the respondent, under section 3 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), charging that she had been delivered of a bastard child of which the respondent was the father, and applied for a summons against the respondent.

The appellant, at the time of the birth of the child and for some years previously, was a married woman, the wife of one Benjamin Jones, a seafaring man. The child was born on the the 3rd of December, 1899. The appellant's husband was at sea from the 23rd of February, 1899, to the 6th of July, 1899. It was proved that the husband became aware of the appellant's pregnancy about four months after conception. Notwithstanding that knowledge, he returned to his wife, who had throughout remained at his home, in July, 1899, and cohabited with her for three weeks, when he again went to sea. He returned again from sea in September, 1899, and again cohabited with his wife.

He was again at sea when the child was born. He returned to his home on the 27th of January, 1900, when he again lived with his wife. But this time he did not sleep in the same house.

On the 31st of January, 1900, while the appellant and her husband were so living together, she, accompanied by her husband, laid an information and applied to a justice for a summons under the Bastardy Laws Amendment Act, 1872, against the alleged father of the child, which summons was duly issued and served. On the 7th of February the appellant and her husband, who were still living together in the manner described, called upon a solicitor. The solicitor advised the appellant that in order to entitle her to a bastardy summons she must be living apart from her husband. Accordingly, from that day the appellant and her husband separated, and did not see each other again until the 28th of February. The appellant returned to her husband's house, and her husband went to live at the house of his father-in-law, about seven miles from his own home. On the same day the appellant laid a second information describing herself therein as a "single woman," and applied for another summons, the first having been withdrawn. The summons was duly issued and served, and came on for hearing on the 28th of February. Both the appellant and her husband attended the hearing, and after it was over the appellant went to the workhouse at Aberayron, and her husband returned to his own house.

The justices found that the alleged separation on the 7th of February was not a *bonâ fide* separation, but colourable, and for the purposes of the bastardy proceedings, and that the parties intended to and did cohabit together. Without inquiring into the parentage of the child, they dismissed the summons upon the ground that the words "single woman" in the Act did not apply to a married woman who was living with her husband at the time the information was laid and the summons applied for.

The Bastardy Laws Amendment Act, 1872, enacts as follows: "Any single woman who may be with child, or may be delivered of a bastard child after the passing of this Act may, either before the birth, or at any time within twelve months from the birth of such child . . . make application to a justice of the peace for a summons to be served on the man alleged by her to be the father of the child . . . "

S. T. Evans, for the appellant.—The justices were wrong in dismissing the summons on the ground that the appellant was not a person entitled to apply for it. It was held in *Stacey* v. *Lintell*, 27 W. R. 551, 4 Q. B. D. 291, *Tozer* v. *Lake*, 4 C. P. D. 322, 28 W. R. Dig. 23, and *Peatfield* v. *Childs*, 63 J. P. 117, that the mother of an illegitimate child who afterwards marries is not entitled to apply for a summons, even where the husband has, on learning of the existence of her bastard child, turned her out of doors. The case of a woman who commits adultery is different, for a husband is not bound to support his wife's bastard child born during wedlock, whereas in the case of a woman having children born before marriage the husband is bound, by virtue of 4 & 5 Will. 4, c. 76, s. 77, to support such children.

7 & 8 Vict. c. 101, s. 2, and 6 Geo. 4, c. 31, s. 1, are in terms similar to section 3 of the Act of 1872, and in *Rex* v. *Luffe*, 8 East 193, and *Reg.* v. *Collingwood*, 12 Q. B. D. 681, it was held that a married woman giving birth to an illegitimate child could apply for a summons. These decisions were followed in *Ex parte Grimes*, 22 L. J. M. C. 153.

Bryn Roberts, for the respondent.—The appellant here was found to be living with her husband. No case has gone so far as to lay down that a married woman living with her husband is a single woman within the meaning of the Act.

S. T. Evans, in reply.—In *Rex* v. *Luffe* Lord Ellenborough did not advert to the fact that the woman was living apart from her husband, the sole consideration with which he dealt was the question of the legitimacy or otherwise of the child. The presumption that a child born in wedlock is legitimate

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law

is rebuttable: see *Burnaby* v. *Baillie*, 38 W. R. 125, 42 Ch. D. 282, and *Bosville* v. *Attorney-General*, 36 W. R. 79, 12 P. D. 177.

LAWRANCE, J.—The justices were right. In none of the cases which have been cited to us has it been held that a married woman can be regarded as a single woman for the purpose of the Bastardy Laws Amendment Act, 1872, while she is living with her husband. The words "single woman," which appear in the early Bastardy Acts as well as in the Act of 1872, at first caused a difficulty. The courts got over that difficulty by deciding that a married woman living apart from her husband was a single woman within the meaning of this Act. But in no case had it been held that a married woman living with her husband can obtain a bastardy summons. No doubt the solicitor who advised the appellant to separate from her husband had read the cases of *Rex* v. *Luffe* and *Reg.* v. *Collingwood*, but the justices having found that the separation which took place was only colourable and effected with a view to the bastardy proceedings, the appellant must be taken to be a woman who was living with her husband. The appeal will therefore be dismissed.

KENNEDY, J.—This case is one of some difficulty. The question is whether when, according to the finding of the justices, a woman is living with her husband, she can obtain a bastardy summons and order against a man other than her husband, assuming that it can be proved that that man is the father of her child. The section which deals with the matter, in terms relates to an application by a "single woman." *Primâ facie* the appellant, being a married woman, would not come within the terms of the section. But a number of authorities have been cited to us which go to show that the word "single" may be so far neglected as to permit of the successful application by a woman, notwithstanding her *status* be that of a married woman in the eye of the law. But one ought not to tamper with the plain meaning of the words of a statute and create exception after exception upon it. It is not for us to criticize the decisions of the earlier judges. It is true that there have been cases in which the courts have held that a married woman was entitled to a summons when at the time of her application she was living apart from her husband.

In *Rex* v. *Luffe* the woman at the time of the application by the poor law authorities, in respect of the maintenance of her child, was a woman who had committed adultery, and was living apart from her husband. In *Reg.* v. *Collingwood* also the order was made while the woman was living apart from her husband, and the order provided for the payment to be made till the child should attain the age of thirteen or die, or the husband should again live and cohabit with his wife, or the woman should marry again after the decease of her husband. In his judgment Lord Denman, C.J., said: "The single question is whether a married woman becoming the mother of an illegitimate child is within the Act of 7 & 8 Vict. c. 101, which authorizes the justices to make an order of bastardy. The language of the statute applies in terms only to single women; so did the language of statute 6 Geo. 2, c. 31; yet Lord Ellenborough and the whole court in *Rex* v. *Luffe* held that an order might be made on the putative father of the bastard child of a married woman, who was to be considered single under the existing circumstances and for that purpose." The "existing circumstances" meant that she was a person living away from her husband.

In *Ex parte Grimes*, at the time of the order, the woman's husband was away. Then he came back, and the justices said, "Now we will put an end to the order." It was held that they had a discretion to refuse to enforce the order. The justices, however, took the view that the order itself was bad. In this the court held they were wrong. Lord Campbell said, referring to *Reg.* v. *Collingwood*: "I think that decision is quite right for the reason given in *Rex* v. *Luffe*, that in contemplation of law a married woman living separate from her husband may be within the meaning of the Act, which was passed for the purpose of providing for the support of the child, which, according to the present argument, would otherwise be altogether unprovided for." It is said that this woman was single within the meaning of the Act at the date of the conception, but the section speaks of the time of the application for the summons. As there is no authority for saying that a woman who is living with her husband at the time of her application for a bastardy summons is a single woman for the purposes of the Act, we ought to hold that the appellant is not entitled to apply for a summons and not further extend the exceptions contrary to the *primâ facie* meaning of the Act.

I feel the force of the argument that the child will be equally without support whether the husband is living with the woman or not. But that is a question for the Legislature. I am of opinion that the decision of the justices was right.

Appeal dismissed.

Solicitor for the appellant, *J. T. Lewis*, for *D. P. James*, Aberayron.

Solicitor for the respondent, *W. P. Owen*.

Q. B. Div. (Bigham, J.) } July 20; Aug. 11, 1900.

STEAMSHIP BALMORAL CO. (LIMITED) v. MARTEN. (*a*.)

Insurance (marine)—Ship—Valued policy—Salvage and general average contribution—Real value of ship—Liability of underwriters.

A ship was insured by a policy for £33,000, and was valued in the policy at £33,000. During the currency of the policy salvage services were rendered and general average expenses were incurred. For the purpose of the salvage award, and in making up an average statement, the value of the ship was taken to be £40,000.

Held, that the underwriters on the policy were only liable to pay to the owners 33-40ths of the amount due from the ship for salvage and general average.

Action tried in the Commercial Court without a jury.

The plaintiffs were the owners of the steamship *Balmoral*. Policies of insurance were subscribed by the defendants and others, underwriters at Lloyd's, insuring the *Balmoral* for twelve months for £33,000. The policies were expressed to be on hull and machinery valued at £33,000. During the currency of the policy the *Balmoral* received salvage services, in respect of which a salvage award was made in the Admiralty Court against ship, freight and cargo. Certain general average expenses were also incurred. In the salvage action the value of the ship was proved to be £40,000, and the general average statement was made up on the basis of £40,000 being the value of the ship.

The plaintiffs brought this action to recover from the underwriters on ship the whole of the ship's proportion of the salvage and of the general average contribution. The defendants contended that as the

(*a*.) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

ship was valued in the policy at £33,000, the plaintiffs were only entitled to recover under the policy thirty-three-fortieths of the amount due.

Evidence was given on behalf of the defendants that where a vessel was insured by a valued policy for a sum less than the contributory value upon which general average was adjusted or less than the amount at which the vessel was valued in a salvage action, according to the practice of English underwriters and average adjusters, underwriters on the policy were only to pay on the proportion of the insured value to the contributory or salvage values.

Leck (*Joseph Walton, Q.C.*, with him), for the plaintiffs.—In the case of salvage it is not necessary to fix a value on the ship; value is only an element in arriving at the amount of the salvage. Salvage is recoverable under the policy as a direct loss by perils insured against. With regard to the claim for general average, the liability to contribute in general average is a loss of the subject-matter of the insurance, which the underwriter has fully insured. The defendants' contention would leave the plaintiffs uninsured as to seven-fortieths, and it assumes the policy to be an insurance for £33,000 of a ship worth £40,000. But as between assured and underwriter the value in the policy is conclusive: *Dixon* v. *Whitworth*, 28 W. R. 184, 4 C. P. D. 371; *North of England Insurance Association* v. *Armstrong*, 18 W. R. 520, L. R. 5 Q. B. 244. Evidence as to the practice or course of business amongst average adjusters is inadmissible. If the practice is not in accordance with the law it is not binding on anyone: *Svendsen* v. *Wallace*, 10 App. Cas. 404, 33 W. R. Dig. 200.

Pickford, Q.C., and *Mackinnon* (*Scrutton* with them), for the defendants.—The plaintiffs, not the defendants, are endeavouring to go behind the valuation in the policy. The defendants are only liable for the amount of salvage or general average contribution which would be payable in respect of a vessel worth £33,000. The principle applicable—namely, that of indemnity, is the same in both cases. It is said that salvage is in the nature of a particular average loss. Assuming that to be so, the principle on which a particular average loss is settled supports the defendants' view, because in the case of a particular average loss (except in case of a ship where on account of the fluctuating value a different method prevails in practice) the principle is that the assured only recovers the proportion which the real value bears to the policy value: *Lewis* v. *Rucker*, 2 Burr. 1167; *Pitman* v. *Universal Marine Insurance Co.*, 30 W. R. 906, 9 Q. B. D. 192. The decision in *Dixon* v. *Whitworth* was based on the assumption that salvage comes within the suing and labouring clause, but it was held in *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755, that that view was erroneous. *Dixon* v. *Whitworth* is therefore not an authority in the plaintiffs' favour.

Leck replied.

Cur adv. vult.

Aug. 11.—BIGHAM, J., read the following judgment: In this case the defendants underwrote a policy of marine insurance on the plaintiffs' ship for £33,000, the ship being valued in the policy at the same sum. While the policy was current a general average loss was sustained and a salvage claim had to be paid, and thereupon an average statement was made up. The real value of the ship at the time of the average statement was £40,000, and the rights of the parties interested—namely, owners of the ship, freight and cargo respectively—were regulated *inter se* on that footing.

The question is whether the defendants must indemnify the plaintiffs against the whole of the average loss payable by them, or only against thirty-three-fortieths thereof.

The first question divides itself into two parts—viz., that relating to the general average loss, and that relating to the salvage claim. As to the general average loss, the evidence satisfies me that the practice in this country is for the underwriter on a valued policy to pay only the proportion which the value in the policy bears on the actual value on which the statement has been made up. Applying the rule of practice to the present case, the defendants will only be liable to make good to the plaintiffs thirty-three-fortieths of the general average loss. The plaintiffs say that this rule is inconsistent with the contract contained in the policy, because, as between themselves and the defendants, the ship is a fully insured ship. She is, they say, by agreement valued at £33,000, and she is insured for that same sum; and being fully insured, they are entitled to a full indemnity against the general average claim. But I think it is the plaintiffs' contention rather than the defendants' which is inconsistent with the terms of the policy, for the defendants have promised to be bound on the basis of the ship being worth £33,000, whereas the plaintiffs are asking them to pay on the footing of the ship being worth £40,000. The plaintiffs have not satisfied me that their contention is right. The rule of practice to which I have referred has been in force for nearly a century. I am asked to disregard it. If I did so I should unsettle the basis on which existing policies for many millions of money have been made. I am not disposed to do this unless I see clear reasons for it. I see reasons rather the other way, and therefore on this part of the question I find for the defendants.

As to the claim for salvage loss, the practice has been for more than a century to treat such claims precisely as claims for general average are treated. I think, therefore, the defendants succeed on this part of the case also.

Judgment for the defendants.

Solicitors for plaintiffs, *Lowless & Co.*

Solicitors for defendants, *Waltons, Johnson, Bubb, & Whatton.*

Q. B. Div.
(Ridley and Darling, JJ.) May 9, 1900.

ATTORNEY-GENERAL v. MIDLAND RAILWAY CO. (a.)

Inland Revenue—Stamp duty—Railway company—Conversion of stock—Increase of nominal share capital—Liability of new stock to stamp duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

The Midland Railway Co., by a special Act authorizing them to do so, consolidated certain perpetual rent-charge stock and perpetual preferential stock so as to amount to an increased nominal value, and extinguished certain preference stock and ordinary stock, and in lieu thereof created respectively certain other preference stock and ordinary stock of an increased nominal value.

Held, that such increase of the nominal amount of the share capital of the company was an "increase of the amount of nominal share capital" within the meaning of section 113 *of the Stamp Act.* 1891.

Special case stated by consent pursuant to ord 68, r. 2, and ord. 34, r. 1.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

By section 113 of the Stamp Act, 1891 (54 & 55 Vict. c 39), it is provided as follows:

"(1) Where by virtue of . . . any Act the liability of the holders of shares in the capital of any corporation or company is limited, otherwise than by registration with limited liability, under the law in that behalf, a statement of the amount of nominal share capital of the corporation or company shall be delivered by the corporation or company to the commissioners (of Inland Revenue) within one month after . . . the passing of the Act, and in case of any increase of the amount of nominal share capital of any corporation or company, whether now existing or to be hereafter formed, being authorized by any . . . Act, a statement of the amount of such increase shall be delivered by the corporation or company to the commissioners within the like period.

"(2) The statement shall be charged with an *ad valorem* stamp duty of two shillings for every one hundred pounds and any fraction of one hundred pounds over any multiple of one hundred pounds of the amount of such capital or increase of capital as the case may be, and shall be duly stamped accordingly when the same is delivered to the said commissioners.

"(3) In case of neglect to deliver such a statement as is hereby required to be delivered, the corporation or company shall be liable to pay her Majesty a sum equal to ten pound per centum upon the amount of duty payable, and a like penalty for every month after the first month during which the neglect shall continue."

By section 12 of the Finance Act, 1896 (59 & 60 Vict. c. 28), it is provided as follows:

"Section 113 of the Stamp Act, 1891, which requires delivery of, and charges stamp duty on, a statement of the nominal capital of any corporation or company, where such company or corporation is constituted, or an increase of its capital is authorized by letters patent or by any Act shall extend so as to require delivery of, and charge the like stamp duty on, a statement of any nominal share capital of any corporation or company, or of any increase of such capital, where such capital or increase is authorized by an Order in Council or a certificate of a Government department, or in any other manner."

The defendant company was incorporated on the 10th day of May, 1844, by the Act 7 & 8 Vict. c. xviii.

On the 6th of August, 1897, the Midland Railway Act, 1897, was passed upon the petition of the defendant company. This Act recites (*inter alia*) as follows:

"And whereas it is expedient that the undertaking of the Kettering, Thrapston, and Huntingdon Railway Co. should be vested in the company as provided by this Act. And whereas it is expedient that provision should be made as contained in this Act for the rearrangement and consolidation of the several classes and denominations of the shares and stocks in the capital of the company and of their loans and debenture stocks. And whereas it is expedient that the company should be empowered to raise additional capital for the purposes of the railways and other works by this Act authorized and for other purposes of this Act, and also for the making and enlargement of stations, sidings, warehouses, engine sheds, workshops, coal wharves, depots, mineral, goods, and other works and conveniences for the accommodation of the traffic on their railways, and for completing the purchase of lands and buildings for any of the above-mentioned purposes, and for providing additional plant and rolling stock, block and interlocking signals, and for the general purposes of their undertaking."

Section 2 of the said Act of 1897 incorporates (*inter alia*) the provisions of the Companies Clauses Consolidation Act, 1845, with respect to (1) the transfer or transmission of shares, (2) the borrowing of money by the company on mortgage or bond, and (3) the conversion of borrowed money into capital; and also Part II. (relating to additional capital) and Part III. (relating to debenture stock) of the Companies Clauses Act, 1863, as amended by subsequent Acts.

The following is a summary of the changes effected by the Midland Railway Act, 1897:

(1) By section 57; £342,500 Midland Railway four per cent. guaranteed stock was authorized to be created and issued to the said Kettering Co. in substitution of the then existing four per cent. guaranteed stock of the said company, and £25,000 Midland Railway four per cent. preference stock was authorized to be created and issued to the liquidators of the said company in extinguishment of contingent rent payable to the said company.

(2) By section 59: (*a*) £3,899,121 5s. four per cent. consolidated perpetual rent-charge stock was authorized to be consolidated so as to amount to £6,238,594 guaranteed stock bearing interest at the rate of £2 10s. per cent. per annum, an increase of £2,339,472 15s.

(*b*) £150,000 Sheffield and Rotherham perpetual preferential stock was authorized to be consolidated so as to amount to £375,000 guaranteed stock bearing interest at the rate of £2 10s. per cent. per annum, an increase of £225,000.

(*c*) £6,337,076 12s. 6d. four per cent. consolidated perpetual guaranteed preferential stock was authorized to be consolidated so as to amount to £10,139,322 12s. guaranteed stock bearing interest at the rate of £2 10s. per cent. per annum, an increase of £3,802,245 19s. 6d.

(3) By section 60; £29,048,191 15s. four per cent. perpetual preference stock (being the amount referred to by the section) was extinguished, and in lieu thereof £46,477,106 16s. two and a-half per cent. perpetual preference stock was created, an increase of £17,428,915 1s.

(4) By section 61; ordinary stock (existing and authorized) to the amount of £35,434,947 8s. stock (being the amount referred to by the section) was extinguished, and in lieu thereof there was created £35,434,947 8s. preferred converted ordinary stock entitled to a dividend at the rate of £2 10s. per cent. per annum and £35,434,947 8s. deferred converted ordinary stock, an increase of £35,434,947 8s.

(5) By section 70; there was authorized £960,000 new stock.

To sum up, the total new stock authorized was—by way of wholly new stocks—£342,500, £25,000, £960,000; by way of increase due to "consolidation," and creation of new stock in lieu of stock extinguished, £2,339,472 15s., £225,000, £3,802,245 19s. 6d., £17,428,915 1s., £35,434,947 8s. Total, £60,558,081 3s. 6d.

The Commissioners of Inland Revenue claimed that duty was payable in respect of or upon the whole £60,558,081 3s. 6d.

The defendants delivered to the Commissioners of Inland Revenue such a statement as is by section 113 of the Act, 1891, required to be delivered with reference to the increase of nominal share capital authorized by sections 57 and 70 of the Act, 1897—that is to say (section 57), £342,500 Midland Railway four per cent. guaranteed stock and £25,000 Midland Railway four per cent. preference stock, and (section 70) £960,000 Midland Railway four per cent. preference stock, and the statement was stamped with *ad valorem* stamp duty in respect of these increases of nominal share capital which amount to £1,327,500. But the defendants refused to deliver such a statement with reference to the increases due to the sections 59,

60, and 61 of the Act of 1897, and contend that they were under no liability or duty to deliver such last-mentioned statement.

On the 22nd of April, 1899, the informant filed an information claiming £108,581 10s., being £10 per centum of the stamp duty of 2s. per centum on the total amount of the increase of nominal share capital authorized by the Act of 1897 as aforesaid—*i.e.*, £6,036 15s.—for every month after the 6th day of September, 1897, elapsed before the commencement of this suit. To this information the defendants pleaded the general issue.

The questions for the opinion of the court were:

(1) Whether such increases are to be included in the statement of the amount of increase to be delivered pursuant to the Stamp Act, 1891, and the Finance Act, 1896, or either of them; and

(2) Whether the defendants are liable to pay to her Majesty the above penalties, or any and which of them.

Judgment (with costs of this suit and special case, and the determination thereof) is to be given—(*a*) For the Attorney-General if the court shall be of opinion that her Majesty is entitled to recover any penalty, and for the amount of the penalties incurred before the commencement of this suit; or (*b*) for the defendants if the court should be of opinion that her Majesty is not entitled to recover any penalty.

Sir R. E. Webster, A.G. (*Danckwerts, Q.C.*, and *S. A. T. Rowlatt* with him), for the Crown.—The defendants ought to have delivered the statement required by section 113 of the Stamp Act, 1891, and therefore the Crown is entitled to judgment for the penalties claimed. The conversion of the various stocks practically doubled their nominal value, and this constitutes "an increase of the amount of nominal share capital" within the meaning of such section. The fact that the shareholders do not get an increased dividend is immaterial. In the case of *Attorney-General* v. *Milford Docks Co.*, 69 L. T. Rep. 453, the company, under the authority of a special Act, converted debenture into preference stock, and this was held to be an increase of the nominal share capital of the company within the meaning of section 17 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7), which section is repealed by the Stamp Act of 1891, but is re-enacted in section 113 thereof.

Sir Robert Reid, Q.C. (*Asquith, Q.C.*, and *Loehnis* with him), for the defendants. — There has been no increase of "nominal share capital" here. In order to come within section 113 there must be a real increase of the nominal capital; it is not sufficient if there be only an increase of the nominal amount. Here there has been no actual increase of the capital, but only a re-arrangement. *Attorney-General* v. *Milford Docks Co.* is distinguishable from this case. There the re-arrangement was effected in order to make debenture-holders shareholders, and therefore in that case there was a real increase in the share capital.

Sir R. E. Webster, A.G., replied.

RIDLEY, J.—I think that the judgment of the court in this case should be given for the Crown. The question turns upon the phrase "increase of the amount of nominal share capital" in the 113th section of the Stamp Act of 1891.

Now, it is argued on behalf of the defendants, the Midland Railway Co., that there is not here any increase of the capital within the meaning of that section; that it should be and is intended to mean a real increase in the nominal share capital—that is to say, that not only in figures, but in point of fact, there should be more capital—more money advanced by way of capital and more actually existing capital in money than there was before. I do not find that the words of the statute require that interpretation. The words are "in case of any increase of the amount of nominal share capital." Now, the nominal share capital means the capital in shares, and the figure value attached to it. The increase of such nominal share capital seems to me to be simply this: If instead of being £100 it becomes £200—not necessarily that it means more, but that if the company extends the capital and gives it a greater nominal value, that is an increase which requires an additional statement of the amount of such increase to be delivered by the company.

It is argued that that is not the intention of the Act, that the object was that only the actual and real increase of capital should be the subject of the stamp duty. It does not, as I have said, say so in the Act of Parliament. Why should we limit the words in the way in which it is argued that they should be limited by Sir Robert Reid. He points to certain sections of the private Act of the company in order to show the way in which these words may have been used. I am not able to say that his argument on that point produces much conviction in my mind.

In the preamble of the private Act he refers to the recital that "it is expedient that provision should be made as contained in this Act for the re-arrangement and consolidation of the several classes of shares," and argues that that phrase was used by way of distinction between what has taken place and the real increase which he argues is the meaning of the section in the Stamp Act. I cannot accept that position. I think the words "re-arrangement and consolidation" are used as the best general words to cover the operation which was intended to take place, which might result in an increase, or it might possibly have resulted in a decrease. It does not follow that the words are used with so great a signification as he would put upon them. They are simply the defining words which may result in the one or the other. Another part of the Act referred to is the 66th section, in which he argues that the words "in the nominal amount of the preference or ordinary capital of the company" are used as distinguished from the "nominal share capital," and that the "nominal share capital" in the Stamp Act is used with a different signification. I am not able myself to find out the difference between the "nominal amount of share capital" and the "nominal share capital." I think it is precisely the same thing—that is to say, the quantity of it is judged by the amount. To say that the "nominal amount of share capital" is something different from the "amount of nominal share capital" seems to me not to be sufficient unless you show a reason for it. It is simply another collocation of the words that has, I think, the same meaning. The fact is that by this change of securities, which represent the capital of the company, there does come about an increase in the nominal share capital. Whether it was contemplated that this particular operation would be resorted to by the railway companies when the Stamp Act was passed it is impossible to say, but it is enough for us to come to the conclusion that, *primâ facie*, unless some better reason is shown, this operation does come within the Stamp Act, s. 113, and that therefore the companies must be prepared to pay the stamp duty which is consequent on the increase of their nominal share capital.

DARLING, J.—I am of the same opinion. It seems to me that the contention of Sir Robert Reid simply comes to this, that whereas the statute says "in case of any increase of the amount of nominal share

capital of any corporation" then the stamp duty shall become payable, he wants us to read "in case of any real increase of the amount of nominal share capital," and to hold that what happened here was only a nominal increase in the amount of the share capital—that is, he says that the Attorney-General is dealing with a case in which what has happened is that there has been a nominal increase in the amount of share capital, and that does not fall within the statute because it is not an increase of the nominal share capital. But look at the real facts. The nominal share capital stood, let us say, at £50,000. The result of the re-arrangement was that the nominal share capital then stood at £75,000. That cannot have happened without there being an increase of the nominal share capital.

It appears to me that it has been argued here as though the words "nominal share capital" were a convertible term with the word "assets." It is quite true the assets of the company have not been increased. The amount which would be divisible among the shareholders if the company were wound up has not been increased; but the nominal amount divisible among them has been increased, and that appears to me to be the nominal share capital.

Judgment for the Crown.

Solicitor for the Crown, *The Solicitor of Inland Revenue*

Solicitor for defendants, *Beale & Co.*

IN BANKRUPTCY.

Q. B. Div.
(Wright and Phillimore, JJ.) Nov. 20.

In re SHAW.
Ex parte GILL AND SUTCLIFFE. (a.)

Bankruptcy—Receiving order—Refusal to make receiving order—"Sufficient cause"—Conduct of petitioning creditor antecedent to presentation of petition—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 7, *sub-section* 3.

By section 7, *sub-section* 3, *of the Bankruptcy Act,* 1883, "*If the court . . . is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.*"

In July, 1899, *the debtor proposed to pay his creditors a composition of* 10*s. in the pound. Gill, one of the petitioning creditors, refused to accept the composition unless the debtor gave him a promissory note for the balance of his debt. The composition fell through, and in August,* 1900, *Gill and Sutcliffe presented a joint petition against the debtor.*

Upon the hearing of the petition the registrar held that the conduct of Gill with reference to the proposed composition constituted "sufficient cause" why no order ought to be made, and dismissed the petition.

Held, on appeal, that, inasmuch as it had not been shown that the antecedent conduct of Gill had any connection with the petition, or that the petition had been used for the purpose of extortion or obtaining an unfair advantage, there was no "sufficient cause" for dismissing the petition, and that a receiving order must be made.

Appeal by petitioning creditors from the dismissal of a petition by the registrar of the county court at Oldham.

The debtor Shaw was in business as a merchant tailor at Oldham.

On the 19th of July, 1899, he issued a circular convening a meeting of his creditors, which was held on the 23rd of July, 1899.

Creditors to the amount of about £2,500 attended and carried a resolution that the creditors should accept in discharge of their debts a composition of 10s. in the £, payable by instalments at three, six, and nine months from the date of the meeting.

On the 24th of July notices of this resolution were sent to all the creditors.

On the 25th of July, Gill, one of the petitioning creditors, who had not been present at the meeting, called on the debtor and verbally assented to the resolution.

On the 27th of July, Gill again called on the debtor and then stated that he would not accept the composition unless the debtor would give him a promissory note for the balance of his debt, which the debtor declined to do.

Upon the 2nd of August Gill sent a letter to the debtor referring to the arrangement proposed at the interview of the 27th of July, and enclosing a promissory note of £21 5s., which he requested the debtor to sign and return, but the debtor refused to do so. The composition resolved upon at the meeting of the 23rd of July, 1899, fell through owing to the opposition of Gill and certain other creditors.

Upon the 4th of August, 1900, the debtor executed a deed assigning the whole of his property to trustees for the benefit of the general body of his creditors.

On the 29th of August, 1900, Gill and another creditor named Sutcliffe, neither of whom had assented to the deed of assignment, presented a joint petition against the debtor, setting up that deed as an act of bankruptcy. Sutcliffe had been in no way connected with the arrangement proposed by Gill to the debtor in July, 1899.

Upon the hearing of the petition the registrar found on the facts that the arrangement proposed by Gill to the debtor was intended by Gill to be kept secret from the other creditors, and that the petition had been presented in consequence of the debtor's refusal to carry out that arrangement. He therefore held (relying upon *In re Otway, Ex parte Otway,* [1895] 1 Q. B. 812, 43 W. R. Dig. 17), that there was sufficient cause why no receiving order should be made, and dismissed the petition.

The petitioning creditors appealed.

Reed, Q.C., and *Frank Mellor,* for the appellants.—In this case there was no sufficient cause for the refusal of a receiving order. The fact that all the creditors other than the petitioning creditors had assented to the deed of assignment has been decided not to be sufficient cause for the refusal of a receiving order: *In re Dixon, Ex parte Dixon,* 32 W. R 837, 13 Q. B. D. 118; *Ex parte Oram, In re Watson,* 33 W. R. 890, 15 Q. B. D. 399. In this case the proposed secret arrangement was long antecedent to the petition, was never carried out, and had nothing to do with the petition. There is no case deciding that such circumstances as these constitute sufficient cause for the dismissal of a petition.

They referred to *In re Atkinson, Ex parte Atkinson,* 9 Morr. 193; *In re Otway, Ex parte Otway; King* v. *Henderson,* 47 W. R. 157, [1898] A. C. 720; *In re Bebro,* 48 W. R. 561, [1900] 2 Q. B. 316.

Scott Fox, Q.C., and *J. J. Wright,* for the respondent.—The facts in this case amounted to extortion within the decision in *In re Otway.* If the debtor had consented to sign the promissory note sent to him by Gill no petition would ever have been presented. Under these circumstances the registrar exercised his discretion rightly in dismissing the petition.

Reed, Q. C., was not called upon to reply.

(a.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

WRIGHT, J., after expressing his disapproval of the secret arrangement proposed by Gill, continued: The question we have to decide here is whether or not the registrar rightly exercised his discretion when he held that the arrangement proposed constituted sufficient cause for refusing to make a receiving order. I think he did not. If it had been shown to the court that the petition was presented with the view of forcing the debtor into signing the promissory note that would have been "sufficient cause"; or again, if it had been shown that after the presentation of the petition there had been an attempt to make an improper use of it, it is clear upon the authorities that a receiving order ought to have been refused. In this case nothing of the sort has been done. When the petition was presented all question of the compositon, with regard to which the improper arrangement had been proposed was long done with, and it is not suggested that since the presentation of the petition it has been used for the purpose of extortion, or of obtaining any unfair advantage. The previous conduct of the petitioner is not shown to have been in any way connected with the presentation of the petition, and there are no authorities which decide that circumstances like the present constitute sufficient cause for the refusal of a receiving order. It is immaterial whether or not the petition was actuated by motives of spite or revenge on the part of the petitioning creditor. The court will no doubt reject a petition where the motive which actuates it is the desire to extort an advantage, for that would be an improper use of the machinery of the court, but motives of spite or revenge are immaterial. The appeal must be allowed, and a receiving order made as of the date of hearing of the petition.

PHILLIMORE, J.—I accept the conclusions of fact as found by the learned registrar, but in my opinion they do not constitute sufficient cause for his refusal to make a receiving order. To do so would be to place the appellant Gill in the position of an outlaw. There is no ground for thinking that the object of the petition was to enable him to succeed in the arrangement which he had proposed to the debtor.

Appeal allowed; receiving order made.

Solicitors for the appellant, *Longbotham & Co.*, Halifax.

Solicitor for the respondent, *J. W. Piercy*, Huddersfield.

Privy Council.

(*From the Supreme Court of New South Wales.*)

May 15, 1900.

EDGAR *v.* PLOMLEY. (*a.*)

Administration—Separate account—Rights of parties—Fund in court—Claims against separate accounts—Lien.

Where, upon an administration order made in presence of all interested parties, and declaring their rights in a fund, money is paid to various separate accounts, then, although it is open to the parties to the suit to show that they have claims enforceable against a separate fund which were not known or not existent when the fund was separated, still, until such step is taken, the separation must be considered as showing that the separated funds are free from claims by the other sharers in the estate.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Bonâ fide *assignees of distinct shares are not liable to claims by the other sharers arising out of matters subsequent to the separation or latent at the time.*

Appeal from the Supreme Court of New South Wales.

The facts are given at length in their lordships' judgment.

Swinfen Eady, Q.C., and *Terrell*, for appellant.

Levett, Q.C., and *George Serrell*, for respondents.

The judgment of their lordships (Lords HOBHOUSE, MORRIS, DAVEY, and Sir RICHARD COUCH) was delivered by

Lord HOBHOUSE.—The question in this suit arises in the administration of the estate of William Shepherd, in connection with which other questions have been discussed before this board. That gentleman, who died in the year 1855, devised his real estate to be divided amongst his wife and children when the youngest child should attain the age of twenty-one years. Each child was to take a life interest, with remainder to his or her children. The testator left eight children, of whom one was named James. The youngest child attained twenty-one in the year 1876. In the year 1879 James Shepherd was appointed a trustee of the will, and in the year 1882 he became sole trustee.

Francis James Plomley, the respondent in this appeal, purchased the interest of some of the devisees, and in August, 1885, he instituted a suit against James Shepherd and all the other beneficiaries, praying for a sale of the testator's land with a view to distribution of the proceeds according to the interests of the parties, to be ascertained by the court. A decree for sale was made on the 3rd of December, 1885. The suit is numbered 3,840.

On the 29th of March, 1888, a decree was made on further consideration, by which it was ordered that eight separate accounts should be opened, the fourth of which was headed "The account of James Shepherd and his children." The purchase-moneys of the testator's land were to be paid to the several accounts in certain specified proportions. And as to account No. 4 it was ordered "That all moneys which shall at any time hereafter during the life of the defendant James Shepherd be carried over to the credit of the said account Number Four (4) in respect of the interest or income arising from unpaid purchase-moneys of the said hereditaments, or otherwise received or credited to the said account in respect of interest or income, and all interest and income that may arise from the investments, if any, of the said moneys, or any part thereof respectively, which may from time to time be authorized by this court, be paid from time to time as and when the same shall have been carried over or credited as aforesaid to the defendant James Shepherd, or his duly authorized attorney or attorneys, until further order." As regards some of the accounts it was ordered that nothing should be paid out of court without notice to the persons mentioned, but no such order was made to affect account No. 4.

On the 26th of September, 1893, the respondent and Anne Jones, who was one of the testator's children, jointly instituted a suit against James Shepherd alone. This suit is numbered 6,542. The plaintiffs stated that some of the land was still unsold, and they prayed for an account of rents and profits received by James Shepherd, and so far as necessary for administration of the trusts of the will. The plaintiffs did not suggest any breach of trust on James Shepherd's part, nor did they apply for a stop order against account No. 4 in suit 3,840. On the 11th of May, 1894, a decree was

made for an account of the rents and profits of the real estate of the testator received by James Shepherd.

On the 24th of October, 1895, James Shepherd assigned to the present appellant all his interest in the testator's estate for the purpose of securing the sum of £725 and interest. The mortgage deed specifies James Shepherd's interest under account No. 4 in suit 3,840 to the credit of which there was then standing the sum of £5,158 6s. 5d.; and it gives to the appellant full powers of application to the court for procuring payment to himself. It does not mention suit 6,542, but the pendency of that suit was known to the appellant.

On the 5th of August, 1896, the Master in Equity made a certificate under the decree in suit 6,542 by which he found that certain moneys were due from James Shepherd on the account of the testator's real estate to the other sharers in that estate. This certificate underwent some variations not now material to mention. By the decree made on further consideration on the 12th of March, 1897, the liability of James Shepherd was established, and he was ordered to pay into court sums amounting to nearly £2,500, and also to pay certain costs.

In the meantime, on the 31st of October, 1896, the respondents had filed a new claim against James Shepherd and the present appellant by way of supplement to suit 6,542. James Shepherd had at that time been made bankrupt, and his assignee, Mr. Lloyd, was added as a defendant to the suit. The respondents claimed the same benefits of suit 3,840 as if the appellant had been made a defendant to it; and they claimed declarations that the sums due from James Shepherd were charges on his interest under the will, and further that they had priority over the appellant's mortgage.

The appellant does not claim to enforce his mortgage against any interest of James Shepherd in the testator's estate except the fund standing to the credit of account No. 4 in suit 3,840. That is now the sole question; whether, in the peculiar position in which that fund was placed by the decree of the 29th of March, 1885, priority of charge should be given to the mortgagee of James Shepherd, or to the beneficiaries whose funds he has misapplied.

The learned Chief Judge in Equity gave the respondents a decree in accordance with the prayer of their claim. He relied on the general principle that a defaulting trustee must make good his default before he is entitled to take any part of the trust estate for his own benefit, and that his assignee cannot stand in any better position. As for the effect of the decree carrying over funds to No. 4 account, he considered that suit 3,840 was a mere partition suit, and that the order was nothing more than a declaration that, so far as that suit was concerned, the fund might be treated as the separate property of the persons named in the heading. No question of administration, he said, was or could have been raised in that suit. There was no *res judicata* between the parties, or if any, it was only that James Shepherd was entitled to the income of the fund until further order. The appellant's contention that he was a *bonâ fide* purchaser for value is, in the opinion of the learned Chief Judge, displaced by the fact that he had notice of suit 6,542.

So far as regards the liability of James Shepherd and his assignee in bankruptcy this judgment cannot be and is not impeached. But as regards the position of the appellant it raises a question of some subtlety and difficulty; and it appears to their lordships to be open to the remarks which they are about to make.

As regards suit 3,840 it is hardly correct to call it a mere partition suit or to say that no question of administration was or could have been raised in it. It is a suit for partial administration of the trusts of the will. It involved the necessity of ascertaining the legal interests of the several beneficiaries and of ascertaining and distributing the sums to which each was entitled. It also had the important effect of turning the testator's specific gifts of land into money, which on the attainment by each devisee of an absolute and indefeasible interest could and would be paid over if no claims were put forward by the others interested in the estate; who again were not entitled to receive notice of application for payment.

If on the proposal to carry over James Shepherd's share to account No. 4 it had been suggested that he was a debtor to the estate inquiry would certainly have been directed, and care taken that he should not receive any part of the estate till his debt was made good. Or if it had been pointed out that he was still receiving trust funds, and might become a debtor to the estate, care might, and probably would, have been taken either to leave his share to the general credit of the estate, or if it were carried to a separate account to frame the heading of that account in such a way as to show the claim which the estate might have against the fund, or in some other way to protect it against a transfer by him.

But nothing of this kind was done. As the account stands it would lead anyone to suppose that in a suit for partial administration the fund had (to use Lord Langdale's language *In re Jervoise*, 12 Beav. 209) been released from the general questions in the cause, and marked as being subject only to the questions arising on the particular matter referred to in the heading of the account. The right of James Shepherd to receive what was designed for him by the will was one of the general questions in the cause arising under the prayer for distribution, and not one that arose between himself and his children; and from that question his fund was released, though the release would not of itself be a bar to any subsequent proceedings which might be taken to set aside or qualify the order.

As regards the question of notice on which the learned judge lays great stress, all that the appellant knew was that James Shepherd was trustee, and had been called on for an account in suit 6,542. Every trustee is known to be subject to that liability. Of course there was the legal possibility that he might be a defaulter and that his creditors might take steps to recall the fund placed to his separate account and make it availabe to answer their claim. But nothing of the kind was suggested by the frame of the suit, nor indeed could it be done except by some proceeding adapted to the legal position created by the existence of account No. 4. In every case an executor or trustee is liable to account and may make default; the remedies for which may be worked out against his remaining interest in the testator's estate. But it would be a new thing to hold that such a possibility of itself disables an executor or trustee during the whole continuance of his executorship or trusteeship from making a good title to a *bonâ fide* purchaser of a separate portion of the estate which the testator has given to him.

A similar question arose in the case of *Price* v. *Price*, 35 W. R. 386. 35 Ch. D. 297. There a trustee, having committed a breach of trust, died. A *cestui que trust* sued his two executors, claiming payment, and afterwards by amended bill a general administration of the defaulter's estate if his executors should not admit assets. The plaintiff registered his suit as a *lis pendens* in May, 1878. In November, 1878, and July, 1879, one of the executors created charges on part of the defaulter's estate specifically devised to him. In March, 1880, the plaintiff established the liability of the

executors, and obtained the usual creditors' decree. Sir Edward Kay pointed out that the suit was not one to administer a trust created by will for payment of debts, and that the registration of *lis pendens* did not indicate any purpose of making liable that portion of the defaulter's estate which had been specifically devised to and mortgaged by the executor. On that view of the case he gave priority to the executor's mortgagees.

In the case before their lordships there was not only no indication prior to October, 1895, of a purpose to enforce liability against the fund carried to account No. 4, but the proceedings in the two suits when put together were such as to induce a belief that the fund appearing by the separate account to be free was really free by not being attacked in suit 6,542.

Their lordships are disposed to agree with the learned judge that it may not be quite accurate to apply the term *res judicata* to an order of this kind; because, though made in a suit in which one of the respondents was the plaintiff and the other a defendant, the particular question which has now arisen was neither decided nor raised. But that is hardly more than a verbal question. The important point is that the order was made in the presence of all parties interested; and its intention was to treat this fund as so far separated from the estate that it could be dealt with by the separate donees without notice to the others. That is a step forward in the administration of an estate, and it saves a great deal of expense and trouble. This fund could not be actually paid out because nobody had acquired an absolute and indefeasible interest in it; for the absolute interests acquired by the children were liable to variation in amount by the birth of more children. But the object of separate accounts is to relieve the subjects of each account from entanglement with the others, and to make the persons specified in each heading the owners of the fund carried to its credit, so far as is consistent with the necessity for retaining those funds in court. The retention of the fund is not meant to prevent adult owners of interests in it from dealing with those interests. The division into separate accounts is intended to facilitate such dealings. Of course it is true that so long as any fund remains in court, claims against its owners can practically be enforced against it which could not practically be enforced if it were paid out. It is open to the other parties to the suit to show that they have claims enforceable against a separate fund which were not known or not existent when the fund was separated, and by proper proceedings to enforce them notwithstanding the order for separating the fund. But until some step is taken for that purpose the separation is commonly and rightly looked upon as showing that the separated funds are free from claims by the other sharers in the estate. Persons honestly dealing with those whom the court declares to be the owners of such funds are justified in trusting to that declaration; and their lordships hold it to be unjust to subject them to claims by the other sharers arising out of matters subsequent to the separation or latent at the time.

They are supported in this opinion by a case which was decided by Chitty, J., *In re Eyton, Bartlett* v. *Charles*, 39 W. R. 135, 45 Ch. D. 458. P. E. Eyton, whose estate was being administered in the suit of *In re Eyton, Bartlett* v. *Charles*, had bequeathed money to Mrs. Charles and her descendants. By the decree made on further consideration in August, 1886, a fund was carried over to an account headed "Annuity of A. P. Charles and her issue" with a direction to pay the income to her for her life. She created charges on her interest and her creditors obtained stop orders in 1886 and 1887. In 1889 a decree was made in another suit charging the testator and Mrs. Charles jointly with breaches of a trust they had undertaken, and it was ordered that the liability should be made good out of the testator's estate. A motion was made by one of the parties to the suit of *Bartlett* v. *Charles* to make Mrs. Charles's separate fund answerable in priority to the incumbrances effected by her. That application was rejected by Chitty, J., on the grounds that the matter was *res judicata* as between the applicant and Mrs. Charles, and that the separation of the fund by the court had given to the incumbrancers a right to believe that fund was clear. The learned judge below has subjected this decision to a very careful examination, and he summarizes his reasons for thinking it inapplicable to the questions before him in the following terms: "Manifestly this case presents three serious points of difference from *In re Eyton*. In the first place the charge sought there to be enforced was for an ordinary debt and not for a breach of trust; (2) the order carrying the funds to a separate account was made in another and entirely distinct suit; and (3) there was no suggestion of any question of notice." As to the third ground of difference, their lordships have already given their views on the point of notice. As to the first ground, the distinction between debts arising out of breaches of trust and other debts seems to their lordships immaterial to the present question. In point of fact the claim made in *In re Eyton* did arise out of a breach of trust, and we are not told by the report whether the breach was or was not connected with the property left by the testator. But how can this consideration affect the principle that the action of the court amounts to a representation that as between the parties to the suit the separated fund is clear? If any distinction is to be drawn between the two cases with reference to the cause of the assignor's liability and to the assignee's knowledge of it, a presumption against the existence of claims connected with the estate under administration, whether entire or partial, would be stronger when a separate account has been established than the presumption against wholly independent claims. And the second ground of difference—viz., that the order establishing the separate account of Mrs. Charles was made in a separate suit from that in which her liability was established, is subject to precisely the same considerations. It is true as the learned judge observes that Chitty, J.'s, decision is not binding in the present suit. But it is one founded on a similar practice and procedure and as it appears to their lordships to be sound in principle and exactly in point, they are glad to avail themselves of it.

The decision is also rested on the authority of many cases cited to show that a trustee who has misappropriated trust funds must be taken to have received payment of his share by anticipation, and that he has nothing to assign except the excess of his share over that payment. The learned judge applies the decisions thus: "If these cases correctly state the principle on which the rule is founded, as I have no doubt that they do, then it would seem that the case of the assignee is not helped by the fund having been carried to a separate account, nor is it affected by notice or want of notice. The answer then to this case is: 'You bought the interest of a man under a will of which he was a trustee. True his share independently of any question of administration was fixed at so much, and it was by order of the court placed in such a position that it could be dealt with without reference to the other parties interested under the will, but it turns out that all the time he was entitled to nothing. He had in fact overpaid himself

out of the rents of the estate, and when he affected to give you a charge, there was in fact nothing on which the charge would operate.' "

In most of these cases, such as *Morris* v. *Livie*, 1 Y. & Coll. Ch. Cas. 380, the liability enforced in priority to assignees was against portions of the estate still in bulk. The nearest to the present case is *Jacubs* v. *Rylance*, L. R. 17 Eq. 341, 22 W. R. Dig. 251. In that case a Mr. Elkes was executor, and was in default. He had an interest in the estate which he mortgaged. Another fund was given to his children, and was carried over to their separate accounts. One child died, and his interest passed to Elkes. It was held that the liability to make the default good extended to Elkes's derivative as well as to his original interest. But so far is the case from deciding the present point that the report does not even mention the date of Elkes's mortgage, whether before or after the separation of the fund or the death of the child, nor the subject-matter specifically assigned by it. The sole question was whether the general principle requiring trustees to make good defaults before receiving their shares extended to derivative interests. In none of the cases was a trustee's general liability to make defaults good enforced against funds so far administered as to be carried to a separate account and specifically assigned for value by a person entitled according to the terms of that account.

The result is that the decree cannot stand so far as it is adverse to the appellant. The proper order will be to discharge the decree so far as it declares that the charges established by the plaintiffs against James Shepherd have priority over the appellant's mortgage, and so far as it awards an injunction against the appellant, and so far as it orders that no part of the interest accruing on account No. 4 shall be paid to the appellant, and so far as it directs the appellant to pay costs. Instead thereof the decree should declare that the mortgage of the 24th of October, 1895, is as between the plaintiffs and the appellant a valid security, and the first charge on the interests of James Shepherd thereby assigned; and order that the income of the funds comprised in account No. 4 shall be paid to the appellant until further order; and that the plaintiffs shall pay him his cost of suit. That will leave standing all those parts of the decree which relate to James Shepherd and to Mary MacGovern, and to the requisition of notice to the plaintiffs before any principal money is paid out, and to the questions reserved for further consideration.

Their lordships will humbly advise her Majesty in accordance with this opinion. The respondents must pay the costs of this appeal.

Solicitor for the appellant, *Charles F. Martelli.*

Solicitors for the respondent, *P. J. Gordon & Son.*

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Romer, L.JJ.) — Dec. 11.

EWART *v.* FRYER. (*a.*)

Landlord and tenant—Lease to company of public-house—Condition for re-entry on liquidation—Forfeiture—Underlessee—Conveyancing Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14—*Conveyancing Act*, 1892 (55 & 56 *Vict.* c. 13), *s.* 4—*Waiver.*

A voluntary winding up by a solvent company for the purpose of amalgamating with another company works a forfeiture under a condition for re-entry on liquidation.

On forfeiture of the head lease the court has power, under section 4 *of the Conveyancing Act*, 1892, *in granting relief to an underlessee, to vary* (*even by way of increase*) *the amount of rent reserved by the underlessee, and will direct an inquiry for that purpose.*

Decision of Kekewich, J., 48 *W. R.* 443, *affirmed.*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

This was an appeal from the decision of Kekewich, J. (reported 48 W. R. 443).

The action was brought by the trustees of the will of a lessor to recover possession of a public-house under a condition for re-entry in the lease. By the lease in question, made in 1896, the lessor demised the premises to Combe & Co. (Limited) for a term of thirty years at a rent of £300 a year, and there was an express condition that if and whenever the lessees or their assigns, being a company, should enter into liquidation, whether compulsory or voluntary, it should be lawful for the lessor, his heirs or assigns, to re-enter upon the demised premises. By an underlease of the same date Combe & Co. demised the premises to the defendant Fryer for 29¾ years in consideration of a premium of £8,000, and at a rent of £800 per annum, reducible to £300 so long as he should buy his beer from Combe & Co. This the defendant Fryer had always done.

In the year 1899 Combe & Co., who were perfectly solvent, were voluntarily wound up for the purpose of being amalgamated with two other large brewery companies under the name of Watney, Combe, Reid, & Co. (Limited). This amalgamated company was the second defendant to the action.

The defendant Fryer never paid the £8,000 premium, and never paid more than £300 a year rent for the public-house of which he was in possession, and in the event of the plaintiffs being held entitled to recover possession he claimed relief under section 4 of the Conveyancing Act, 1892, and an order vesting the premises in him for the remainder of the term of his underlease. It was admitted that in the event of forfeiture he was entitled to relief, and the only question was upon what terms it should be granted.

Kekewich, J., decided that there was a forfeiture, and made an order vesting the property in Fryer on conditions to be settled in chambers, and directed an inquiry as to the rent to be paid, having regard to the fact that the tie was gone.

From this decision the company and Fryer appealed.

Warmington, Q.C., and *R. Merivale*, for Fryer.

Renshaw, Q.C., and *Davenport*, for the company.

Warrington, Q.C., and *T. T. Methold*, for the plaintiffs.

On the first point, with regard to forfeiture, their lordships held that they were bound by the case of *Horsey Estate* (*Limited*) v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79, and affirmed the decision of Kekewich, J.; the only other question being the terms upon which relief should be granted to the defendant Fryer.

RIGBY, L.J., said the question was whether relief ought to be given to the defendant Fryer under section 4 of the Conveyancing Act, 1892, on the principle decided by Kekewich, J., or on some other principle. The real dispute was whether the underlessee ought to derive any advantage from the forfeiture. The underlessee covenanted to pay £800 a year rent which was to be reduced to £300 so long as he got his beer from Combe & Co. The lease granted to Combe & Co. had now gone altogether out

of existence, and there could no longer be any question as to the beer being taken from their brewery. Of course, if the underlessee could get the property for £300 a year without the tie he would be better off to the extent of £500 a year than he would otherwise have been under the sub-lease if he had ceased to get his beer from Combe & Co. He thought Kekewich, J., was right in saying that the underlessee ought not to get that advantage. The appeal would therefore be dismissed.

VAUGHAN WILLIAMS, L.J., agreed. The question was as to the conditions under which relief was to be granted. Was the defendant Fryer entitled to come here and say he was to have a lease at £300 a year or ought he to pay £800 or some other larger sum than £300. In his judgment section 4 was intended to protect a vested interest. The object of the Act was to protect the underlessee, and enabled the court to vest in him not the lease, but the property, but it did not entitle the court to say to the underlessee: "We think that the property is worth so much a year, and we therefore grant you a lease at that rent." He did not think that that was the intention of the Legislature. The lessor, by virtue of the forfeiture, had at the present moment vested in him not only his own right as lessor, but also the rights of the lessee, and he might enforce those rights as far as possible, but in this particular case the rights of the lessee could not be enforced, and therefore he thought an inquiry ought to be held as to what was a fair rent for the underlessee to pay.

ROMER, L.J., also agreed. In his opinion the operation of section 4 ought not to be cut down or unduly hampered by giving a restricted meaning to the language there used. He thought it was purposely framed in general terms to give the utmost discretion to the court to do what was just. It gave amplest powers to the court in determining on what conditions and at what rent a new lease should be vested in the underlessee. The discretion was unfettered except as to the term. The section did not necessarily contemplate that the terms of the head lease should be kept alive, although no doubt they would most probably be kept alive in ordinary cases. The terms of the lease were left to the discretion of the court. The Act does not say what the rent is to be, but such as the court thinks fit—that is, what is just as between the parties. If the underlessee is placed in no worse position than before the forfeiture he cannot complain. In the present case it would not be right to fix the rent at £800, because that would not be fair to the underlessee, nor at £300, because that would be unfair to the lessor, for by fixing the rent at that amount the court would be taking away some of the property of the landlord and giving it for no consideration to the underlessee, who would thus get a pecuniary advantage by the forfeiture. The right thing to do was to fix such a rent as, looking at all the circumstances, would be a fair and proper rent. On the one hand regard should be had to the rent of the underlease, and on the other it should be borne in mind that the house was no longer a tied house. Kekewich, J., had exercised his discretion rightly, and the appeal failed.

Appeal dismissed.

Solicitors, *Bolton & Co.; Bompas, Bischoff, Dodgson, Coxe, & Bompas.*

From Chan. Div. (Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) — Nov. 30.

WATTS v. DRISCOLL. (a.)

Partnership—Mortgage of share by one partner—Dissolution—Right of mortgagee to an account—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.

A mortgagee of a share in a partnership has a right to an account on dissolution in order to ascertain what the share of his mortgagor really is, even though the partners have inter se *determined the value of the share.*

Decision of Farwell, J., 48 *W. R.* 521, *affirmed.*

This was an appeal from Farwell, J. (reported 48 W. R. 521).

The facts (more fully reported in the court below) were shortly these:

The defendant Driscoll carried on a retail business. It was agreed between him and plaintiff that the latter should purchase a share of the business for the benefit of the plaintiff's son W. S. Watts, who was the other defendant.

Articles of partnership dated the 9th of January, 1899, and made between the defendants Driscoll and W. S. Watts, were accordingly entered into whereby in consideration of sums amounting to nearly £2,000 expressed to be paid by the defendant W. S. Watts to the defendant Driscoll, it was agreed that they should become partners for the term of fourteen years, determinable as therein mentioned and subject to the clauses and stipulations therein contained.

The money was found by the plaintiff, who took as security for the advance a deed of assignment dated the 23rd of March, 1899, from the defendant W. S. Watts of his share in the assets and profits of the partnership business.

By this deed the defendant W. S. Watts covenanted with his father that he would keep him informed as to the partnership business and give him access to the partnership books, and until the advance was repaid would pay the plaintiff the weekly drawings of the defendant W. S. Watts less a weekly sum agreed on.

It was held as a fact that Driscoll knew that the money had been advanced by the plaintiff and had full knowledge and notice of the deed of assignment.

Friction arose between the partners, and on the 14th of August, 1899, the defendants agreed to dissolve the partnership on the terms that the defendant Driscoll should buy from W. S. Watts his share in the partnership business for the sum of £500, and that W. S. Watts should accept £40 in consideration of his share of the profits made during the partnership.

This agreement was made without the knowledge or consent of the plaintiff. Accounts had been made and approved by the partners up to the 30th of June, and from that date it was agreed that the partnership should be dissolved.

The plaintiff thereupon brought an action to have it declared that the plaintiff was entitled to a charge on the share of W. S. Watts and for an account.

Farwell, J., held that the plaintiff was entitled to a charge on the share of W. S. Watts as on the 30th of June, and to an account as from that date.

From this decision the defendant Driscoll appealed.

Hughes, Q.C., and *F. P. Onslow,* for the defendant Driscoll, argued that an assignee or mortgagee takes subject to the equities, and that one of such equities was the right of partners to fix *inter se* the value of their shares in the partnership.

In addition to the cases cited in the court below, they referred to *Cavander* v. *Bulteel,* 22 W. R. 177, L. R. 9 Ch. App. 79, and Lindley (6th ed.), p. 367.

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

Bramwell Davis, Q.C., and *J. H. Boome*, for the plaintiff, contended that the assignee was not bound by an equity outside the partnership deed, and referred to *Smith* v. *Parkes*, 16 Beav., 115 at p. 119.

Lord ALVERSTONE, L.C.J., said the only question in this case was whether a bargain for the sale of one partner's share to the other partner was binding upon the mortgagee of the share assigned. It was found by the learned judge below that the defendant Driscoll knew that the money was advanced by the plaintiff and that he had a charge upon the share of W. S. Watts for the amount. There was no doubt also that the defendant Driscoll knew that the plaintiff did not concur in the bargain. It was said that the bargain for dissolution was not binding on the plaintiff as assignee, and his lordship agreed with Farwell, J., that it was not so binding. The question depended upon section 31 of the Partnership Act, 1890. The court was pressed to say that that section includes any and every bargain made between partners, whatever may be its terms, and even though they have no reference to taking accounts. That was going too far, and would render the latter part of the section nugatory. The old law was not altered by the Partnership Act, 1890. An assignee is bound by accounts properly taken, but in this case no account was taken. A bargain behind the back of the assignee was not an account. The court could not assume that £500 was the value of the share, and an account ought therefore to be taken. The decision of Farwell, J., was right, and the appeal must be dismissed.

RIGBY, L.J., agreed. The first sub-section of section 31 defines the rights of an assignee during the continuance of the partnership; the second sub-section provides that on dissolution the assignee shall be entitled to receive the actual share of the assigning partner, to be ascertained by taking an account as from the date of the dissolution. The partners cannot, on dissolution of the partnership, alter their rights *inter se* regardless of their assignees.

VAUGHAN WILLIAMS, L.J.—The agreement made between the partners with notice of the charge cannot override the rights of the assignee. An assignee of a partner's share takes subject to equities and must be taken to have notice of the partnership deed and cannot repudiate anything done under it. But what was done with regard to the sale in this case was not something done under the partnership deed and was not an account taken in the ordinary course of business. It was not done in the relation of partners nor to facilitate the partnership business. It was a mere sale that put an end to the partnership, and such a transaction could not be justified as one entered into as a partnership transaction. Apart from the Partnership Act the decision of the learned judge below was correct, and section 31 simply affirmed the proposition that the order was right.

Appeal dismissed.

Solicitors, *T. Durant; W. M. Bond.*

From Q. B. Div. (A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Nov. 27.

MONTI *v.* BARNES. (*a.*)

Mortgage—Fixtures—Dog-grates not attached to the freehold.

After the execution of a mortgage of a freehold house the mortgagor removed certain fixed grates which were in the house, and substituted for them dog-grates which were not fixed, but rested by their weight upon the ground. The mortgagor subsequently assigned the equity of redemption, together with the furniture in the house, and the assignee removed the dog-grates from the house. The mortgagee, having foreclosed the mortgage, brought an action against an assignee to recover possession of the dog-grates, on the ground that they were fixtures passing with the freehold.

Held, that physical annexation to the freehold was not necessary to make the dog-grates fixtures as between mortgagor and mortgagee so as to pass with the freehold; that, as the grates were in fact placed in the house in substitution for the old fixed grates for the purpose of improving the house, they were fixtures passing with the freehold.

Appeal from the judgment of Bigham, J., at the trial of the action without a jury.

The action was brought for the delivery up of certain fixtures or for their value, and for damages for their detention. The defendant in his statement of defence denied that the articles were fixtures, and counterclaimed for the delivery up of eleven dog-grates or their value.

The cases is reported solely upon the counterclaim.

On the 27th of August, 1890, the owner in fee of a house at Windsor executed a mortgage in fee of the house to Lady Ross. In 1893 Lady Ross transferred the mortgage to the defendant. Subsequently, in July, 1893, Mr. Grenfell transferred the equity of redemption to the plaintiff, and also sold to him all the furniture, fittings, &c., in the house.

In March, 1898, the defendant foreclosed the mortgage and became owner in fee of the house. After the mortgage had been effected, and prior to its transfer by Lady Ross to the defendant, the mortgagor effected extensive decorative improvements in the house, and put up certain articles which formed the subject of the claim in this action. Bigham, J., held that these fittings were, on the facts, fixtures which formed part of the freehold, and passed to the mortgagee. The Court of Appeal affirmed the decision of the learned judge with regard to these articles. The mortgagor also removed eleven fixed grates which were in the house, and put in their place eleven heavy dog-grates, which were not fixed to the premises. The plaintiff, when removing the furniture from the house, took away these eleven dog-grates. The defendant counterclaimed for the return of the dog-grates or their value.

Bigham, J., held that the dog-grates, though not affixed to the freehold, were intended by the mortgagor to be part of the freehold in the place of the old fixed grates which had been removed, and therefore formed part of the freehold passing to the mortgagee. He accordingly gave judgment for the defendant on the counterclaim.

The plaintiff appealed.

Herbert Reed, Q.C., and *Cannot*, for the plaintiff, contended that the dog-grates, which were not in any way affixed to the freehold, were not fixtures, and did not pass with the freehold to the mortgagee.

They referred to *Holland* v. *Hodgson*, 20 W. R. 990, L. R. 7 C. P. 328; *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382; *Hobson* v. *Gorringe*, 45 W. R. 356, [1897], 1 Ch. 182.

Rufus Isaacs, Q.C., and *J. W. McCarthy*, for the defendant, were not called upon.

A. L. SMITH, M.R.—The issues in this case arise between mortgagor and mortgagee, and the question we have to decide is the right to the articles which are the subject of the claim and of the counter-

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

claim. If the articles were fixtures so as to form part of the freehold, they passed to the mortgagee. [His lordship then dealt with the articles which formed the subject of the claim, and came to the conclusion that there was ample evidence upon which the learned judge was justified in coming to the conclusion that the articles were affixed to the premises by the mortgagor with the intention of improving the house as a house, and were not put there as mere articles of furniture.] There remains the question as to the eleven dog-grates. The mortgagor removed the old fixed grates which were in the house, and substituted these dog-grates, which were of considerable weight, in their place. Were they fixtures as between mortgagor and mortgagee? No doubt they were not fixed to the premises, and that raises some difficulty. But when I look at the authorities, and particularly at the case of *Holland* v. *Hodgson*, where Blackburn, J., in delivering the judgment of the Exchequer Chamber, laid down the principle applicable to these cases, it seems that physical annexation to the freehold is not necessary. We must have regard to the character of the articles and the intention with which they were placed there. In my opinion, looking at the weight of these dog-grates, and at the intention with which they were placed in the house—namely, to take the place of the old fixed grates, there was ample evidence upon which the learned judge was entitled to come to the conclusion that they were fixtures forming part of the freehold. In each case the court must have regard to the facts and the intention. The appeal must therefore be dismissed.

COLLINS, L.J.—I am of the same opinion. The case affords a most admirable instance of a question which is a mixed question of fact and law, and the learned judge has most accurately separated for himself the two questions. The learned judge asked himself whether the things put in by the mortgagor were put in for a temporary purpose merely, or whether they were put in so as to form part of the house, to improve the inheritance—that is to say, to make it a better house than it was; or were they merely put in for a temporary purpose, to be removed whenever the person who put them in thought fit. That is the question, and in deciding it we are guided by the judgment of the Exchequer Chamber in *Holland* v. *Hodgson*, where Blackburn, J., said (L. R. 7 C. P., at p. 334): "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention—viz., the degree of annexation and the object of the annexation." The object of the annexation is a material circumstance to be considered, and in considering that question one must have regard to the position of the person who put the things there. This is a case of mortgagor and mortgagee, and differs from the case of landlord and tenant. Whether the articles are put into the house before or after the mortgage, the mortgagor puts them into a house that is his own. With the exception of the dog-grates each of the articles was affixed to the house. That leads us to inquire into the object with which they were put there, and there can be no doubt that the commanding object was to improve the house. There was evidence, therefore, which justified the learned judge in coming to the conclusion that they were fixtures and passed with the freehold. With regard to the dog-grates, which alone raise any difficulty, it is clear that there was no annexation in the ordinary sense. But in law there can be annexation by mere right. In *Gregory* v. *D'Eyncourt* it was held that statues in a house which merely rested on the ground by their own weight, formed part of the house as part of the architectural design and not mere ornaments. I only refer to that case as showing that an article may be attached to the freehold, though it is not attached by nails or screws. We must therefore draw some line, and we must look at the article and see whether it is capable of annexation. Obviously an ordinary footstool or fire-irons cannot be fixtures, but a dog-grate can be. A dog-grate, therefore, being capable of annexation, we must consider the object with which the mortgagor put it there. In the present case the mortgagor put in these dog-grates in the place of other grates which were undoubtedly part of the freehold, for the purpose of improving the house as a house. I think, therefore, that the learned judge was quite right.

STIRLING, L.J.—I am of the same opinion. Blackburn, J., laid it down in *Holland* v. *Hodgson* that the question must depend on the circumstances of each case, and mainly on two circumstances, as indicating intention—viz., the degree of annexation, and the object of the annexation. It is said for the plaintiff that there must be some kind of annexation to the freehold, and that an article, however weighty, cannot be said to be annexed to the soil unless there is some form of physical annexation. That argument is answered by Blackburn, J., in the case above-mentioned, where he says that "when the article in question is no further attached to the land than by its own weight, it is generally to be considered a mere chattel: see *Wiltshear* v. *Cottrell*, 1 E. & B. 674, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *Gregory* v. *D'Eyncourt*."

It is important to remember that these dog-grates were placed in their position after the mortgage and in substitution for the old fixed grates which were in the house at the date of the mortgage. Eleven old grates which were fixed were taken out, and the dog-grates were put there instead. If they had been removed without substitution it would have been an act of waste as between mortgagor and mortgagee. In my opinion, when those fixed grates were removed by the mortgagor, the defendant, the mortgagee, might have applied for an injunction to restrain the commission of the act of waste in removing them. The defendant, however, made no such application, and the mortgagor was allowed to remove the old fixed grates to substitute new dog-grates for them. The object was that the new grates should take the place of the old ones in every respect, and this was done in order to make the house a better house. There was therefore an annexation to the freehold, and the object of the annexation being to improve the house as a house, the dog-grates were fixtures and passed with the freehold to the mortgagee.

Appeal dismissed.

Solicitor for the plaintiff, *M. S. Rubinstein.*

Solicitors for the defendant, *Calkin, Lewis, & Stokes.*

From Prob. Div. & Adm. Div. (Earl of Halsbury, L.C., A. L. Smith, M.R., and Vaughan Williams, L.J.) Nov. 5.

DORMER (OTHERWISE WARD) v. WARD. (a.)

Divorce—Nullity of marriage—Impotence—Power to vary settlements—Property settled—Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

The powers of the court under section 5 of the Matrimonial Causes Act, 1859, *and section* 3 *of the Act of* 1878, *can be exercised in the case of a decree of nullity of marriage on the ground of impotence, and are not confined to cases where there are or might have been children.*

By a marriage settlement the husband, in consideration of the intended marriage, covenanted with the trustees that, if the marriage should take place, he would, during the joint lives of himself and his wife, pay to the trustees £200 a year upon trust for his wife. Further, in consideration of the intended marriage, and in exercise of a power of appointment vested in him, he appointed to the trustees a term of 1,000 *years in certain hereditaments to secure the payment of a rent-charge to his wife, the term and the rent-charge to commence as from his death. Further, in consideration of the intended marriage, and in exercise of a power of appointment vested in him, he appointed to the trustees a term of* 1,200 *years in certain hereditaments, to commence from the solemnization of the intended marriage, upon trust to raise the sum of £20,000 upon certain trusts for himself and the issue of the marriage; but no part of the £20,000 was to be raised during his lifetime, except with his consent in writing. No such consent was ever given.*

On a petition by the wife for a variation of the settlement, after a decree of nullity of marriage on the ground of the impotence of the husband,

Held, that the court had power, under section 5 of the Matrimonial Causes Act, 1859, *to deal with the annuity of £200; but that it had not power to deal with the term of* 1,000 *years and the rent-charge, because the term and rent-charge were not to commence till the death of the husband; neither had it power to deal with the sum of £20,000, because the husband had not given his consent to the raising of any part of that sum.*

Appeal from the judgment of Barnes, J., on a petition for variation of a marriage settlement under section 5 of the Matrimonial Causes Act, 1859 (reported 48 W. R. 524, [1900] P. 130).

The marriage settlement, the subject of the petition, was dated the 27th of May, 1885.

The parties were married on the 28th of May, 1885, the wife, the present petitioner, being then under twenty-one years of age.

On the 22nd of October, 1895, the petitioner commenced a suit in the Divorce Division claiming a declaration that her marriage was null and void on the ground of the impotence of her husband, the respondent.

A decree *nisi* for nullity was pronounced on the 21st of December, 1896, and this decree was made absolute on the 28th of June, 1897.

On the 12th of June, 1899, the petitioner by leave presented a petition to the court to obtain a variation of the marriage settlement for her benefit. The petitioner was without means, and the respondent was a wealthy man.

By the Matrimonial Causes Act, 1859, section 5: "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

By the Matrimonial Causes Act, 1878, section 3: "The court may exercise the powers vested in it by the provisions of section 5 of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage."

By an indenture of settlement, dated the 8th of December, 1874, made between the respondent's father (who died before the date of the marriage settlement of the 27th of May, 1885) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of the 27th of May, 1885, together with other hereditaments, were limited (subject, as to part, to a jointure rent-charge of £1,200 payable thereout to the respondent's mother during her life, and to a term of 500 years for securing the same) to such uses, upon such trusts, and under such powers as the respondent should by any deed or deeds, to be executed by him after his father's death, or by will appoint, and subject thereto to the use of the respondent and his assigns for his life, with remainders over. The indenture contained a power for the respondent, after his father's death, by deed or will to charge the settled property with the payment to himself or any other person of any money not exceeding £8,000. This power had not at the time of the marriage settlement been exercised. The indenture also contained a power for the respondent to appoint by deed or will to any woman whom he might marry, for life or for any less period as from the day of his death if she should survive him, any yearly rent-charge of any amount payable after his father's death, such rent-charge to be charged upon and payable out of all or any of the premises comprised in the indenture of settlement, and to appoint the premises so charged to any persons for any term of years to secure the same.

By the marriage settlement of the 27th of May, 1885, the respondent, in consideration of the intended marriage, covenanted with the trustees thereof, that, if the marriage should take place, he would, during the joint lives of himself and the petitioner, pay to the trustees £200 a year upon trust for the petitioner. The respondent further, in consideration of the intended marriage, and in exercise of the special power vested in him by the indenture of the 8th of December, 1874, appointed to the use of the petitioner and her assigns during her life, in case the marriage should take effect and she should survive him, a yearly rent-charge of £1,300, so long as his mother should be living, and from and after her death the yearly rent-charge of £1,600, the rent-charges to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto, subject to the above-mentioned jointure rent-charge of £1,200 and the term of 500 years; and the respondent, as beneficial owner, in exercise of the special power vested in him by the indenture of the 8th of December, 1874, appointed the said hereditaments and premises unto and to the use of the trustees for the term of 1,000 years, to commence from the death of the respondent, to secure the payments of the rent-charges. Further, in consideration of the intended marriage and in exercise of the general power of appointment vested in him by the settlement of the 8th of December, 1874, the respondent, as beneficial owner, apppointed the hereditaments and premises comprised in the second schedule to the marriage settlement to the use of trustees for the term of 1,200 years, to commence from

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claim. If the articles were fixtures so as to form part of the freehold, they passed to the mortgagee. [His lordship then dealt with the articles which formed the subject of the claim, and came to the conclusion that there was ample evidence upon which the learned judge was justified in coming to the conclusion that the articles were affixed to the premises by the mortgagor with the intention of improving the house as a house, and were not put there as mere articles of furniture.] There remains the question as to the eleven dog-grates. The mortgagor removed the old fixed grates which were in the house, and substituted these dog-grates, which were of considerable weight, in their place. Were they fixtures as between mortgagor and mortgagee? No doubt they were not fixed to the premises, and that raises some difficulty. But when I look at the authorities, and particularly at the case of *Holland* v. *Hodgson*, where Blackburn, J., in delivering the judgment of the Exchequer Chamber, laid down the principle applicable to these cases, it seems that physical annexation to the freehold is not necessary. We must have regard to the character of the articles and the intention with which they were placed there. In my opinion, looking at the weight of these dog-grates, and at the intention with which they were placed in the house—namely, to take the place of the old fixed grates, there was ample evidence upon which the learned judge was entitled to come to the conclusion that they were fixtures forming part of the freehold. In each case the court must have regard to the facts and the intention. The appeal must therefore be dismissed.

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Appeal dismissed.

Solicitor for the plaintiff, *M. S. Rubinstein.*

Solicitors for the defendant, *Calkin, Lewis, & Stokes.*

From Prob. Div. & Adm. Div. (Earl of Halsbury, L.C., A. L. Smith, M.R., and Vaughan Williams, L.J.) } Nov. 5.

DORMER (OTHERWISE WARD) *v.* WARD. (*a.*)

Divorce—Nullity of marriage — Impotence—Power to vary settlements — Property settled — Matrimonial Causes Act, 1859 (22 & 23 *Vict. c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.

The powers of the court under section 5 of the Matrimonial Causes Act, 1859, *and section* 3 *of the Act of* 1878, *can be exercised in the case of a decree of nullity of marriage on the ground of impotence, and are not confined to cases where there are or might have been children.*

By a marriage settlement the husband, in consideration of the intended marriage, covenanted with the trustees that, if the marriage should take place, he would, during the joint lives of himself and his wife, pay to the trustees £200 a year upon trust for his wife. Further, in consideration of the intended marriage, and in exercise of a power of appointment vested in him, he appointed to the trustees a term of 1,000 *years in certain hereditaments to secure the payment of a rent-charge to his wife, the term and the rent-charge to commence as from his death. Further, in consideration of the intended marriage, and in exercise of a power of appointment vested in him, he appointed to the trustees a term of* 1,200 *years in certain hereditaments, to commence from the solemnization of the intended marriage, upon trust to raise the sum of £20,000 upon certain trusts for himself and the issue of the marriage; but no part of the £20,000 was to be raised during his lifetime, except with his consent in writing. No such consent was ever given.*

On a petition by the wife for a variation of the settlement, after a decree of nullity of marriage on the ground of the impotence of the husband,

Held, that the court had power, under section 5 of the Matrimonial Causes Act, 1859, *to deal with the annuity of £200; but that it had not power to deal with the term of* 1,000 *years and the rent-charge, because the term and rent-charge were not to commence till the death of the husband; neither had it power to deal with the sum of £20,000, because the husband had not given his consent to the raising of any part of that sum.*

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The marriage settlement, the subject of the petition, was dated the 27th of May, 1885.

The parties were married on the 28th of May, 1885, the wife, the present petitioner, being then under twenty-one years of age.

On the 22nd of October, 1895, the petitioner commenced a suit in the Divorce Division claiming a declaration that her marriage was null and void on the ground of the impotence of her husband, the respondent.

A decree *nisi* for nullity was pronounced on the 21st of December, 1896, and this decree was made absolute on the 28th of June, 1897.

On the 12th of June, 1899, the petitioner by leave presented a petition to the court to obtain a variation of the marriage settlement for her benefit. The petitioner was without means, and the respondent was a wealthy man.

By the Matrimonial Causes Act, 1859, section 5: "The court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the court shall seem fit."

By the Matrimonial Causes Act, 1878, section 3: "The court may exercise the powers vested in it by the provisions of section 5 of the Act of the twenty-second and twenty-third years of Victoria, chapter sixty-one, notwithstanding that there are no children of the marriage."

By an indenture of settlement, dated the 8th of December, 1874, made between the respondent's father (who died before the date of the marriage settlement of the 27th of May, 1885) and the respondent and certain trustees, the lands and hereditaments comprised in the schedules to the marriage settlement of the 27th of May, 1885, together with other hereditaments, were limited (subject, as to part, to a jointure rent-charge of £1,200 payable thereout to the respondent's mother during her life, and to a term of 500 years for securing the same) to such uses, upon such trusts, and under such powers as the respondent should by any deed or deeds, to be executed by him after his father's death, or by will appoint, and subject thereto to the use of the respondent and his assigns for his life, with remainders over. The indenture contained a power for the respondent, after his father's death, by deed or will to charge the settled property with the payment to himself or any other person of any money not exceeding £8,000. This power had not at the time of the marriage settlement been exercised. The indenture also contained a power for the respondent to appoint by deed or will to any woman whom he might marry, for life or for any less period as from the day of his death if she should survive him, any yearly rent-charge of any amount payable after his father's death, such rent-charge to be charged upon and payable out of all or any of the premises comprised in the indenture of settlement, and to appoint the premises so charged to any persons for any term of years to secure the same.

By the marriage settlement of the 27th of May, 1885, the respondent, in consideration of the intended marriage, covenanted with the trustees thereof, that, if the marriage should take place, he would, during the joint lives of himself and the petitioner, pay to the trustees £200 a year upon trust for the petitioner. The respondent further, in consideration of the intended marriage, and in exercise of the special power vested in him by the indenture of the 8th of December, 1874, appointed to the use of the petitioner and her assigns during her life, in case the marriage should take effect and she should survive him, a yearly rent-charge of £1,300, so long as his mother should be living, and from and after her death the yearly rent-charge of £1,600, the rent-charges to be charged upon and issuing out of all the hereditaments and premises comprised in the first schedule thereto, subject to the above-mentioned jointure rent-charge of £1,200 and the term of 500 years; and the respondent, as beneficial owner, in exercise of the special power vested in him by the indenture of the 8th of December, 1874, appointed the said hereditaments and premises unto and to the use of the trustees for the term of 1,000 years, to commence from the death of the respondent, to secure the payments of the rent-charges. Further, in consideration of the intended marriage and in exercise of the general power of appointment vested in him by the settlement of the 8th of December, 1874, the respondent, as beneficial owner, apppointed the hereditaments and premises comprised in the second schedule to the marriage settlement to the use of trustees for the term of 1,200 years, to commence from

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ditaments and premises be applied for the benefit of the petitioner. It seems a very extraordinary proposition that, because a charge, it may be a very small one, is created on a large real estate by a marriage settlement, the whole estate can be dealt with by the court under the powers created by the sections aforesaid. I agree with Barnes, J., as to this; but this is not the argument which was urged before us by counsel. On the contrary, it was expressly admitted before us that such an argument could not be supported. What was urged before us was that the result of the settlement of 1885 was that Mr. Ward no longer took the rents and profits of the scheduled estates and premises under his original title, the settlement of 1874, but takes them under the settlement of 1885, and that therefore the court can make an order for the application of those rents and profits. Now, the clause relied on was the clause relating to the 1,200 years' term. It could not relate to the 1,000 years' term, because that was only to commence from the death of Mr. Ward, and the surplus after paying the rent-charge charged upon it was to go to the person or persons for the time being entitled to the reversion immediately expectant on the said term to the premises therein comprised—that is, the persons entitled after the death of Mr. Ward, for the term was only to commence after this death. But the 1,200 years' term was to commence from the solemnization of the said intended marriage, and it is said did commence, although it might be voidable. Now, the trusts of that term were to raise and stand possessed of the sum of £20,000, which £20,000 has not been raised, because it could only be raised in the lifetime of Mr. Ward by his written consent, which has not been given. The trust then goes on: "Provided always that subject to the trust hereinbefore declared concerning each of the said terms"—*i.e.*, the trust in favour of Mr. Ward's mother, who was dead before the declaration of nullity—"and to the rights of the trustees and trustee for the time being of such respective terms to raise by any of the means aforesaid, and to pay or reimburse themselves or himself all costs, charges, and expenses in relation to the said several trusts, the rents and profits of the hereditaments and premises comprised in each of such terms respectively, or such part thereof as shall from time to time remain after satisfying the said trusts shall be taken and received by the person or persons for the time being entitled to the said premises in reversion immediately expectant on such respective terms." Now, it is said that the term of 1,200 years is still in existence, or, at all events, was in existence immediately before, and at the time of, the declaration of nullity, and that the duty of the court is to inquire into the existence of settlements made on the parties whose marriage is the subject of the decree. It is said that "in existence" means in existence at the date of the decree, and that, although the inquiry is to be made after the decree, it is to be made as of the date of the decree, and that the court having regard to section 5 must be taken in making the decree to have reserved to itself the right to deal with the settlement as of that date. If this is right—and I am inclined to think it is—the only question would be whether Mr. Ward immediately before and at the date of the decree was taking and receiving the rents and profits of the hereditaments and premises comprised in the term under, and by virtue of, the marriage settlement of 1885. This point was not dealt with at any length by the counsel for Mr. Ward, but the answer as I understood it was two-fold—(1) the only effect of these words in the events which have happened was to except these rents and profits from the operation of the settlement save in so far as they should be required for the purpose of satisfying the trusts. The proviso was likened to the ordinary proviso in a marriage settlement that the settlor shall be entitled to receive the rents and profits unless and until the intended marriage takes place; (2) it was said that this proviso had at the date of the decree no operation whatever because at that date there were no trusts whatever to be performed by the trustees; Mr. Ward, sen., was dead, and the £20,000 had not been raised, and, in the absence of the written consent or death of Mr. Ward, could not be raised; in other words, that the proviso had no appplication excepting in the case of surplus profits after satisfying the trusts, and that there were none. On the whole, I think, notwithstanding these answers made on behalf of the respondent, that Mr. Ward at the date of the decree of nullity was receiving the rents and profits under and by virtue of the settlement of 1885, and I am justified in this view because at the date of the settlement Mr. Ward was not the "owner in fee" of the estates mentioned in the second schedule, but only in receipt of the rents and profits under and by virtue of the settlement of 1874, and had at most only an equitable life estate. He then, by the settlement of 1885, exercises the powers of appointment conferred upon him by the settlement of 1874, and from that time forward it seems to me that his right to receive the rents and profits was based upon the settlement of 1885. I think that this appeal should be allowed, and that the matter should be sent back to Barnes, J., with an intimation that we think that an order should be made for the application for the benefit of the appellant of so much of the £200 and the rent and profits as to Barnes, J., may seem right.

A. L. Smith, M.R.—The Lord Chancellor and I agree in the judgment which has been delivered.

Appeal allowed.

Solicitors for the petitioner, *Witham, Roskell, Munster, & Weld.*

Solicitors for the respondent, *Few & Co.*

High Court of Justice.

Chan. Div.
Kekewich, J. } Dec. 1.

Attorney-General v. Wilson. (a.)

Practice—Trial—Venue—Transfer—Attorney-General.

Where the Attorney-General, suing at the relation of a corporation with that corporation as co-plaintiffs, had brought an action in the Chancery Division of the High Court of Justice, on an application by the defendants to have the case transferred to the Queen's Bench Division,

Application refused, on the ground that the Attorney-General having exercised his discretion with regard to the division in which the action should be brought, the court would not, unless extremely strong cause were shown against it, overrule the discretion of the Attorney-General.

This was an application by the defendants in the action to have the venue changed.

The action was brought by the Attorney-General (at the relation of the Mayor, Aldermen, and Burgesses of the Borough of Sunderland) and the Mayor, Aldermen, and Burgesses of the Borough of Sunderland as plaintiffs, against J. A. Wilson & Sons as defendants, and asked for an injunction restraining

(a.) Reported by C. C. Hensley, Esq., Barrister-at-Law.

the defendants from continuing a public nuisance—namely, the subsidence of a highway in Sunderland, which the plaintiffs alleged in their claim was caused by excavations made by the defendants in premises occupied by them adjacent to the highway in question and by the non-maintenance by the defendants of a retaining wall, and requiring the defendants to restore the surface of the highway and to re-erect the wall, and for damages.

The writ to which the fiat of the Attorney-General had been duly obtained was taken out in the High Court of Justice, Chancery Division, and was dated the 18th of April, 1900.

On the usual summons for directions coming before the master, and the defendants contending (*inter alia*) that the action should have been brought in the Queen's Bench Division, and not in the Chancery Division of the High Court of Justice, he held he had no jurisdiction in the matter, and the defendants were given time to bring it before the judge. This they did upon the pending summons for directions without issue of a substantive application, but they filed an affidavit in support. On the matter coming before the judge in chambers, he directed it to stand over until the pleadings were closed, and that it should then be argued in open court. It appeared from the defendants' affidavit that the application was not merely for a transfer to the Queen's Bench Division, but was really for a transfer to the Durham Assizes for trial by a judge and special jury.

W. Renshaw, Q.C., and *Edward Shortt*, for the applicants.—This is a local case and could best be tried before a judge and special jury at Durham, because (1) it would be most convenient that the tribunal should be able to view the *locus in quo*, and (2) expense would be saved. Moreover, there would be no delay. [KEKEWICH, J., referred to *Baerlein* v. *The Chartered Mercantile Bank*, 43 W. R. 692, [1895] 2 Ch. 488.] The practice is to transfer with particular directions. It may be objected that the court will not interfere with the Attorney-General's direction in selecting his tribunal, but here the corporation are the real persons whose rights are involved and the Attorney-General is merely a part of the machinery in the action. If the corporation, in whom the roads are vested, fail, the Attorney-General must fail. Alone he could not sue for damages done to the highway. The court therefore has jurisdiction to order a transfer if more convenient, just as in an action between private parties: *Attorney-General* v. *Magdalen College, Oxford*, 5 W. R. 716, 6 H. L. Cas. 189. As to any objection that the Attorney-General's right to select his tribunal where suing on behalf of the Crown, we do not dispute that beyond saying that even there there are restrictions: *Attorney-General* (*for Prince of Wales*) v. *Crossman*, 14 W. R. 699, L. R. 1 Ex. 381. Here, however, he is not suing *ex officio*.

T. R. Warrington, Q.C., and *Alexander Glen*, for the respondents (plaintiffs in the action)—The Attorney-General, as representing the Crown, has in his discretion a prerogative right to select his tribunal: Chitty on Prerogative, p. 244; Coke's 4th Institute, p. 17; Rolles' Reports, p. 13, James I.; Daniel's Chancery Practice, p. 54, Prerogative of the Crown; *Attorney-General* v. *Lord Churchill*, 8 M. & W. 171. The Judicature Act has not altered that: Annual Practice, 1901, p. 33, note to order 429; *Attorney-General* v. *Constable*, 27 W. R. 661, 4 Ex. Div. 172. There is no distinction between his suing *ex-officio*, and, as in this instance, at the relation of the corporation. He might alone have brought an action against the defendants for obstructing the Queen's highway: *Attorney-General* v. *Cockermouth Local Board*, 22 W. R. 617, L. R. 18 Eq. 172. [They also cited *Attorney-General* v. *Barker*, 4 Myl. & C. 262; *Attorney-General* v. *Hallett*, 15 M. & W. 97.] Our second point is that a transfer would not be convenient. A view of the *locus in quo* would not assist the court, and an important question of law would have to be reserved for hearing in London.

W. Renshaw, Q.C., replied.

KEKEWICH, J.—This has been an interesting discussion on various points of procedure. I propose to give a definite opinion on one point only. It would not, however, under the circumstances, be satisfactory to deal only with that point, and I shall therefore consider, without expressing any concluded opinion thereon, other points which are not perhaps strictly pertinent. In the first place no one could dispute that this is an action which might be commenced with equal propriety either in this division or in the Queen's Bench Division. It is not an action which must necessarily from its nature be assigned either to the one or the other division. Were it an action brought by private plaintiffs, their solicitors and counsel might bring it in either division, and if they, after due consideration, decided to bring it here I should have to treat that decision with great consideration, although, on the other hand, I must not attach too much weight to it, bearing in mind the convenience of the defendant as well as that of the plaintiffs. Now, in the case of ordinary parties, I am bound by the case of *Baerlein* v. *The Chartered Mercantile Bank* to say that if more convenient I ought to transfer the case to the Queen's Bench Division. If I were to decide to transfer it on that ground I should transfer it generally to the Queen's Bench Division, and leave it to the control of that division to decide how and where it should be tried, although it appears a practice has grown up of transferring cases with particular directions in this respect. My strong opinion is that the right course, where a transfer has to be made, is to transfer the case generally, leaving it to the judge who has the control of the case in the division to which it is transferred to say how it should be tried. As to the interesting question as to the prerogative right of the Attorney-General to select his venue I sympathize with the hesitation of Bramwell, B., in the case of *Attorney-General* (*for the Prince of Wales*) v. *Crossman*, where he says "But without much consideration I should be very sorry to lay down the rule, that in any case, at the pleasure of those who advise the Crown, they may lay and retain the venue in an inconvenient county." Of course that is not exactly what the point is here, but it shows that the right of the Crown is not so definite as some of the cases might lead us to believe. The question is too big to decide without very full consideration, and I shall therefore pass it by. I must say I do not think it makes any difference, although I reserve my judicial opinion with regard to this point, whether the Attorney-General is suing *ex officio* or at the relation of parties, and whether with or without those parties as co-plaintiffs.

I am going, however, to decide the case on another point—I mean the discretion of the Attorney-General. I have already said that the discretion of a private plaintiff under the Judicature Acts is entitled to great weight, though after the decision of the Court of Appeal in *Baerlein* v. *The Chartered Mercantile Bank* it is not, of course, conclusive; but the discretion of the Attorney-General differs from that of an ordinary plaintiff. An ordinary plaintiff may for many reasons select a particular division of the High Court in which to bring his action (though in the Chancery Division he cannot select a particular judge) —*e.g.*, he may wish to obtain the services of particular counsel, or to have his case tried at a particular

time, or it may be more convenient for his solicitors, or for reasons affecting himself personally, and his discretion may possibly be exercised in a way which conflicts with the convenience of the administration of justice, and may be a hardship upon the defendant. Not so with regard to the Attorney-General. I do not accurately know what his present practice is, but it can only be a modification of the old practice before the passing of the Supreme Court of Judicature Act, and the Attorney-General does not give his fiat—that is, sign the writ—without a full consideration of the case, and we well know that he has the assistance of experienced counsel. He goes into the matter thoroughly, and, even if I did not know this as a matter of common knowledge, I should be bound to give him credit for not issuing his fiat without careful consideration. I must consider that the Attorney-General, knowing well that this action might have been brought in either the Queen's Bench or the Chancery Division, has deliberately selected the Chancery Division. Of course he might later on change his mind, but he has up to the present time brought his action here, and I should not do him justice if I did not say that his discretion ought to prevail in the absence of very strong cause shown against it. Were he even to bring a revenue case here I don't see how I could refuse to hear it. The result is that since he has chosen to bring his action in the Chancery Division in the Chancery Division it must be tried. Application dismissed accordingly with costs.

Solicitors, *Crossman, Prichard, Crossman, & Block*, for *Kidson, McKenzies, & Kidson*, Sunderland; *Johnson, Weatherall, & Sturt*, for *F. M. Bowey*, Town Clerk, Sunderland.

Chan. Div.
Cozens-Hardy, J. } Oct. 30, 31; Nov. 1, 10.

NEAVESON v. PETERBOROUGH RURAL DISTRICT COUNCIL. (a.)

Inclosure—Private road—Pasturage—Ownership of soil—User in excess of award—Prescription—Presumption of lost grant.

By an award made under an Inclosure Act of 1812 *it was provided that all the grass and herbage which should from time to time grow upon all the private roads therein set out should belong to and be the property of the surveyor of the highways for the time being, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at the best rent or rents that could reasonably be obtained for the same.*

Plaintiff was the occupier of a farm, allotted under the award, on one side of a private road. Since 1846 *the pasturage of this private road, along with other roads, had been let out annually pursuant to directions given at public vestry meetings, and with conditions (contrary to the restriction of the award) providing a varying limit as to the number of cattle or horses which might be grazed upon this road. Plaintiff was party to many such lettings. On a claim by him for an injunction restraining the rural district council (the successors of the surveyor of highways) from so letting or using the road,*

Held, that, there having been an open and regular and unchallenged dealing with the herbage of the road in a manner and to an extent not authorized by the award, and which was apparently to the advantage of the owners and occupiers of the allotted lands, a lawful origin must be presumed from the long usage, based on a lost grant from the owner of the soil.

Held, that, having regard to the Inclosure Act, the soil of the road became vested in the owners of the adjoining allotments, subject to a right of way and to the right of herbage.

Poole *v.* Huskinson, 11 *M. & W.* 827, *and* Haigh *v.* West, [1893] 2 *Q. B.* 19, 41 *W. R. Dig.* 87, *referred to.*

This action related to the pasturage of a private road, called Moor-road, in the parish of Newborough, which was constituted out of fen land in the Bedford Level by the Newborough Inclosure Act 1812.

The facts as taken from his lordship's judgment are as follows: By the Newborough Inclosure Act of 1812, the Borough Fen Common and the 400 acres of common were dealt with substantially in the manner usually adopted in Inclosure Acts. Commissioners were appointed who were directed (*inter alia*) to set out certain roads, and it was enacted by section 21 that the herbage of the public and the private roads should belong to and be the property of the person or persons to whom the commissioners should allot and award the same. By section 24, one-twentieth part of the land was to be allotted to the lord of the manor in respect of his right to the soil, and by section 27 such allotment was to be had and taken in lieu full bar and compensation for all right of soil in the said open common of waste land therein directed to be divided and enclosed. The award under this Act was made in 1822. It set out a large number of roads, public and private, amongst others "one private carriage, bridle, and drift road and footpath distinguished by the name of Moor-road of the breadth of 40ft." By the award, all private roads were to be kept in repair by and at the expense of the owners and proprietors of lands and estates in Borough Fen Common and the 400 acres common, in such shares and proportions as they by law were or thereafter would be liable to contribute to the repair of the public roads. The award provided that all the grass and herbages which should from time to time grow and arise upon all the private roads set out and thereinbefore awarded should belong to and be the property of the surveyor for the time being of the highways to be appointed for the said common and waste land called Borough Fen Common and the 400 acres common, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at and for the best rent or rents that could be reasonably obtained for the same. And that such rent or rents should be annually paid and applied towards defraying the charges and expenses of maintaining and keeping in repair the said public and private roads. . . . The plaintiff was the occupier of a farm, allotted under the award, on one side of the Moor-road, from which it was separated by a ditch, with a low hedge on the farm side of the ditch. It was established by evidence that the herbage on this and several highways had been annually let by auction. The precise terms of letting immediately after the award could not be ascertained; but the evidence satisfied his Lordship that, at least since 1846, the roads, including Moor-road, had been let publicly by auction, year by year, pursuant to directions given at public vestry meetings, without any restriction providing for depasturing of sheep only. On the contrary, the conditions provided a limit varying from time to time as to the number of cattle or horses which might be grazed upon Moor-road. The conditions usually provided that the hirer of Moor-road might hang a gate next Thorney-road, and this was regularly done. It was further proved that the plaintiff himself had been party to

(a.) Reported by A. GLYNNE-JONES, Esq., Barrister-at-Law.

many such lettings, and had himself hired Moor-road upon these terms and grazed cattle thereon, and received money paid by others for the right of turning cattle thereon during his tenancy. In 1899, the defendants, the rural district council, who were the successors of the surveyor of the highways, let Moor-road by auction to the defendant Vergette upon conditions of which the following alone are material:—

4. That not more than six horses nor more than twelve beasts shall be allowed to graze on any road at any one time, under a penalty of 5s. for every head of stock above the number, and if any stock be found on any of the roads without a tender, such stock shall be deemed trespassers, and be impounded accordingly.

5. That no swine or geese shall be allowed to graze on any of the said roads.

6. That if any scabbed sheep or diseased or entire cattle be found grazing upon any of the said roads or highways, the owner thereof shall forfeit and pay to the district council of Peterborough the sum of 10s. for every such animal.

The defendant Vergette turned horses and cattle in excess of the prescribed number into Moor-road, and without a tender.

It was alleged that damage had been done to the ditches, which the plaintiff or his landlord was bound to repair; and, further, that the cattle and horses trespassed upon the plaintiff's land and injured his corn.

The defendant Vergette had paid 40s. damages, and the action was stayed against him.

The defendant council paid 40s., with a denial of liability.

The plaintiff now sought an injunction to restrain the district council from grazing or depasturing horses, cattle, or stock other than healthy sheep in or upon Moor-road.

Rawlins, Q.C., and *Herbert Percival* for the plaintiff.

Eve, Q.C., and *Schiller* contended that the defendant council had acquired by prescription the right to let the pasturage as they had been doing in a manner not authorized by the award. Further, the Attorney-General should have been a necessary party, as this was an action by the plaintiff to compel the performance by the defendants of a statutory obligation.

Rawlins, Q.C., in reply.

Nov. 10.—COZENS-HARDY, J., after stating the facts as above set out said: It has not been argued before me that the restriction upon the mode of dealing with the herbage was beyond the powers of the commissioners, and I therefore assume its validity. These facts being admitted, or proved, several questions arise for my decision. In the first place, it is by no means clear in whom the soil of the road is now vested. It may be vested in persons claiming under the Marquis of Exeter, in whom the soil of the common was vested at the date of the award, on the ground that it is not allotted to anyone else. This seems to have been the view of Parke, B., in *Pool* v. *Huskinson*, 11 M. & W. 827, where he says, dealing with a similar road: "As to the ownership of the soil, I do not apprehend that there is any difficulty. It remains in the lord of the manor, for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others." A different view was, however, expressed by the Court of Appeal in the recent very similar case of *Haigh* v. *West*, [1893] 2 Q. B. 19, 41 W. R. Dig. 87, where Lindley, L.J., in delivering the considered judgment of the court, used the following language: "Having regard to the fact that the allotments to the lord and to the owners of the common fields and to the commoners were expressly made in satisfaction of all the respective former rights not expressly reserved to them, the soil in the lane set out would not remain in its former owners, but would *primâ facie* pass to the allottees of the land abutting on the lane, although described as bounded by the lane." Having regard to sections 26 and 27 of the Inclosure Act, I think I must hold that the soil of Moor-road became vested in the owners of the adjoining allotments, including that of which the plaintiff is the occupier, subject only to a right of way and to the right of the surveyor of the highways to the herbage thereon. This being so, I am relieved from considering some of the arguments addressed to me as to the right of a private individual to maintain an action to enforce the performance by a public body of a statutory obligation. It seems to me that the plaintiff must be entitled *primâ facie* to assert that the land, of which he is in occupation, ought not to be subjected to any greater burden than was imposed upon it by the award. Assuming this to be the legal position immediately after the award, has anything happened to change it? It is plain that an owner of land subject to a limited right may enlarge that right or release any restrictions upon the exercise of that right. Now I find an open and regular and unchallenged dealing with the herbage of this road, and similar roads, for more than fifty years in a manner and to an extent not authorized by the award. The depasturing of horses and cattle was apparently to the advantage of the owners and occupiers of the allotted lands. More money was obtained for the repair of all the parish roads. The plaintiff himself recognized this advantage, for he took an active part in letting the herbage, and, moreover, himself stocked the road with horses and cattle. Some justification or explanation of these acts ought to be presumed from long usage, and I think I must presume a lost grant by the owner of the soil of the road by virtue of which the surveyors were released from the restriction imposed by the award as to the mode of grazing. The case of *Haigh* v. *West* above referred to is a strong authority in support of this presumption. The result is that, in my opinion, the action fails, and must be dismissed, with costs.

Solicitors, *Clarke, Rawlins, & Co.*, for *Percival & Son*, Peterborough; *J. M. Voss*, for *J. W. Buckle*, Peterborough.

Chan. Div. } Farwell, J. } Oct. 25, 26, 30.

HUNT v. LUCK. (a.)

Vendor and purchaser—Notice of adverse title—Rents paid to house agent—Inquiry.

Though an intending purchaser or mortgagee, who has actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor, has notice of such person's rights, yet such payment must be actually inconsistent. Thus, the knowledge that the rents are paid to a house agent puts the purchaser to no inquiry and fixes him with no notice.

Barnhart v. Greenshields, 9 *Moo. P. C.* 18, *and* Knight v. Bowyer, 6 *W. R.* 28, *at p.* 33, 23 *Beav.* 609, *at p.* 642, *discussed and explained.*

Mumford v. Stohwasser, 23 *W. R.* 833, *L. R.* 18 *Eq.* 566, *discussed and dissented from.*

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

The plaintiff's husband, Dr. Hunt, was the owner of certain freehold cottage property at Wimbledon, consisting of twenty-seven cottages, twenty-five of which were let to weekly tenants, and two to yearly ones. The rents were collected for Hunt by Woodrow, a well-known house and estate agent at Wimbledon. In the year 1896 he resided at Hastings, and was on terms of intimacy with one W. M. Gilbert. Dr. Hunt was an old man in feeble health, but the court found as a fact that he was not insane and was capable of managing his affairs. By a deed dated the 31st of March, 1896, and made between Hunt of the first part, and Gilbert of the second part, Hunt conveyed part of this cottage property to Gilbert by way of gift. By another deed dated the 10th of October, 1896, and made between the same parties in consideration of the sum of £12,000 (the receipt of which Hunt thereby acknowledged), Hunt conveyed the whole of this cottage property to Gilbert Hunt, however, continued to receive the rents of the property up to the time of his death, and his widow, the plaintiff, continued to receive them after his death, and there was no evidence to show that the sum of £12,000 had ever been paid to him by Gilbert. Gilbert subsequently mortgaged the property to the defendants, Sayer, Slater & Hodgson. While negotiating the mortgages they employed a valuer named Woodhams to value the property. When doing so it was alleged that he inquired of the tenants to whom they paid their rents, and was told that it was to Woodrow; he, however, did not see Woodrow, nor inquire of him on whose behalf he collected the rents. Hunt died on the 10th of June, 1898, and letters of administration, with the will annexed, were granted to the plaintiff. Gilbert died on the 6th of September, 1898. By his will the defendant Luck was the executrix of his will and also his residuary legatee and devisee.

The plaintiff now claimed to have these mortgages set aside on various grounds, most of which were questions of fact. For the purpose of the argument of the present point it was assumed that there was a defect in Gilbert's title, and that at the date of the mortgages Hunt, and not he, was the beneficial owner of the property.

Upjohn, Q.C., and *W. F. Webster*, for the plaintiff.—The mortgagees had constructive notice of the defect in Gilbert's title, for their valuer knew that the tenants paid their rents, not to Gilbert, but to the house agent, Woodrow. This should have put him on inquiry—if he had inquired of Woodrow he would have found that he received the rents for Hunt: *Knight* v. *Bowyer*, 6 W. R. 28, at p. 33, 23 Beav. 609, at p. 642; *Barnhart* v. *Greenshields*, 9 Moo. P. C. 18; *Holmes* v. *Powell*, 8 De G. M. & G. 572. [FARWELL, J., referred to *White* v. *Wakefield*, 7 Sim. 401, and to *Lloyds Bank (Limited)* v. *Bullock*, 44 W. R. 633, [1896] 2 Ch. 192.]

Hughes, Q.C., *Rufus Isaacs, Q.C.*, and *C. Church*, were not called upon to argue this point.

FARWELL, J.—Then comes the question on which I have heard an ingenious argument this morning. It is said: "True it is that on the 10th of October, 1896, Hunt executed this conveyance which contains in the body of it an acknowledgment of the receipt of the purchase-money, but the mortgagees, the defendants, are affected with notice of the fact that Hunt was the true owner at the time the mortgagees negotiated the mortgage, and that Gilbert, the mortgagor, was not interested beneficially at all." This doctrine of constructive notice, imputing as it does knowledge which the person affected does not actually possess, is one which the courts of late years have been unwilling to extend. I am not referring to cases where a man wilfully shuts his eyes so as to avoid notice, but to cases like the present, where honest men are to be affected by knowledge which everyone admits they did not in fact possess. So far as regards the merits of the case, even assuming both parties to the action to be equally innocent, the man who has been swindled by too great confidence in his own agent has surely less claim to the assistance of a court of equity than a purchaser for value who gets the legal estate and pays his money without notice. Granted that the vendor has every reason to believe his agent to be an honest man, still, if he is mistaken and trusts a rogue, he, rather than the purchaser for value without notice who is misled by his having so trusted, ought to bear the burden. In the present case it is attempted to fix the defendants with notice in this way. The property consisted of twenty-seven houses, twenty-five occupied by weekly tenants and two by tenants from year to year. The defendants employed Woodhams, a valuer, to value the property for the purposes of their advance. The rents were then collected by Woodrow, an estate agent. Woodhams did not see Woodrow at all, but the defendants' solicitor's clerk stated that he believed that Woodhams inquired of the tenants to whom they paid their rents. From this it is argued that the defendants had constructive notice of Hunt's title. It is not suggested, and certainly is not proved, that the tenants knew anything of Hunt. If they were asked they would say that they paid to Woodrow, who was a well-known house agent and rent collector at Wimbledon. The plaintiff's contention, therefore, is that it was the duty of the mortgagees to direct their agent first to inquire of the tenants not merely whether they claimed any or what interest in their holdings, but also who was the person to whom their rents were paid; and secondly, having ascertained to whom the rents were paid, to inquire of the recipient on whose behalf those rents were received.

Now in my opinion, on the authorities as they stand, it is not the duty of a purchaser to inquire of the tenants, to whom they pay their rents. The fact that a tenant is in occupation is notice of his own rights, but it is not notice of the rights of the persons through whom he claims. I take the law as stated in 1853 by Lord Kingsdown, then Mr. Pemberton Leigh, in *Barnhart* v. *Greenshields*: "With respect to the effect of possession merely, we take the law to be that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to the interests connected with his tenancy, as in *Taylor* v. *Stibbert*, 2 Ves. jun. 437, but also to interests under collateral agreements, as in *Daniels* v. *Davison*, 16 Ves. 249, and *Allen* v. *Anthony*, 1 Mer. 282, the principle being the same in both classes of cases—namely, that possession of the tenant is notice that he has some interest in the land, and that a purchaser having notice of that fact is bound, according to the ordinary rule, either to inquire what that interest is or to give effect to it, whatever it may be. . . . The last case on the subject, *Bailey* v. *Richardson*, 9 Hare 734, rests on precisely the same principles, and although in the argument at the bar it was suggested that the language of the learned judge in that case goes further and lays down that it is the duty of a purchaser to make inquiries of a tenant in possession, not only for the purpose of protecting himself against any interest of the tenant; but for the purpose of guarding against interests of other persons; it is clear from the context that such is not the meaning of the words

used, and we know from the learned judge himself that he had no intention of laying down any such doctrine. In all the cases to which we have referred it will be observed that the possession relied on was the actual occupation of the land, and that the equity sought to be enforced was on behalf of the party so in possession. There is no authority in these cases for the proposition that notice of a tenancy is notice of the title of the lessor, or that a purchaser neglecting to inquire into the title of the occupier is affected by any other equities than those which such occupier may insist on. Whatever authority there is upon the subject is the other way." That is an authoritative and correct statement of the law as it was then and as I understand it is still. Counsel for the plaintiff did not contest the correctness of the propositions which I have just read, but they relied on *Knight* v. *Bowyer* as extending that doctrine. The case is very lengthy and somewhat involved, but so far as is necessary for the present purpose, it is sufficient to state that Henrietta Lady Bowyer, who purchased the reversionary interest in a mortgage from the tenant for life in possession of settled estates in whom that interest was previously vested, had actually knowledge of the fact that a receiver appointed under a deed was in receipt of the rents for certain annuitants. The whole gist of the case, in my view, rests on the proposition that the receiver was to the knowledge of the purchaser receiving for annuitants. I take the proposition from the judgment of Turner, L.J. He says: "Now, that Lady Bowyer knew that Bridger was in the receipt of the rents of the estate and in receipt of them on behalf of annuitants seems to be clear from the evidence." That seems to me to be the point on which it turns. Reading for "annuitants" in the present case "Hunt" this would then be a case on all fours with *Knight* v. *Bowyer* if here the mortgagees had known that Woodrow was in receipt of the rents and in receipt of them on behalf of Hunt. There would then have been a different case to consider altogether. The meaning of the learned Lord Justice is rendered even plainer by a passage a few lines lower down on the same page: "The cases fully establish that purchasers are bound to make inquiries of occupying tenants as to their rights, and are affected by notice of those rights if they fail to make such inquiries, and I do not see upon what principle it can be held that inquiry must be made of an occupying tenant, but that if a stranger be found in the enjoyment of the estate no inquiry need be made of him. To hold that such inquiry must be made is not, as I think, any extension of the doctrine of constructive notice, which certainly I am by no means inclined to extend." It is clear, therefore, that Turner, L.J., did not himself intend in any way to make any addition to the doctrine as already laid down in *Barnhart* v. *Greenshields*, and by himself in *Bailey* v. *Richardson* therein referred to, but was expressly pointing out that it was no extension of such doctrine to apply it to the annuitants who were known by the purchasers to be in enjoyment of the rents. The rules established by these two cases may be stated thus: (1) a tenant's occupation is notice of all that tenant's rights, but not of his lessor's title or rights; and (2) actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor is notice of such person's rights. In the present case I am by no means satisfied that Woodhams ever inquired at all of the tenants to whom they paid their rents, but assuming that he did, and that he was informed that the rents were paid to Woodrow, a well-known local estate agent, that, in my opinion, affects him with no notice at all. Many landlords have employed agents, and there is nothing inconsistent with the title shown to the mortgagees by the abstract in the fact that the rents of the property were collected by a house agent. If it could have been proved that the mortgagees were told that Woodrow collected the rents as Hunt's agent, the case would have been within *Knight* v. *Bowyer*, but the mere fact that rents are known to be paid to a house or estate agent puts the purchaser on no inquiry or fixes him with no notice. Even if any such extension of the doctrine could ever be applied, it certainly could not apply to a case like the present, where the defendants rely on Hunt's signature and receipt, and the plaintiff is attempting to fix them with constructive notice of facts which would make it their duty to distrust and disbelieve such signature. If authority be necessary to show that the doctrine of constructive notice is not carried to that length, I think it is to be found in *White* v. *Wakefield*, to which I have already referred during the course of the argument. The head-note is: "Where a vendor signs a receipt for the whole purchase-money but suffers the purchaser to retain part of it and remains in possession of the estate as tenant to the purchasers, his possession is no notice to a subsequent purchaser or incumbrancer of his lien on the estate for the sum retained." Supposing that in the present case I found that the deed was the deed of Hunt and was binding on him, but that the purchase-money had not been in fact paid, the plaintiff's right would be that of the plaintiff in *White* v. *Wakefield*—namely, the right of an unpaid vendor to a lien for his purchase-money. Shadwell, V.C., disposed of that claim in that case by words which appear to me to be applicable to the present: "Suppose, however, that it was otherwise and that there had been a lien, then the question would be whether if there were no actual notice to the annuitants they would be bound by the lien, because the attorney had notice that the plaintiff was in possession of the estate. The only fact of which they could have had notice was that the money was not paid. But as White had declared by the conveyance in the most solemn manner that he had received all the money, no man could be expected to inquire whether the purchase-money had been paid; and therefore, if there had been any lien, the case must have totally failed as against the annuitants."

Constructive notice is the knowledge which the courts impute to a person upon a presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him to further inquiry, or from his wilfully abstaining from inquiry to avoid notice. How can I hold that the mortgagees have wilfully neglected to make some inquiry, which is usual in cases of mortgages or sales of real estate in order to avoid acquiring some knowledge which they would thereby have obtained? *Benby* v. *Barnes*.

When the plaintiff's counsel admitted that, so far as they knew, there was no authority covering the present case, how can I hold that the mortgagees had actual knowledge of some defect, inquiry into which would disclose others? The action therefore fails as against the mortgagees, and as against them I dismiss it with costs.

Since delivering my judgment my attention has been called to Sir George Jessel's statement of the law in *Mumford* v. *Stohwasser*, L. R. 18 Eq. 556, where he says "At that time the house was undoubtedly in the possession of the tenant of the plaintiffs, and therefore he"—the defendant—"had constructive notice of his tenancy, and *consequently notice of the plaintiff's title*." The last sentence is directly contrary to the statement of the law by the Privy Council above set out. It does not purport to be a decision

of a new point, but is the recollection of Sir George Jessel, M.R., of the law as it had always stood. Neither the case in the Privy Council nor any other authority on the point appears to have been cited, and it is clear that the law was not as stated by Sir George Jessel, M.R., unless he intended to alter it by his decision. With all respect for that eminent judge, I am driven to the conclusion that his memory had failed him for the moment in this respect. The Privy Council had stated the law in 1853, and no case had occurred to alter it in the meantime, and I cannot accept the words italicized above as a correct statement. Further, the proposition appears to me unreasonable. The purchaser is fixed with notice of the tenant's rights, because he can inquire of the tenant, and can practically compel an answer, for a tenant who was told that the purchaser proposed to buy on the footing that the tenant's interest was to the effect appearing in his lease, who refused to answer, would find it difficult to establish any greater right against such purchaser. But the tenant runs no risk by refusing to answer an inquiry to whom he pays his rent, and it is surely unreasonable to apply the doctrine that a man has constructive notice of a fact which he could have discovered by inquiry, to a fact which he could not so discover. If a vendor or mortgagor offers property stated to be subject to tenancies there is nothing in that fact that tenants are in possession to give rise to any suspicion. It might well be otherwise if the mortgagor or vendor stated that there was no tenant, and a tenant was in fact found in possession, but this would depend on the circumstances of the case, and on the suspicion that might or might not be fairly deemed to be aroused thereby.

Solicitor for plaintiff, *Henry H. Fanshawe.*

Solicitors for defendants, *Leslie & Hardy*, for *Sayer & Colt*, Hastings.

Chan. Div. } Farwell, J. } July 16, 17, 18, 1900.

TOWNSEND *v.* JARMAN. (*a.*)

Partnership—Trade name—Limited company—Sale of trade name—Abandonment—Covenant in restraint of trade—Unilateral covenant — Incident to business—Freehold premises — Name carved in structure — Erasure.

A limited company which on being incorporated takes the name of the old firm, whose business and goodwill it has bought, and which, in accordance with the requirements of the Companies Act, 1862, *adds the word "Limited" to that name, does not thereby abandon the use of the trade name of the old firm but may sell it to a purchaser of the company's business.*

Montreal Lithographing Co. (Limited) *v.* Sabiston, [1899] *A. C.* 610, 48 *W. R. Dig.* 189, *considered and distinguished.*

A covenant made between two partners, whereby one of them agrees on the termination of the partnership not to carry on business within a certain distance of the place where the partnership business is situated, is of necessity an incident to the business and for its benefit, as there cannot be a covenant in restraint of trade in gross as that would be unreasonable and therefore void.

Jacoby *v.* Whitmore, 32 *W. R.* 18, 49 *L. T. Rep.* 335, *followed.*

Elves *v.* Crofts, 10 *C. B.* 241, *explained.*

Where a man sells to another a freehold house on which his name is carved on part of the structure he cannot compel the purchaser to erase the name unless he has taken a direct covenant to that effect.

The defendant had for many years carried on the business of a seed and corn merchant and nurseryman at his freehold shop at Chard under the name of "E. J. Jarman," the name being carved in stone over the doorway of the shop.

In June, 1888, the defendant took the plaintiff into the business as partner.

The partnership deed dated the 30th of June, 1888, provided (article 1) that the partnership should commence on the 1st of July, 1888, and continue for a term of twenty-one years unless previously terminated as thereinafter provided; (article 2) that the firm should be called "Jarman & Co., The People's Seedsmen"; (article 25) that either partner might retire from the firm at the end of the seventh or fourteenth year on giving his partner twelve calendar months' notice in writing, in which case the continuing partner should have the right to purchase the retiring partner's share on giving notice to that effect—the plaintiff also covenanting that if he should withdraw from the partnership by notice as aforesaid, or the same should have determined by effluxion of time or by death or in any other manner, should not during the period of twenty-one years from the commencement of the partnership (unless he should purchase the share of the defendant under article 28) carry on a similar business within forty miles from Chard. By article 28, if either of the partners were to die before the expiration or determination of the term, the surviving partner was given the option of purchasing the share of the deceased partner at a valuation. The partnership business was carried on principally at Chard, at the defendant's freeholdshop, which the firm held as tenants of the defendant; they also carried on a branch business on leasehold premises at Taunton.

In January, 1895, a limited company was formed under the name of "Jarman & Co. (Limited)," which purchased and took over the partnership business. This company was really a private company, the majority of the shares being held by the plaintiff and defendant.

By an indenture dated the 25th of May, 1895, the plaintiff and defendant sold and assigned all the beneficial interest and goodwill of the plaintiff and defendant "in the trades or businesses of seed growers, seed merchants, and nurserymen, so carried on by them as aforesaid, and also all the stock-in-trade, goods, fixtures, articles, and things" connected with the business, and they conveyed to the company the freehold nursery ground belonging to the partnership.

The defendant also, by a deed bearing even date, conveyed the freehold shop at Chard to the company in fee simple.

The plaintiff and defendant became the managing directors of the company.

In July, 1899, the company was voluntarily wound up, and in September of that year the property of the company was sold at auction in lots. The plaintiff purchased two lots—the freehold shop at Chard, "together with the valuable goodwill of Messrs. Jarman & Co.'s seed and corn business as heretofore carried on by them," and the freehold nursery ground, "together with the valuable goodwill of the business of nurserymen and florists as heretofore carried on by the company." These lots were conveyed to the plaintiff. The goodwill of the business was also assigned to him by a deed dated the 16th of Novem-

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

ber, 1899. The plaintiff continued to carry on the business under the name of "Jarman & Co." When conveyed to the plaintiff the name "E. J. Jarman" was still carved on the stone over the shop, but this was removed after the issue of the writ. The defendant purchased at the auction the interest and goodwill of the company in the branch business carried on at Taunton, and this was assigned to him by an indenture dated the 26th of September, 1899. The defendant carried on this business till the lease expired in June, 1899, since which time he had no shop at Taunton. He also carried on a business at Chard, and had a nursery at Chard Stoke. He carried on business first of all as "Jarman & Co." and afterwards as "Jarman & Jarman," and in this way and by the use of catalogues similar to those used by the company held himself out as carrying on business at Chard in succession to the original business.

The plaintiff claimed an injunction asking that the defendant might be restrained from carrying on or resuming business at Chard as "Jarman & Co." The defendant counterclaimed for an injunction to restrain the plaintiff from carrying on business at Chard in breach of article 25 of the partnership articles and also to restrain him from carrying on business.

Younger, Q.C., and *Buckmaster*, for the plaintiff.—The defendant may trade under his own name of E. J. Jarman, but he is not entitled to carry on business at Chard under any name likely to be confused with the plaintiff's trade name of "Jarman & Co." The assignment of the goodwill to the plaintiff carries with it the exclusive right to the old name at Chard, and the plaintiff is entitled to use it so long as he does not make the plaintiff liable: *Massam* v. *Thorley's Cattle Food Co.*, 28 W. R. 966, 14 Ch. D. 748; *Turton* v. *Turton*, 38 W. R 22, 42 Ch. D. 128; *Trego* v. *Hunt*, 44 W. R. 225, [1896] A. C. 7; *In re David & Matthews*, 47 W. R. 313, [1899] 1 Ch. 378; *Burchell* v. *Wilde*, [1900] 1 Ch. 551. The plaintiff's covenant in article 25 was an asset of the partnership, and as such passed to the company. The plaintiff purchased it as part of the goodwill: *Jacoby* v. *Whitmore*, 32 W. R. 18, 49 L. T. Rep. 335. The name "E. J. Jarman" carved on the shop has been erased by the plaintiff, but he was not bound to do so, as it passed to the company with the freehold, and from them to the plaintiff. The defendant is not therefore entitled to have the name erased.

Hughes, Q.C., and *Kerly*, for the defendant.—The covenant in article 25 of the partnership deed was not for the benefit of the business, but was a personal right as between the partners. *Jacoby* v. *Whitmore* is therefore to be distinguished as it was not a covenant by a third person for the benefit of the firm, but was an obligation of one partner towards the other, it could not be an asset of the business for it only can arise on the termination of the partnership. The covenant was for the protection of the defendant's business and was valid when made, it cannot therefore be invalid now: *Elves* v. *Crofts*, 10 C. B. 241. The company could not sell the right to the plaintiff to use its name, as that was granted to it by the Crown and is not a subject for sale: *Montreal Lithographing Co. (Limited)* v. *Sabiston*, [1899] A. C. 610, 48 W. R. Dig. 189. The use of the name "Jarman & Co." will involve the defendant in liability and he is therefore entitled to an injunction: *Thynne* v. *Shove*, 38 W. R. 667, 45 Ch. D. 577. The plaintiff has in any case no right to use the name "E. J. Jarman" over the shop and the defendant is entitled to have costs of the counterclaim on that point.

Buckmaster replied.

FARWELL, J., after finding as a fact that the defendant was holding himself out as carrying on the business formerly carried on at Chard by the partnership firm and afterwards by the company, continued: Now it is said that I cannot grant an injunction in this case without restraining the use by the defendant of his own name, and that all that he is doing is that he is using his own name. I entirely disclaim any intention of granting an injunction—nor does the plaintiff ask for it—which will prevent the defendant using his own name of E. J. Jarman. He has been trading first of all as "Jarman & Co.," which is not his name, and then as "Jarman & Jarman," which also is not his name, and the obvious reason for his preferring these names is that customers seeing the plural would suppose that "Jarman & Co." was the old firm or that "Jarman & Jarman" was a variation of the old firm. It appears to me that the very fact that he is not trading under his own name is very strong evidence that he desires to get the benefit of something beyond the benefit to be derived from the use of his own name. I shall in no way restrain him from using his own name.

Then it is said that I cannot restrain the defendant from using the name of Jarman at the suit of a purchaser from Jarman & Co. (Limited), because the limited company could not sell the right to use that name as it was granted to them by the Crown, and it could not therefore be disposed of by them in any way on sale. In support of that contention the case of *Montreal Lithographing Co. (Limited)* v. *Sabiston* has been cited. There are, however, several points of distinction between that case and this. In the first place the defendant is not purporting to trade in the name of the limited company, so no question of that sort arises here. Again, apart from any such question, all that was decided in that case was a mere question of fact, as is pointed out in Lord Davey's judgment. There it was found as a fact that the defendant was not holding himself out as the successor, and therefore that decision merely goes to that particular case. Why am I to hold, as has been suggested, that the plaintiff has not got that right which was conveyed to him in terms—viz., the goodwill of the old firm of Jarman & Co., which was assigned to the company and assigned by them to the plaintiff? It appears to me plain that the company did buy it and were entitled to use the words "Jarman & Co." as their trade name. It was as much their property as any trade-mark which might have been bought from the old firm and used in their business. So far as it was possible for them, compatibly with the requirements of the Companies Acts to use that old name, they continued to use it. The only way in which a trade name or trade-mark can be lost is by abandonment. Abandonment is, I have always understood, a question of fact to be determined by the facts in each particular case. A man is not held to abandon, unless the court comes to the conclusion that he intended so to do. To my mind, it would be impossible for anyone to find as a fact that a company which on being incorporated takes the name of the old firm whose business and goodwill the company has bought, and which necessarily according to law adds to that name the word "Limited," thereby abandons the right to the trade name or trade-mark of the old firm which the company has used in the only way in which it could use it legally. Therefore, so far as that is concerned the plaintiff has the right to use the words "Jarman & Co.," and he has a right to prevent the defendant from holding himself out as the successor either of the firm or of the company; but the injunction which I intend to grant will be so limited as not to restrain the defendant from trading as Edgar James Jarman, which is his own name.

I now pass on to the defendant's counterclaim, which raises an ingenious and novel suggestion which goes to the root of the whole claim. It comes to this: The defendant, who was the antecedent trader, took into partnership the plaintiff, who by the partnership articles agreed that in certain events he would not on the determination of the partnership carry on a similar business within certain limits. Now it is said that the company has bought the partnership business, and that the benefit of this particular agreement is no portion of that business. To my mind that argument contains a fallacy. The company has bought the business and goodwill of the two partners; by reason of that particular covenant there was something more in the defendant than in the plaintiff, because the business, considered as a continuing business, with the goodwill attached to it, was worth more to the defendant by reason of that covenant; but such a covenant when entered into must necessarily be incident to a business. In other words there cannot be a covenant in gross in restraint of trade, for such a covenant would be unreasonable and therefore void. I cannot state a test of reasonableness better than by taking the reasons given by Tindal, C.J., in *Horner* v. *Graves*, 7 Bing. 735, at p. 743. Now, if one man apart from any business takes a covenant in gross from another man that he will not trade at all, that is simply oppressive. He does not require it to protect his own interest, because he has no interest to protect. It is, therefore, only as incident to the business that the covenant can in its origin have legal validity, although, as held in *Elwes* v. *Crofts*, it may very well continue to have validity after the original business has ceased, because *ex post facto* occurrences do not necessarily invalidate a covenant good in its inception. The defendant, therefore, cannot successfully assert that this was a covenant in gross not incident to the business. Moreover, it plainly increased the value of the business in the hands of an assignee, and the defendant in terms assigned the whole of the goodwill to the company. Test it in this way: Suppose the plaintiff had gone out of the partnership, so that the defendant was entitled to enforce the covenant against him, and the defendant had then sold the goodwill to the company, could it have been contended that the company did not get the benefit of that covenant, so that they could restrain the plaintiff from trading in that form? I should have thought that that was hopelessly unarguable. The benefit of the covenant, therefore, passed as incident of the goodwill, not only for the reason I have suggested, but also for the reason given in the case of *Jacoby* v. *Whitmore*—viz., that the covenant was for the benefit of the business. As Brett, M.R., says: "It has been said that such an argument does not add to the value of the goodwill because it does not bring fresh customers; but it prevents them from being taken away." The groundwork of that decision was that it was found, as a matter of common sense, that the agreement added to the value of the goodwill, and the inference, therefore, was irresistible that when the goodwill was conveyed the grantor intended to obtain the whole of the benefit and protection of anything which was sold as incident to or beneficial to the goodwill. There is nothing in *Elwes* v. *Crofts* which interferes with this. That was a case of an implied release of a covenant. That particular case in no way touches the question which I am now considering, of the assignment of the benefit of such a covenant. That the goodwill of the property which is conveyed shall pass, and that it will so pass, seems to me to be plain from the various cases to which I have been referred, including amongst others the case before Stirling, J., of *Thynne* v. *Shove*, but that really is not the point which has been pressed upon me with so much energy. Therefore, so far as that contention is concerned on the construction of the deed, I hold that it was one of the incidents of the goodwill, and that it was conveyed by the person who owned it—viz., the defendant—to the company, and from the company has passed by conveyance to the plaintiff.

Then it was said that I ought not to allow the name "Jarman & Co." to be used by the plaintiff at all, and also that I ought, having regard to the facts, to order the plaintiff to pay the costs of the counterclaim in respect of the name "E. J. Jarman" on the shop at Chard. The two points are somewhat different. The court no doubt qualifies the right which is given under an assignment of goodwill, when the actual use of the name is not specified by restricting the user of the name to which the goodwill is annexed, so as not to impose a personal liability on the assignors. So far, however, as the use of the name of "Jarman & Co." is concerned, I am of opinion there is no liability which can reasonably be supposed to accrue to the defendant by its user. The defendant having transferred the right to use the name to the company knowing that the company might sell it again to somebody else, cannot complain that they have sold that which he gave them the right to sell, nor can I see that the use of the name will involve the defendant in any liability. On that point it is sufficient to refer to *Burchell* v. *Wilde*, 48 W. R. 491, [1900] 1 Ch. 551. The defendant's name is not held out as a partner by the use of a name which is not his own.

Then there is the very curious question about the carved words "E. J. Jarman." This is only material on the question of costs, but it raises a question which, as far as I know, is absolutely novel. When the shop was used for the business of the old firm and of the defendant the name "E. J. Jarman" was carved in stone over the door. Now if the plaintiff was using that name otherwise than by allowing the carving to remain on the shop he has bought, I should certainly think that he was not entitled so to use it—no right to use that name has been assigned to him. He tells me he does not intend to use the name, and that he has erased it. The question is, whether he was bound so to erase it? It is a question of conflicting rights. The defendant sold the freehold with the carving thereon to the company, which resold it to the plaintiff. What right has the defendant afterwards to require the company or the plaintiff to remove part of the freehold? I am wholly unable to see that he has any such right. If a man choses to sell a house with his name carved thereon, and takes no covenant from the purchaser to alter the building in that respect, I can see no equity whatever which will afterwards enable him to compel the purchaser to do so. The name here was capable of erasure without much trouble, but it might have been built in by means of coloured bricks and in that case the defendant, if his contention is correct, would have been entitled to compel the plaintiff to pull out that portion of the building. I can only say that if the vendor of a shop desires to compel the purchaser to pull down and alter some portion of it because the use of the shop as it stands may impose some liability on him, he must take a covenant to that effect. In the absence of such a covenant I hold that he has no such right. The counterclaim therefore fails, and the plaintiff is entitled to an injunction.

Solicitors, *James Banks Pittman; Reed & Reed*, for *Reed & Co.*, Taunton.

Court of Appeal.

Appeal.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) Nov. 15.

MERRILL v. THOMAS WILSON, SONS, & CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—"Factory"—Ship unloading at quay—"Undertakers"—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

A ship carrying cattle and other cargo was moored alongside a quay not belonging to the shipowners. The shipowners were going to discharge the ship by their own men. A workman in the employment of the shipowners was on the quay engaged in getting a gangway from the quay on to the ship when he slipped and fell between the ship and the quay wall, and was killed. The gangway was for the purpose of enabling the workmen and crew to get to and from the ship, but was not used, or about to be used, in the process of unloading. The cattle were, on the day in question, discharged into lighters on the other side of the ship. No other cargo was discharged on that day.

In an application for compensation under the Workmen's Compensation Act, 1897, *the county court judge held that the deceased man was employed on or in or about a ship, and that, therefore, the employment was not within the Act.*

Held, that the employment, at the time of the accident, was on a quay, and therefore on a "factory" within section 7 *of the Act; that the shipowners had at the time the "actual use" of that part of the quay where the ship was moored, and were, therefore, the occupiers of it, and came within the definition of "undertakers" in section* 7, *sub-section* 2, *of the Act; and that the Act applied.*

Held, also, that the gangway was not plant used in the process of unloading on to the quay, and was not, therefore, a "factory" within section 7 *of the Act, as defined by section* 23, *sub-section* 1 (a), *of the Factory and Workshop Act,* 1895.

Appeal from an award of the Hull County Court judge under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a workman who, at the time of his death, was in the employment of the respondents. The respondents' steamship, *The Ohio*, was moored, for the purpose of discharging her cargo, alongside a quay in the Alexandra Dock at Hull belonging to the railway company on the morning of the 24th of December, 1899. The shipowners were going to discharge her cargo with their own men. The cargo consisted of cattle and goods. The deceased man was engaged with other men in the employment of the respondents in getting a gangway from the quay on to the ship. While so engaged the deceased man, who was standing on the quay, slipped and fell between the quay wall and the ship, and was killed. The gangway was used for enabling the workmen and the crew to go to and from the ship, and also for the use of passengers, if there were any, and their light luggage, but not for the purpose of loading or unloading cargo. There were no passengers arriving by the ship upon the occasion in question. On the 24th of December the cattle were discharged from the ship into lighters on the other side of the ship by means of another gangway. No other cargo was discharged until after the Christmas holidays, when the cargo was discharged on to the quay. The county court judge held that the employment of the deceased man at the time of the accident was on or in or about a ship, and that therefore the Act did not apply. He also held that the gangway was not plant used in the process of unloading on to the quay, within section 23, sub-section 1 (a), of the Factory and Workshop Act, 1895, so as to come within the definition of a "factory" in section 7, sub-section 2, of the Workmen's Compensation Act, 1897. He accordingly made an award in favour of the respondents.

The applicant appealed.

W. H. Owen, for the applicant.—The county court judge was wrong in holding that the applicant was not entitled to compensation under the Workmen's Compensation Act, 1897, on the ground that the deceased man was employed on the ship. The deceased was employed at the time of the accident on the quay, which is made a "factory" by section 7, sub-section 2, of the Act of 1897 by reference to section 23, sub-section 1 (a), of the Factory and Workshop Act, 1895. [He referred to *Flowers* v. *Chambers*, 47 W. R. 513, [1899] 2 Q. B. 142.] The respondents were the "undertakers" in respect of that factory. By section 7, sub-section 2, of the Act of 1897, the undertakers are the occupiers of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895; and by section 23, sub-section 1, of the Factory and Workshop Act, 1895, the person having the "actual use or occupation" of a factory is deemed to be the occupier of it. The respondents had the actual use of this part of the quay; no other ship could use it at the same time. Further, the gangway was "plant" used in the process of unloading on to the quay within section 23, sub-section 1 (a), of the Factory and Workshop Act, 1895, and was therefore a "factory" within section 7 of the Act of 1897.

He referred to *Medd* v. *MacIver*, 15 Times L. R. 364; *Durrie* v. *Warren & Co.*, 15 Times L. R. 365; *Yarmouth* v. *France*, 36 W. R. 281, 19 Q. B. D. 647; *Woodham* v. *Atlantic Transport Co.*, 47 W. R. 105, [1899] 1 Q. B. 15.

Joseph Walton, Q.C., and *B. D. Kilburn*, for the respondents.—The real question in this case is whether the respondents were the "undertakers" in respect of this quay. To be the undertakers the respondents must have had the "actual use or occupation" of the quay within section 23, sub-section 1, of the Act of 1895. The word "use" is introduced into the section coupled with the word "occupation." Use in this section means something in the nature of exclusive occupation. A mere user like that of a person walking across the quay could not bring the case within the section. Everyone who goes to a quay or dock, such as a carrier, or a bill of lading clerk, uses it in one sense, but not in the sense intended by this section. There was no exclusive use or occupation of any portion of the quay in the present case. Anyone could have gone on to the quay at the time the ship was there. [They referred to *Francis* v. *Turner*, 48 W. R. 228, [1900] 1 Q. B. 478.] Nor was this gangway "plant" used in the process of loading or unloading to or from the quay. It was a passenger gangway, and a mode of access to the ship for the workmen and crew. It was not used for discharging cargo at all.

A. L. SMITH, M.R.—In this case the respondents were the owners of a ship laden with cattle and other cargo. The ship had taken her berth alongside a quay in the Alexandra Dock, and the respondents were going to discharge the ship with their own men. The ship had the use of the quay as long as was necessary for the discharge of her cargo. A gangway was about to be placed from the quay to the ship in order that the workmen and the crew might get to and from the ship. The deceased man, who was in

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

the employment of the respondents, was engaged in helping to get the gangway from the quay on to the ship, when he slipped on the quay and fell between the quay wall and the ship, and was killed. The cattle were subsequently discharged into lighters by means of another gangway on the side of the ship furthest away from the quay. The county court judge came to the conclusion that the deceased man was at the time of the accident employed on or in or about the ship, and that therefore the respondents were not liable to pay compensation under the Workmen's Compensation Act, 1897. With all deference to the learned judge, I can see no evidence to support that finding. The deceased man never was on board the ship. He was working on or in or about the quay at the time of the accident. Upon that point, therefore, I cannot agree with the decision of the learned judge.

Other points, however, were raised on the appeal. It is not disputed that the quay was a "factory" within the meaning of section 7 of the Workmen's Compensation Act, 1897. Sub-section 2 of that section defines a factory as having the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also as including any dock, wharf, quay, warehouse, machinery, or plant to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895. Turning to section 23 of the Factory and Workshop Act, 1895, we find that certain provisions of the Factory Acts relating to accidents were extended to docks, quays, wharves, and warehouses, and were to have effect as if every dock, wharf, quay, and warehouse, and so far as relates to the process of loading or unloading therefrom or thereto, were included in the word "factory." There can be no doubt that by that section this quay was a "factory" Therefore the deceased man, who at the time of the accident was working on the quay, was employed in a factory, and so far the Act of 1897 applies.

But now comes the real point in the case. It is said that, though that may be true, the respondents were not the "undertakers" in respect to that factory within the meaning of section 7 of the Act of 1897. "Undertakers" are defined by section 7, sub-section 2, in the case of a factory as meaning the occupiers of a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895. That relegates us to the Factory and Workshop Acts. In those Acts there does not appear to be any definition of "occupier" until we come to the Factory and Workshop Act, 1895. By section 23 of that Act the person having the "actual use or occupation" of a dock, quay, wharf, or warehouse is to deemed to be the occupier of a factory. The question therefore is, had the respondents the "actual use" of this quay at the time of the accident? The quay was constructed for the purpose of ships using it for the purposes of loading and unloading cargo. The respondents brought their ship alongside the quay and monopolized it for the purpose of unloading cargo. It is not at all like the case, suggested in argument, of a carter coming on the quay to deliver a load, or of a clerk going to the quay with a bill of lading. The question is whether this ship, on the facts found in this case, had not the actual use of this quay. I cannot cut down the words of the section. I cannot say otherwise than that the respondents had the actual use of this quay at the time of the accident. The case therefore comes within the Act.

Another point was taken on behalf of the applicant, which only becomes material in case the other points are decided against her. It is said that the deceased man at the time of the accident was employed on or in or about "plant" used in the process of unloading on to the quay, and that therefore he was employed on or in or about a "factory" as defined by section 23 of the Factory and Workshop Act, 1895. It is said that the gangway in question was "plant" being so used. Upon the facts here it is clear that the gangway at the time of the accident was not being used or about to be used in the process of unloading. It was about to be used for the purpose of enabling the men to get on to the ship to discharge the cattle by another gangway into lighters on the other side of the ship. The applicant therefore is wrong upon this point. Upon the other points, however, she succeeds, and the appeal must be allowed.

COLLINS, L.J.—I agree. The question we have to decide is whether the respondents are "undertakers" in respect of a "factory" in which the deceased man was employed at the time of the accident causing his death. It is not disputed that the place where the man was employed was capable of being a factory within the meaning of the Act. He was employed on or in or about a quay, and also on or in or about a ship. It is clear that whatever his duties were on the ship he was employed on the quay. Therefore he was employed on what was capable of being a factory. A quay is made a factory by section 7, sub-section 2, of the Workmen's Compensation Act, 1897, by reference to section 23 of the Factory and Workshop Act, 1895. By this roundabout process a factory is made to cover several different things, but each of those things must be capable of a definable area, not minutely, but each must be capable of being for practical purposes defined with regard to space. Accordingly it would be difficult to say that such an indefinable area as that upon which a man rested the soles of his feet as he was moving about could be a factory within the Act. A mere *pedis possessio* is not enough. There must be some area capable of being defined by metes and bounds. In the present case we have an area capable of being a factory if used to such an extent and in such a way as to render the space of quay so used definable. I see no reason why the space of quay used here was not a factory. Were, then, the respondents the undertakers in respect of that factory? The word "undertakers" is defined by section 7, sub-section 2, of the Act of 1897 as meaning the occupier of the factory within the meaning of the Factory and Workshop Acts, 1878 to 1895 By section 23 of the Factory and Workshop Act, 1895, a person having the "actual use or occupation" of a quay is to be deemed to be the occupier of it. In order to ascertain whether a person has the actual use of a thing we must look at the subject-matter and see what is its ordinary user. The user must have some reference to the object for which the subject-matter exists. A quay exists for the practically exclusive use or occupation by ships for the purpose of loading and unloading. Such an exclusive user does not indeed prevent people from walking about the quay, but it is an exclusive user for the purposes for which ships ordinarily use a quay. The whole length of this ship had the use of this quay to the full extent to which a ship ever does use a quay for the purpose of loading or unloading cargo, and for processes analogous thereto. I do not see how there can be any greater actual user. Use is something less than occupation. The word "actual" has full force given to it when the ship uses the quay for all purposes involved in the process of loading or unloading and in so using it necessarily prevents other ships from using it in the same way at the same time. The respondents had the practical use of a substantial and definable area of this quay. Therefore all the necessary elements exist to entitle the applicant to succeed. There is a factory; the respondents had the actual use of that factory, and

the deceased man met his death while employed on or in or about that factory. There is one other point with regard to the word "plant." I agree with the Master of the Rolls that the gangway in question was not "plant" used in the process of loading or unloading on, to, or from the quay. The most that can be said is that it was ancillary to that process It was not used in either of those processes. A still more fatal difficulty exists. The process of unloading was not on to the quay, but into lighters alongside the ship.

STIRLING, L.J., concurred.

Appeal allowed.

Solicitors for the applicant, *Williamson, Hill, & Co.*, for *T. & A. Priestman*, Hull.

Solicitors for the respondents, *Pritchard & Sons*, for *Hearfields & Lambert*, Hull.

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) Oct. 25.

DOUGLAS *v.* BOLAM. (*a.*)

Trustee—Judicial trustee—Appointment of new trustee—Rejection of nominee of applicant—Jurisdiction of court—Appointment of third person—Judicial Trustees Act, 1896 (59 & 60 *Vict. c.* 35), *s.* 1 (1) (3).

Sub-section 3 *of section* 1 *of the Judicial Trustees Act,* 1896, *applies only to the particular cases mentioned in the section, and does not cut down the general power of appointing any fit and proper person to be a trustee, given to the court by sub-section* 1 *of section* 1 *of the Act.*

Consequently, if the court is not satisfied of the fitness of the nominee of the person making the application, it is not bound, in such a case, to appoint only an official of the court, but can appoint some other person whose name has been brought before the court by some other of the parties interested.

This was an appeal against the refusal of Kekewich, J., to discharge an order which he had made in chambers for the appointment of a judicial trustee of a settlement dated the 27th of June, 1865, made on the marriage of R. S. Douglas with Jane Eliza Adams.

R. S. Douglas died in 1888, and Mrs. Douglas, the plaintiff, was tenant for life of the property comprised in the settlement.

The settlement provided that it should be lawful for the survivor of R. S. Douglas and Mrs. Douglas "to exercise any statutory power of appointing a new trustee or new trustees" of the settlement

The present action was commenced in 1896 by Mrs. Douglas and her four daughters, who were entitled subject to Mrs. Douglas's life interest to the property comprised in the settlement, against R. G. Bolam, the then surviving trustee of the settlement, to compel him to make good a breach of trust.

A compromise was arrived at which was approved by an order of the 8th of August, 1897, and on the 2nd of August, 1898, an order was made appointing John Broadway judicial trustee, and the defendant Bolam was then discharged.

In 1899 Broadway desired to retire, and on the 20th of June, 1899, Mrs. Douglas took out a summons asking that Broadway might be at liberty to resign the position of judicial trustee of the settlement, and that Edward Brewis, the husband of one of the daughters of Mrs. Douglas, might be appointed judicial trustee in his place.

Broadway had not originally given the notice to the court required by rule 23 (1) of the Judicial Trustee Rules, 1897, of his desire to be discharged from the trust, but he subsequently gave the notice and suggested J. M. Winter as his successor.

Winter's nomination was objected to by Mrs. Douglas and Mrs. Brewis, but was supported by the other three daughters.

Kekewich, J., appointed Winter. Mrs. Douglas moved in court to discharge the order, and Kekewich, J., refused the motion.

Mrs. Douglas and Mrs. Brewis appealed. The notice of appeal asked that the official solicitor or some other fit and proper person might be appointed judicial trustee in place of Winter.

Coldridge, for the appeal, contended that if the court did not appoint the person nominated by the applicant, there was no jurisdiction, by reason of sub-section 3 of section 1 of the Judicial Trustees Act, 1896, to appoint any person a judicial trustee other than an official of the court.

Tomlin, for the other three daughters, was not called on to argue.

Lord ALVERSTONE, L.C.J.—Upon the application of Mrs. Douglas, the tenant for life, for the appointment of Mr. Brewis as judicial trustee of the settlement in succession to Mr. Broadway, the learned judge has appointed Mr. Winter to be judicial trustee. It is contended that if the court is not satisfied of the fitness of the person nominated by a person entitled to apply to the court under sub-section 1 of section 1 of the Judicial Trustees Act, 1896, the court under sub-section 3 of the same section can only appoint an official trustee instead of the person so nominated. I think that would be too narrow a construction of the Act. Mrs. Douglas has not a general power of appointing a new trustee; she is only entitled to exercise any statutory power of appointing new trustees of the settlement. The statutory power material in this case is contained in the Judicial Trustees Act. In my opinion the court under sub-section 1 of section 1 has power to appoint any fit and proper person to be a judicial trustee; and to hold that this power is confined to the appointment of an official trustee where a person who is entitled to apply to the court to make the appointment has nominated someone of whose fitness the court is not satisfied would be to limit the beneficial operation of the Act. I think that sub-section 3 does not cut down the power conferred by sub-section 1, but applies only to the particular cases mentioned in it—that is to say, it gives the court power to appoint the official trustee where the court is not satisfied of the fitness of the person nominated by the applicant when the person so nominated is the only person before the court. But when another fit person is suggested by some of the parties, the court is not bound to appoint the official trustee. Upon the merits of the present case I think no ground has been shown for interfering with the exercise of the discretion of the learned judge. The appeal must be dismissed with costs.

RIGBY, L.J.—I am of the same opinion. A proper application was made to the court for the appointment of a judicial trustee. The applicant wished Mr. Brewis to be appointed, but it has been admitted before us that that would be an impossible appointment. It is contended that if the court does not appoint him it can only appoint an official trustee and has no jurisdiction to appoint a third person. Rule 23 of the rules made under the Act provides that if a judicial trustee desires to be discharged he must give notice to the court, "stating at the same time what

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

arrangement it is proposed to make with regard to the appointment of a successor" Here the retiring trustee did not at first comply with this rule, but on the omission being pointed out by the learned judge, the trustee gave a proper notice, in which he suggested the appointment of Mr. Winter as his successor. In this way the name of Mr. Winter was fairly brought before the court as an alternative to Mr. Brewis; and I have no doubt that the court had ample jurisdiction under the Act to appoint Mr. Winter. I am satisfied that Kekewich, J., exercised the wisest discretion, and, indeed, I should have come to the same conclusion myself.

VAUGHAN WILLIAMS, L.J.—I agree.

Solicitors, *Poole & Robinson; Flux & Leadbitter.*

High Court of Justice.

Chan. Div. } Kekewich, J. } Nov. 28, 29.

BERRY v. HALIFAX COMMERCIAL BANKING CO. (LIMITED). (a.)

Banker and customer—Account current—Mortgage—Power of sale—Closing of account.

A customer mortgaged to his bankers a policy of assurance on his life to secure the amount owing by him to the bank from time to time in account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (inter alia) *the customer made default in payment of the balance due on the account current for the space of one month after the account current had been closed. The customer got into difficulties, and, after some correspondence with the bank, wrote to the manager on the 9th of November,* 1899, *informing him that there had been a meeting of his creditors and a trustee had been appointed. By a deed of the 17th of November he assured all his real and personal estate to the trustee for the benefit of his creditors. On the 28th of November notice of the deed was given to the bank, who, on the 18th of December, sold the policy under the power.*

Held, that, though the bank had not itself closed the account, the debtor's letter of the 9th of November must be taken to have amounted to a closing of the account within the meaning of the clause in the mortgage deed; and, consequently, that the power of sale had been properly exercised by the bank.

Action.

This was an action for redemption of a mortgage and damages for an alleged wrongful sale effected by an improper exercise of the power of sale therein contained.

By an indenture of mortgage dated the 21st of July, 1898, David Smithies assigned a policy of assurance on his own life in the Royal Insurance Co. for £1,000 to the Halifax Commercial Banking Co. (Limited), to secure his banking account current with the Brighouse branch of that company. Smithies covenanted to pay all moneys due upon his current account when thereunto required by the company or their secretary or manager, or any branch manager, or in the event of there being a balance owing to the company on the said account current at the time when it should be closed by the mortgagor's death or otherwise. The mortgage contained the following power of sale:

"Provided always that the statutory power of sale shall be exercisable by the company if default shall be made in payment of the balance owing on the said account current or other the moneys due from the mortgagor or some part thereof for the space of one calendar month after the said account current has been closed, or after a notice in writing demanding such payment shall have been given by or on behalf of the company to the mortgagor, or left for him at his usual or last known place of abode in England or Wales."

In the early part of 1899 the account was overdrawn more than £500, and the manager of the branch began to press Smithies for a reduction of the overdraft.

On the 11th of April he wrote: "You must not draw further on your account under any circumstances."

The account, however, was not closed, for on the 29th of August the manager wrote to complain that the overdraft was upwards of £550 and that Smithies had sent nothing whatever to his credit for upwards of a month.

Not long afterwards Smithies wrote that he had sold his business, but it had not realized enough to pay the first and second mortgagees.

On the 30th of October the manager again wrote pressing for some proposal as to the payment of the balance due to the bank.

On the 8th of November a meeting of Smithies' creditors was held, and on the 9th of November he wrote to the manager: "There was a meeting of creditors yesterday. . . . They agreed to accept all the assets I had. I gave them to understand that I was insured . . . and that you held the policy . . . as security for your account. There was a trustee appointed. . . . Trusting everyone will get 20s. in the pound. . . ."

On the 17th of November, Smithies executed a deed of arrangement assuring all his real and personal estate to the plaintiff Berry as trustee for his creditors.

On the 21st of November this deed was duly registered under the Deeds of Arrangement Act, 1887.

On the 28th of November, Berry wrote to the bank giving notice of this deed and inquiring what securities the bank held.

After some further correspondence the bank answered on the 5th of December that it was impossible then to put a value on the securities, but as soon as they could ascertain the precise value they would reply fully on the subject. At the same they forwarded the pass-book made up to the 17th of November.

On the 18th of December the bank sold the policy for £350 under the power of sale.

On the 6th of January, 1900, Smithies died.

The plaintiff brought this action for redemption and damages for the wrongful sale of the policy, alleging (so far as material) that the account had not been closed one calendar month before sale and consequently that the power of sale had not been properly exercised.

Warrington, Q.C., and *Greenwood*, for the plaintiff.—The first question is whether any formal demand for payment of the balance due was made by the bank. The correspondence discloses no such demand. The next question is whether the account was closed. A bank cannot close a customer's account without reasonable notice: *Buckingham & Co.* v. *The London and Midland Bank (Limited)*, 12 Times L. R. 70. Smithies' account never was, in fact, closed by the bank, and the correspondence shows that they did not treat it as closed. The pass-book was made up to the 17th of November, by a mere pencil entry, and

(a.) Reported by J. S. RISLEY, Esq., Barrister-at-Law.

the account was not finally closed after the sale of the policy. Even after the debtor's death there was a further entry and balancing of the account. The sale was therefore an improper exercise of the power.

Renshaw, Q.C., and *Leigh Clare*, for the defendants.—The account was dead from the 29th of August, and anyhow, was closed by Smithies' letter of the 9th of November giving the bank notice of the meeting of his creditors. The deed of the 17th of November finally severed all business relations between him and the bank. [KEKEWICH, J.—The deed itself was in time, but it was not communicated to you until the 28th of November, in which case it would be out of time.] The bank knew on the 10th of November of the debtor's intention, of which the deed was the fulfilment, and after that date it could not prudently have honoured Smithies' cheques. We rely on the letters of the 29th of August, the 30th of October, and the 9th of November. The letter of the 9th of November was, practically, a notice to the bank that Smithies had committed an act of bankruptcy. The assigning of all his property by the debtor to the trustee was equivalent to closing the account. A declaration of insolvency by one of the parties to a contract, though it does not put an end to the contract, justifies the other party to it in assuming that the insolvent person intends to abandon the contract: *Ex parte Chalmers, In re Edwardes*, 21 W. R. 349, L. R 8 Ch. App. 2 89; *Morgan* v. *Bain*, 23 W. R. 239, L. R. 10 C. P. 15. It is immaterial whether the pass-book was made up in ink or pencil, but the fact that it was made up to the 17th of November shows that the bank regarded it as closed on that date. On the 18th of December, when the policy was sold, the month required by the mortgage-deed had expired and the sale was good.

Warrington, Q.C., in reply.—It was for the bank to close the account, not for the customer. If the debtor had had a balance to his credit at the bank, the letter of the 9th of November might have operated as a notice to the bank of its assignment to his trustee, but the account was a debit one, and the letter did not alter the position of the parties.

KEKEWICH, J.—The present question in dispute is one of interest to bankers and to their customers. It will, I think, be convenient in considering it to examine first the provisions contained in the mortgage deed of the 21st of July, 1898, and then to see how these provisions apply to the facts before me. Turning, then, to the power of sale in the latter part of the deed, we find that it impliedly recognizes and incorporates the statutory power of sale, and extends it by removing some of the restrictions imposed by the statute. [His lordship read the clause in the deed.] The power of sale, then, is to be exercisable by the mortgagee on the occurrence of certain events. "If default shall be made in payment of the balance owing on the said account current . . . for the space of one calendar month after the said account current has been closed"—that is one event named—"or after a notice in writing demanding such payment shall have been given by or on behalf of the company to the mortgagor"—that is the other event named in the clause. I have, therefore to consider whether a demand in writing for payment was made by the company, or the account current was closed within the meaning of the deed, and, in the latter event, whether one calendar month elapsed between the closing of the account and the date of the sale. I do not find from the correspondence—[His lordship read extracts]—that the bank gave any formal notice in writing demanding payment. The manager frequently pressed for reduction of the overdraft or proposals from the debtor as to payment, but there was nothing amounting to a demand or peremptory request for payment by a certain day. Coming to the question of closing the account, in order to discover the meaning of the deed, I turn to the covenant for payment which it contains and find that Smithies covenanted to pay any balance that should be owing to the company on the account current at the time when it should be "closed by the death of the mortgagor or otherwise." "Or otherwise" is a large expression. It can clearly not be construed here by the rule *ejusdem generis*, for no event can be said to be *ejusdem generis* with death. I think that we are entitled to infer that the event closing the account must not necessarily be one communicated by the mortgagee to the mortgagor. Let us now examine the circumstances of the case. What was the object of the deed? Its object was to enable the mortgagor to keep his current account going. There was no express contract by the bank to honour his cheques, but he gave them security for his debit account, and they impliedly promised to honour his cheques up to a certain amount. He got into difficulties, but he intended to realize his business, and hoped by this means to clear his indebtedness to the bank. In this hope the bank manager shared, and though he pressed the debtor again and again for proposals as to payment, there was not a single letter formally demanding payment of the balance due, or saying that if payment was not made by a certain day the account would be closed. In every letter a *locus poenitentiae* was left to the debtor. I do not think that any of the letters written by the manager can be taken to amount to a closing of the account on the part of the bank.

I now come to the letter of the 9th of November. [His lordship read the letter.] If that letter has any meaning at all, it must surely mean, "Here is an end of all our business transactions and of our relations of banker and customer; I have assigned everything I possess, including the securities held by you, to a trustee for my creditors." Some stress has been laid upon the fact that the account was in debit and not in credit, but I do not think that that distinction is of importance, and I do not see how the letter of the 9th of November can be taken to amount to anything else than a closing of the account within the meaning of the clause, and therefore in my opinion the power of sale was properly exercised by the company, and the action must be dismissed.

Solicitors for the plaintiff, *E. C. Rawlings & Butt.*

Solicitors for the defendants, *Jacques & Co*, for *Godfrey, Rhodes, & Evans*, Halifax.

Chan. Div. } Dec. 5, 6.
Byrne, J. }

In re COLEY'S TRUSTS.
GIBSON *v.* GIBSON. (*a.*)

Deed—Construction—"Or" read "and"—Gift to a class—Absence of words of division—Substantial gift.

A settlement contained a trust "for all and every the the child and children or grandchild of Julia Gibson, the wife of John Gibson, party hereto living at the death of the survivor of" H. C. and M. his wife.

Held, that the word "or" must be construed literally.

Held also, that the fact that the document to be construed was a deed and not a will made no difference.

Held also, that the children of Julia Gibson who were

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

living at the death of the survivor of H. C. and M. his wife alone took under the trust, to the exclusion of all the grandchildren notwithstanding that the parents of some of the grandchildren were then dead.

This was a summons to determine the construction of a settlement.

By an indenture of settlement dated the 20th of December, 1852, certain funds were directed in the events which happened to be held by the trustees of the settlement in trust "for all and every the child and children or grandchild of Julia Gibson, the wife of John Gibson, party hereto living at the death of the survivor of" Henry Coley and Marian his wife.

Henry Coley survived his said wife and died on the 14th of January, 1900.

Julia Gibson had thirteen children, of whom eight survived Henry Coley and were still living; four died in the lifetime of Henry Coley without ever having been married; and one died in the lifetime of Henry Coley leaving an only child. Of the eight living children some were now married and had children.

The question for decision was as to what persons were intended to take under the trusts of the settlement as above set out; in other words, whether the word "or" should be read "or," or "and."

Mulligan, Q.C., and *Gurdon*, for the plaintiff, who was an unmarried daughter of Julia Gibson.—There is no authority for holding that the word "or" in a deed shall be read "and." The case of *Margitson* v. *Hall*, 12 W. R. 334, 10 Jur. N. S. 89, is an authority for holding the contrary. Here the gift is to classes as joint tenants in the alternative, and each class is exclusive of the other: *Holland* v. *Wood*, L. R. 11 Eq. 91, 19 W. R. Ch. Dig. 134; *Amson* v. *Harris*, 19 Beav. 210, 3 W. R. Ch. Dig. 112, 126.

Christopher James, for a grandchild of Julia whose parents were living.—The word "or" should be read "and." The grandchildren form part of the class to take: *Excard* v. *Brooke*, 2 Cox Ch. Cas. 213. If this is not so, then the grandchildren whose parents are alive take equally with those whose parents died before the period of distribution.

The Hon. Frank Russell, for another grandchild whose parent, the child of Julia Gibson, had died before the period of distribution.—The contingency of surviving the period of distribution applies both to the original and substituted classes, and that being so the gift must be construed as substitutional: *Congreve* v. *Palmer*, 1 W. R. 156, 16 Beav. 435; *Atkinson* v. *Bartrum*, 28 Beav. 219, 9 W. R. Ch. Dig. 97.

Mulligan, Q.C., in reply.—The cases cited are all cases of tenants in common and do not apply to joint tenants. The survivors of the class of children take all.

Levett, Q.C., *Stewart Smith*, and *Stokes*, for other parties interested.

BYRNE, J.—In this case a question of construction arises upon the terms of a certain settlement made on the marriage of Henry Coley with Miss Marian Pink. In the events which have happened the following trust has come into operation: [His lordship read the provision before stated, and continued:] I have already decided [in the course of the case] that grandchildren cannot take in competition with their parents. The clause has been read, and I think rightly, by everybody as though the word "grandchild" was equivalent to "grandchildren or grandchild." There are three contentions that have been raised. First, it is said that no grandchildren can take if there are children living at the period named for ascertaining the class; secondly, that grandchildren, children of a child predeceasing that period, take the share their parents would have taken if living; and, thirdly, that all grandchildren, even though their parents be living, must take amongst them the share which any deceased child would have taken.

Now the word "or" in this settlement must, I think, be interpreted literally. If that reading be correct, the class of grandchildren is a substitutional class. The question arises upon a settlement, but I do not know that, for the purposes of construction, in the events which have arisen and having regard to the class that was to take, that makes any difference as to the construction to be put upon it. I have been referred to cases in which a similar question has been determined in respect of wills and which bear more or less upon the subject I have to decide. And upon consideration, not only of the cases cited, but of others, I have come to the conclusion that the effect of them is accurately summed up in Theobald on Wills (5th ed.), at p. 592, thus: "Where the gift is to a class or their issue the further question arises whether the original and substituted legatees form two mutually exclusive classes so that no substituted legatees can take if there are any members of the original class to take, or whether the issue of members of the original class dying can take with the surviving members of the original class. It is clear that if all the original class survive the time of distribution they take alone"; and for that the author cites *Sparkes* v. *Restal*, 24 B. 218, and *Margetson* v. *Hill*. So, if none of the original class survive the time of distribution, the substituted legatees alone take. But if some of the original class die leaving children, and others survive the time of distribution—if the gift is to several persons nominative as tenants in common or their children—those who survive the time of distribution take, together with the children of those who die before it: *Price* v. *Lockley*, 6 Beav. 180. In the same way, in the case of a simple substitutional gift to children or their issue to be divided among them in equal shares, the issue of a child dying after the testator and before the time of distribution take with the other children. Now, it is to be observed first of all that, had there been no children at the period named, grandchildren and grandchildren only would have taken. So, on the other hand, had there been the whole number of children living at the period of distribution, had none of them died, they would have taken to the exclusion of grandchildren. There are two things to be observed in this clause which differentiate it from any case to which my attention has been called. In the first place, this is not a gift to a child or children or their issue; but it is a gift to a child and children or grandchildren. That, of course, has occurred in certain cases, but there are no words in this deed denoting division, equality, or the creation of a tenancy in common; nor have I even the word "respectively" to assist me to a construction which would give to grandchildren—*i.e.*, children of a deceased parent, that share which the parent would have taken had he or she survived the period named. Of course the tendency of the decisions has been, whenever the context allows it, to substitute for a parent a child or children, and that has occurred in many cases. That, of course, becomes a comparatively easy matter when there are words denoting an intention of division of the property into shares, but I have no such words here; I have simply a gift in words which create a joint tenancy amongst those who do take. I cannot predicate of any child that that child takes a share. Each child with the other members or class of children or each grandchild with other members or class of grandchildren taking under either of these gifts would take the whole of the property in joint tenancy. Under these circum-

stances it appears to me that I have no words at all in this settlement which will enable me to say that there is anything equivalent to a substitution of grandchildren being children of members of the first class for the parent dying before the period at which the first class was to be ascertained. Although I admit that I think the case is an extremely difficult one, I have come to that conclusion. I may add this, that had I come to the other conclusion I should have felt extreme difficulty in avoiding the argument of Mr. James, who says that in this settlement there are no words importing that the grandchildren forming the alternative or substitutional class ought to be confined to children of the parent dying. That has had some weight with me in bringing me to the conclusion that I have arrived at. Such a conclusion would be a monstrous one and I should only do it with the utmost reluctance.

The result is, I do not think that the children of the parents dying before the period of distribution can take.

Solicitors. *W. M. Tayler & Son; Druces & Attlee; C. G. Alyar.*

Chan. Div. } Dec. 11.
Farwell, J. }

In re WALKER.
SUMMERS *v.* BARROW. (*a.*)

Trustee—New trustee—Absence from the United Kingdom for more than twelve months—Temporary return, with transaction of trust business—Statutory power of appointment of new trustee—Trustee Act, 1893 (56 *& 57 Vict. c.* 53), *s.* 10, *sub-section* 1.

A trustee travelling on the Continent for a period exceeding twelve months, but who has made a temporary visit to England for one week within the twelve months, and on that visit has transacted trust business, is not a trustee who "remains out of the United Kingdom for more than twelve months" within the meaning of section 10 (1) *of the Trustee Act,* 1893.

This was an originating summons in an administration action, and was taken out by George Summers, described therein as "of the Old Manor House, East Molesey, now travelling on the Continent, and temporarily staying at an hotel (named) at Finisterre, in France."

He was one of the original trustees and executors of the will of John Walker, whose widow was also a trustee.

Mrs Walker and her son-in-law, the plaintiff, remained the sole trustees from May, 1888, onwards.

In or before April, 1899, the plaintiff went to travel on the Continent, and had remained abroad, excepting that it appeared from an entry in the books of the London solicitors acting for the trustees that in November, 1899, he came to England for one week, and on the 3rd of that month attended at their office and transacted business connected with the trust.

On the 1st of June, 1900, Mrs. Walker executed a deed, prepared by other solicitors, whereby, after reciting that the plaintiff, "in or before the month of April, 1899, went to reside abroad and has ever since remained and still remains abroad," she appointed another son-in-law, Rev. A. H. Barrow, to be co-trustee with herself in the place of the plaintiff.

The will contained no power for appointing new trustees, but Mrs Walker purported to act under the provisions of section 10 (1) of the Trustee Act, 1893.

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

Owing to family estrangements the affairs of the trust were at a deadlock.

The plaintiff by this summons asked the court to determine who were the present trustees of the will, and, if it were held that Mrs. Walker and Mr. Barrow were such trustees, that he or some other fit person might be appointed a co-trustee with them.

Mrs. Barrow and other parties interested afterwards issued a writ claiming (*inter alia*) the removal of the plaintiff from being a trustee and the appointment of new trustees.

The plaintiff did not now ask the court to administer the estate.

Fellows (*Jenkins, Q.C.*, with him), for the plaintiff.—The power to appoint under the Trustee Act, 1893, has not arisen, the plaintiff not having been out of the United Kingdom for a continuous period of over twelve months; the deed of the 1st of June, 1900, is therefore bad.

Upjohn, Q.C., and *Christopher James*, for the respondents.—The Act should not be construed too literally; a merely temporary presence, without residence, in England is not enough to prevent the operation of section 10 (1). In substance there has been a residence abroad for over twelve months, and the mode of interpretation of a similar clause was adopted in *In re Moravian Society*, 6 W. R. 851, 26 Beav. 101. See also *In re Arbib and Class's Contract*, 39 W. R. 305, [1891] 1 Ch. 601; and *In re Earl of Stamford*, 44 W. R. 249, [1896] 1 Ch. 288.

FARWELL, J.—The point is short, and, so far as I am aware, a novel one. Section 10 (1) of the Trustee Act, 1893, in effect repeating a former enactment that was repealed, has provided for the appointment of a new trustee "where a trustee . . . remains out of the United Kingdom for more than twelve months." In this case the plaintiff was out of the United Kingdom for twelve months prior to the 1st of June, 1899 (on which day Mrs. Walker purported to appoint the new trustee), but with the exception of one week. During that week he attended at the office of the solicitors and transacted business of the trust. I am therefore unable to find as a fact that he was "out of the United Kingdom for more than twelve months," and therefore the power of appointment has not arisen and the appointment made by Mrs. Walker was not good. The plaintiff and Mrs. Walker remained and are the trustees of the will.

Solicitors, *Stibbard, Gibson, & Co.; Druces & Attlee.*

Chan. Div. } Nov. 14, 15.
Farwell, J. }

DEVERGES *v.* SANDEMAN, CLARK, & CO. (*a.*)

Mortgage—Company—Shares—Fluctuating security—Power of sale in mortgagee—Costs.

The plaintiff instructed the defendants, who were brokers, to buy shares of a fluctuating nature for him, but only paid a part of the purchase-moneys in spite of repeated applications; in pursuance of an agreement between the plaintiff and the defendants the shares were entered on the register in the name of the defendants and so held by way of security for the payment of the balance owed to them. Upon the company announcing a scheme of reconstruction the defendants wrote again to the plaintiff for instructions and payment of his debt. Receiving

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law

no reply, they themselves applied for new shares in exchange and sold 300 to pay expenses and the remainder later. The plaintiff now alleged that the sale was improper and claimed redemption of the shares or, in the alternative, damages for the alleged wrongful sale.

Held, that the defendants, as mortgagees, were justified in realizing the 300 shares to pay the expenses of obtaining the new shares under the reconstruction of the company; and, further, apart from a power of sale implied by agreement between the parties, the defendants, as mortgagees with a security of a fluctuating nature, were, after making their applications for payment and the lapse of a reasonable time, entitled to sell the shares without commencing an action of foreclosure and without an express power of sale.

Tucker *v.* Wilson, 1 *P. Wms.* 261 (sub. nomine Wilson *v.* Tooker, 5 *Br. Parl. Cas.* 193), *discussed and approved.*

This was an action by a Spaniard, resident in Spain, against a firm of stockbrokers, claiming redemption of certain shares in a gold mining company, or, in the alternative, damages for the wrongful sale of the shares.

The facts of the case appear from the judgment below.

The full text of the letter of the 31st of August, 1897, referred to by the learned judge was as follows: "We have been expecting to receive from you the further remittance, as promised by you, to complete the amount due to us on the purchase of the shares which have been, as desired by you, registered in our names, and are, subject to the amount you owe us, registered in our names, and are, subject to the amount you owe us, plus interest to the next account day, the 15th of September, at your disposal. Should you not place us in funds by that date we shall deem ourselves at liberty to sell, at our discretion as to date and at the then market price, the shares we hold."

The plaintiff now alleged that the defendants had sold 300 of the shares without notice to him, and that since the sale, which he submitted was wrongful, the price of the shares had gone up, so that he had suffered loss by reason of it.

The defendants admitted the sale, and before action brought claimed to be entitled to the shares for their own benefit; but in their defence they stated that they were willing to account, and they therewith delivered an account showing a balance in the plaintiff's favour of £55, which they brought into court. But the action came to trial.

R. Wallace, Q.C., and *Stutfield*, for the plaintiff.—The sale of the shares was wrongful, because the defendants had no power of sale and gave the plaintiff no due notice of their intention to sell. So far from having any knowledge of the existence of the shares on which his debt was secured, he had understood that they had vanished months before.

Upjohn, Q.C., and *Stewart Smith*, for the defendants.—Upon the facts of the case the defendants, as mortgagees of the original shares, were justified in selling at a reasonable market price, after making repeated applications in 1897 and 1898 for payment to which the plaintiff made no response and after a distinct threat to sell which was not replied to. The plaintiff by insisting here that the new shares were taken for him must be taken to admit that the defendants were mortgagees for the original debt and interest, with a right also to recoup themselves for expense incurred in taking the new shares with interest at the same rate. We submit that upon the evidence and correspondence it is clear that there was an implied power of sale by agreement between the parties; and, if not, that in such a mortgage of shares, being property of a fluctuating value, no express power of sale is necessary, but after the time for payment has passed the mortgagee may sell without any authority from the mortgagor and without commencing an action of foreclosure: *Tucker* v. *Wilson*, 1 P. Wms. 261, and (*sub nomine*, *Wilson* v. *Tooker*), 5 Br. Parl. Cas. 193, cited in Gordon Robbins on Mortgages, p. 276; *Lockwood* v. *Ewer*, 2 Atk. 303; *Kemp* v. *Westbrook*, 1 Ves. sen. 278; *Langton* v. *Waite*, 16 W. R. 508, L. R. 6 Eq. 165; *In re Morritt*, 35 W. R. 277, 18 Q. B. D. 222; *France* v. *Clark*, 31 W. R. 374, 22 Ch. D. 830. The omission to write another letter cannot deprive the defendants of the right to sell. As to the claim for damages the defendants are merely accountable for what they received; the plaintiff need only have asked for an account by summons and he would have had it.

R. Wallace, Q.C., in reply.

FARWELL, J.—This is an action claiming redemption, or, in the alternative, damages for wrongful sale. The real issue I have to try is whether a sale by the defendants was under the circumstances justified or not. In July, 1897, the plaintiff, who, I understand, is a Spaniard resident in Spain, was minded to buy certain shares in the Central Boulders Gold Mine through Messrs. Sandeman, Clark, & Co., brokers, who are the defendants, and accordingly from July, 1897, down to October, 1897, they bought for the plaintiff shares which amounted altogether to £700, and a portion of the purchase-money, about £400, was paid by the plaintiff, the balance being found for him by the defendants on an agreement that they were to have a charge on the shares for the sum with interest at 6 per cent. As far back as the 31st of August, 1897, the defendants wrote to the plaintiff asking for a remittance, and saying "should you not place us in funds by that time" (that is, the next account day) "we shall deem ourselves at liberty to sell, at our discretion at the then market price, the shares we hold." The plaintiff did not remit, and in fact from the 6th of December, 1897, when he paid £12 3s. 10d., no payment was made whatever by him at all. A quantity of letters have been read to the court, and there were continual applications for payment, and no payment was ever made, but the excuse rendered by the plaintiff (being, I daresay, not an unnatural one)—namely, the existence of the Spanish-American War; made money not easy to be obtained by a Spaniard at that time. Then the company in question went into liquidation for the purpose of reconstruction, and on the 9th of June, 1898, a circular was sent to the defendants, in whose name the shares were registered, and was sent on by them on the 13th of June to the plaintiff. The gist of the reconstruction scheme was that a new company was to be formed, and that shareholders in the old company were to exchange each fully paid-up 20s. share in the old company for two or three shares in the new company, the shares in the new company having 17s. per share paid only, so that there would be 3s. a share to be paid up. The circular was sent on by the defendants to the plaintiff, and they impressed upon him that if he wanted the shares taken up he must send the money necessary to pay, and they made statements as to the forfeiture of the shares, which statements were inaccurate from a legal point of view, although, as I have already said, I entirely acquit them of any intention to deceive. I can see quite well what was in the mind of the gentleman who has been in the box. His view was, whether you call it forfeiture or not, if a company of this sort goes into liquidation, and for the purpose of reconstruction you do not choose to take the new shares which are offered you, you practically forfeit

all right, because practically you very seldom, if ever, obtain anything out of the old company. That was obviously the view that was taken, and that was no doubt inaccurate, and it was very likely to have mislead the plaintiff, although the plaintiff has not been called to say so, by the use of the word "forfeit." However that may be, the plaintiff had ample opportunity of finding the money if he desired to have these shares taken up, and he was told in specific terms by the defendants that they would not find money for his benefit. However, the defendants on the last day, I think it was, on which it was possible to take up these new shares, having communicated with the plaintiff by telegram and not having had an answer, thought that after all perhaps they might get an answer just too late, and took up the shares themselves. From that time until the submission in the defence they took up a wrong position. They assumed they were entitled applying as they did in their capacity as owners of the shares in the old company, to hold the shares in the new company as their own absolutely. They could not, in this court, however, have deprived the plaintiff mortgagor of all right in the new shares so taken, and it has not been contended that they can by their counsel in the case. The view they themselves took was this: "We gave you, the mortgagor, every opportunity to pay, and you have not paid, and it was our money that paid, and by paying we kept the shares." In that they were wrong. Then nothing happens until the whole of the year 1898 has practically gone. The shares were applied for and taken up on the 22nd of September, 1898, on which date the defendants obtained 1,050 shares. There was no correspondence or interview, as far as I am aware, between the 16th of October, 1898, and the 9th of July, 1899. In that period the shares went up, and the defendant sold, first of all a block of 300 shares at 10s. per share, realizing £150 gross, and then the remainder of the shares. The proceeds of the first sale were applied in making the payment of 3s. a share which was required on taking up the new shares.

I pause here to say that from whatever point of view this is regarded, a mortgagor coming here in his capacity of mortgagor, and asking for redemption, must allow the mortgagee the expenditure that he has made necessary to obtain the shares which are now claimed by the mortgagor in this action, as forming the mortgagee's security by reason of the transaction entered into by the mortgagee, in his capacity as mortgagee; and in my opinion the mortgagee was not bound to put his hand in his pocket and find his own money and make this payment, but was justified in realizing enough of the shares to make this payment, without which the shares would not have had any existence at all. Therefore, from any point of view, in my opinion, there is no question of wrongful sale of the 300 shares, part of the 1,050. Then the plaintiff comes back to England, and finding these shares in the defendants' own name he commences this action; the defendants in their defence make the proper submission. They first of all pay the balance of £55 into court and say on the account that is delivered that that is the whole amount due, and that it is sufficient to satisfy the plaintiff's claim. They then go on to say: "The defendants are willing to account for all moneys received by them from the plaintiff or realized by the sale of the said shares, and claim to be entitled to deduct all moneys paid by them on the plaintiff's account with interest at 6 per cent. from the dates of the respective payments until recoupment." Those appear to me to be two separate submissions. The first is under the rule which enables the defendant to pay into court money, and allows the plaintiff if he pleases to have that sum out of court, and have done with it. If the plaintiff is not satisfied with that he can have an account. The plaintiff might have applied on that, and taken out a summons under order 14, and got an account, or he might have moved for judgment on admissions and taken the account, and then certain items of commission which have been charged but which have been very properly given up by Mr. Upjohn, would no doubt have been struck off, and there would be the account. But the plaintiff is not satisfied with that. The shares have, in fact, risen from the date when the first of the shares were sold, which was in March, 1899. From the amount at which they were sold, which varied from 17s. per share to something over £1 per share —20s. and one-sixth or one-third—they rose so that it is to his interest, if he can, to say "that sale is bad altogether, and I hold you liable in damages for having wrongfully sold."

The question therefore arises, has the mortgagee of shares who has a legal title by reason of their having been transferred to his name, a right in law or equity, or both, to sell those shares if he cannot get paid after a reasonable time has elapsed? Secondly, assuming the general law was against the defendants, is there in this particular case any implied agreement that they shall have such a power of sale. The general principle is stated, in my opinion, accurately in the last (1897) edition of Coote on Mortgages by the late Leopold George Gordon Robbins, at the bottom of p. 275. He is dealing with mortgages on stock, and in my opinion the shares in this company stand on the same footing. "Express powers were not formerly necessary in mortgages of stock, or in the instrument of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest without any authority from the mortgagor, and without commencing an action of foreclosure." The authority he cites for that is *Tucker* v. *Wilson*, 1 P. Wms. 251. That was a case of Exchequer annuities, and Harcourt, L.C., takes the view that there was no implied power of sale given by law in that case, there being no express power, because he thought they were "like rent-charges issuing out of lands, and not like stocks which might be thought to be of imaginary value." That was reversed by the House of Lords, but I pause for a moment to see what he meant by that. It is clear to my mind that in likening the Exchequer annuities to rent-charges he meant this: "I regard the security as though it was land or a rent-charge issuing out of land, to which the ordinary rules apply, and you must find an express power of sale." I do not understand this, therefore, as at all contesting the general proposition that in the case of a mortgage of stocks which may be taken to be of what he calls imaginary value, by which I think he meant fluctuating value, the general rule was that there was an implied power of sale at law. That that is the true view I think appears from the remarks made by Fry, L.J., in the course of the argument in the case of *In re Morritt*, 18 Q. B. D. 222. The case of *Tucker* v. *Wilson* had just been cited by counsel, and Sir Edward Fry says: "Those cases are cases of 'stocks,' not of moveable chattels," the contrast being drawn not between stocks and shares, but between *choses in action* and moveable chattels, matters capable of manual delivery, and therefore the proper subject-matter of pledges with which the case

in which Fry, L.J., was speaking was concerned, "and the ground taken," says the Lord Justice, "seems to have been that, the value of stocks being subject to fluctuations, the necessity for obtaining a decree of foreclosure before selling would, as a matter of business, destroy the security." That is the view Fry, L.J., takes of the case of *Tucker* v. *Wilson*, and that is the true view, and the view adopted by the House of Lords, as well as, I think, by the Lord Chancellor, as appears from a report in the House of Lords of *Wilson* v. *Tooker*, 5 Br. Parl. Cas. 193. The argument for the defendants, which was, I infer from the report, adopted by the House was this: It was argued (at p. 195) "that annuities in the Exchequer could not be said to differ materially from other stocks, the Parliament having provided a constant interest for all Government securities, as well as for these annuities; there was indeed some difference between them respecting the principal money, but this difference was much to the advantage of the stocks; for there the principal was to be repaid entirely, whereas the principal of the annuities wore out by time, and consequently decreased in value; and in this case the funds appropriated for payment of these annuities, being chiefly the remnants or surplusages of other funds, had proved so deficient, and were so uncertain, that the Exchequer annuities had been more fluctuating in value and had sunk more from their original price than any other Government security whatever; that if the present decree should stand, great inconvenience must arise to merchants and other traders, whose estates often consisting chiefly of annuities and other Government securities, it had been much to their advantage that on any sudden emergency they could readily borrow money for a short time, near to the full value of such securities; but this would be impracticable for the future, because no person would lend if after the money became payable the security must be foreclosed like a mortgage of land." Then it goes on: "Besides, under the sanction of this decree, many persons might be induced to bring bills in Chancery to redeem their annuities and other Government securities, which had been previously sold for the full value at the time of such sale, and by this means an infinite number of suits might be occasioned; that it has always been the known and constant practice, in the case of mortgages of such securities, where the money has been neglected to be paid at the time stipulated, to proceed to a sale on giving eight or ten days' notice, yet these annuities were not sold till above two years after the money became payable, and after all reasonable applications had been used in the meantime to obtain satisfaction of what was due without selling." To my mind it is plain, both on the judgment of the Lord Chancellor and on the reasons which induced the House of Lords to reverse, as they did, the actual decision of the Lord Chancellor, that the foundation of it is that it was a well-known practice two centuries ago in the City of London that where stocks and other securities of a fluctuating value (there were not many of them at that time), were mortgaged the mortgage carried with it a power of sale after a reasonable time had elapsed for payment of the moneys and failure to pay within a reasonable time. No express powers of sale were required and none were given. In my opinion that is still the law. I adopt the statement of the law in Robbins on Mortgages, and I think it is justified by the decision of the Lord Chancellor of that day. These shares are essentially of the character of fluctuating shares. The argument of counsel which I have just read, about the odds and ends of securities which made up the security for annuities in that case, and the fact that they were paid off, applies *a fortiori* to the case of shares in a gold mine, however advantageous that gold mine may turn out to be. Nobody can say that it is not a fluctuating security. Every reason therefore applies to induce me to say that the ordinary rule which is laid down there should apply to the present case Even if that were not so, in my opinion the letter of the 31st of August, 1897, amounts to a statement by the mortgagees that they deem themselves at liberty to sell at any time they think fit, and at the then market price of the shares. That is not dissented from in any way by the mortgagor. The new shares are bought after that date on the footing of that letter remaining unchallenged. The old shares were retained for a very considerable period—many months—and no one can say that a reasonable time had not been given. If it were necessary, and I do not think it is, I should hold that there was in this case a power of sale by agreement between the parties also, and on that ground also the case fails.

Then the only question that remains is the question of costs. On the issue whether the defendants had power to sell, which is the one issue in the action, the plaintiff has failed, and he must pay the costs of the action to that extent. But the defendants were undoubtedly wrong in the position that they first took up, and with regard to the costs I shall make one observation, having regard to the observations of Mr. Wallace. I do not consider that the action of the defendants, although it cannot be supported, in claiming the shares as their own has in any way prejudiced the plaintiff, or put him to any costs beyond the costs down to and including the defence to the action. Those costs I propose to order the defendants to pay, because I think they were guilty of improper conduct within the exception which allows the court in cases of that nature to either direct the mortgagee to pay, or deprive him of, the costs to which he would, were it not for his misconduct, be entitled. There will be a set off of those costs against the general costs of the action, which the plaintiff will have to pay. If it is necessary to direct an account now I will direct an account, but inasmuch as the commissions (£26 5s.) have now been abandoned, I should have thought it would have been better if the parties could arrange, without taking an account, to arrive at a sum without doing so, but I direct the account not to proceed unless the parties wish.

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Q. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 17.

THE QUEEN *v.* SOWTER. (*a.*)

Ecclesiastical law—Admission of churchwarden—Jurisdiction of archdeacon—Inhibition by bishop—Ministerial act.

The admission of a churchwarden by an archdeacon is a ministerial act and cannot be made the subject of an inhibition by the bishop.

Mandamus to the Archdeacon of Dorset to admit a churchwarden.

At the election of churchwardens for the parish of Winterborne Came, in the archdeaconry of Dorset, in April, 1900, the prosecutor and another were candidates. A poll was demanded and was held on the 7th of May, when each candidate received an equal

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

number of votes. The rector, who presided, gave a casting vote in favour of the prosecutor and declared him to be elected.

Before any admission of the prosecutor to the office had taken place—viz., on the 29th of May—the Archdeacon of Dorset, the Rev. T. B. Sowter, was served with the Bishop's inhibition sent preparatory to the triennial visitation of the bishop. By this inhibition the archdeacon was inhibited for the space of three months from exercising within his archdeaconry "any spiritual or ecclesiastical jurisdiction concerning the visitation of the clergy, the admission of the churchwardens, the receiving of presentments, and the doing of any other act, matter, or thing appertaining to the visitation of a bishop," unless the inhibition should be sooner relaxed. On the 13th of July (the inhibition being still in force) the prosecutor applied to the archdeacon to admit him. The archdeacon replied that he was not in a position to do so. The prosecutor then obtained a rule *nisi* which now came on for argument.

Dibdin, for the archdeacon, showed cause.—During the period of the inhibition the bishop only could admit, and the prosecutor ought to have presented himself to him: Cripps' Law of Church and Clergy (2nd ed.), p. 181. The bishop's jurisdiction supersedes that of the archdeacon even as to ministerial acts (Phillimore's Eccl. Law (2nd ed.), p. 1050), and while the inhibition lasts all fees in respect of such acts are paid to the bishop's officials. The ground of the decision in *Rex* v. *Simpson* given in 1 Str. 609—viz., that an archdeacon cannot rely on a bishop's inhibition as excusing him from doing ministerial acts—is not found in the report of the same case 2 Lord Raym. 1379, and *Reg.* v. *Thorogood*, in 12 A. & E. 183, at p. 197, is a contrary authority.

Edwardes Jones, in support of the rule.—The admission of churchwardens is not a spiritual matter and the bishop cannot inhibit. The report of *R.* v. *Simpson* in Strange has always been accepted as correct, and it is confirmed by the report 8 Mod. 325.

He also referred to Burns' Eccl. Law, vol. i., 406, and Phillimore's Eccl. Law (2nd ed.), p. 1480.

Lord ALVERSTONE, L.C.J.—I think that this rule ought to be made absolute. I think, apart from the authority to which I will refer in a moment, it has for a long time been regarded that a churchwarden is for all substantial purposes and for many important duties he has to perform a temporal officer, and I confess I should hesitate before I expressed the opinion that any ecclesiastical authority as such could prevent his admission. It does not seem to be disputed that the admission of a churchwarden is a ministerial act, and that an archdeacon has no right to inquire into the validity of the election when the elected person is presented before him for admission. But there is a direct authority upon the point in *R.* v. *Simpson*, as reported in 1 Str. 609: that case has been criticized (not at all unduly) by Mr. Dibdin, and he has pointed out that in the report of Lord Raymond the passage does not appear, but I think it is quite impossible to take the view that there is a mistake in Strange's report. It has undoubtedly been treated as an authority for the point in many text-books, and inasmuch as we are dealing with a temporal office, it seems to be good sense that the mere prohibition by a spiritual authority in that particular matter should not prevent the person whose duty it is to perform that office from performing it. I was for a time impressed by Mr. Dibdin's arguments, that here there was an inhibition, and that it was a common thing to find in inhibitions the actual words which occur in this, "or the admission of churchwardens"; and if it had relation to anything except a purely ministerial act I should have hesitated a long time before I gave effect to the opinion I am now expressing. I confess I was also impressed from the point of view of principle by the authority of *R.* v. *Harris*, Burr. 1420, where it was held to be a bad return to writ of *mandamus* to the commissary of the episcopal court to admit churchwardens, that there was a dispute then pending with reference to the election of the churchwardens. It seems to me on principle that that would have been quite as good a ground for the court declining to grant the *mandamus* as the ground that there had been an inhibition by the bishop to the archdeacon. I think, therefore, that reason is in favour of the view for which the case in Strange is an authority, that the bishop has no right to inhibit the archdeacon from that purely ministerial act of admitting the churchwarden. That authority is binding upon us, and I think that the rule should be made absolute.

KENNEDY, J.—I agree. No authority has been produced to us which would lead one to differ from the reasonable course which was taken in *R* v. *Simpson* on the grounds stated by Strange. From what is stated in Phillimore's Ecclesiastical Law (2nd ed.) at p. 1471, it appears to be a question whether the Ecclesiastical Court has authority or not to try the validity of an election of churchwardens, but the body of opinion seems to be clearly that the admission of a churchwarden is a ministerial act; in other words, that the validity of his election cannot thus be tried. Being a ministerial act, the bishop has no power to inhibit the archdeacon from performing it.

Rule absolute.

Solicitor for prosecutor, *Jenkins, Baker, & Co.*

Solicitors for archdeacon, *Robins, Hay, Waters, & Hay.*

Q. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 15, 16.

VESTRY OF ST. JAMES AND ST. JOHN, CLERKENWELL (*Appellants*) *v.* EDMONDSON & SON (*Respondents*). (*a.*)

Metropolis—"New street"—Sewering—Expenses—New buildings on one side of old street—Sewer put in on new side—Liability of frontagers—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict.* c. 102), *ss.* 52, 53.

An old highway, in the centre of which was the boundary between the parish of H., in the county of M., and the parish of C., in the county of London, had buildings erected on the H. side of it for almost its whole length before 1856, *when the Metropolis Management Act*, 1855, *came into operation. On the C. side there were then only a few houses, but recently this side also has been covered with buildings; and in* 1898 *a sewer was constructed on the C. side to receive the drainage of the houses on that side. It was found as a fact that the road, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act*, 1855, *came into operation.*

Held, that, for the purpose of determining whether the C. side of the road was a "new street" within the Metropolis Management Acts so as to render the frontagers on that side liable to the expenses of sewering, the road

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

must be taken as a whole and the portion of the road on the C. side could not be taken by itself, and could not, therefore, form a "new street" so as to render the frontagers liable.

Case stated by justices of the peace sitting at Highgate Petty Sessions, in the county of London.

A complaint was preferred by the appellants under the Metropolis Management Act, 1862, against the respondents that the appellants, in accordance with the provisions in that behalf of the Metropolis Management Acts, executed certain works—namely, the construction of a sewer and the works appertaining thereto, in or in part of a new street known as Colney Hatch-lane, for or in respect of certain premises in the street, of which the respondents were the owners, and that the appellants had thereby incurred expenses of which the amount apportioned in respect of the respondents' premises were £130 6s. 8d. and £7 2s. 10d. respectively, and that the respondents had not paid these sums.

The facts were as follows:

Colney Hatch-lane is an old highway, the boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex. The actual boundary is nearly in the centre of the road, but the greater part of the surface is in the parish of Clerkenwell.

Before the year 1856, when the first of the Metropolis Management Acts came into operation, buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell or London side of the lane there were at that time only seven or eight buildings at various points. The length of the lane is 2,993 feet. Since the year 1856, and more particularly within the last few years, the remainder of the Clerkenwell side has been laid out for building, and the greater part of the frontage to the lane is now covered with buildings.

About the year 1887 the Hornsey Local Board laid a sewer on their side of the lane for the drainage of the houses in their district. By agreements between the board and the appellants and the owners of the houses, four of the houses on the Clerkenwell side were drained into the sewer on the Hornsey side until the construction of the sewer referred to in the complaint. On the Clerkenwell side there was no sewer save a surface water sewer, and for a short distance an old brick sewer running obliquely across the lane, and taking the drainage of three or four houses on that side.

Owing to the position of the road on its eastern side it was found to be impossible to provide an outlet into the metropolitan main drainage system from this part of the parish, which was detached from the rest of the parish and was surrounded by the county of Middlesex. By the Metropolitan Board of Works (Various Powers) Act, 1887, s. 44, the Metropolitan Board of Works (now the London County Council) were enabled by agreement with the local authorities to cause any sewer or sewers constructed or to be constructed by the board in this detached portion of Clerkenwell to communicate with the sewers of one or more of such authorities, and an agreement was made for this purpose in 1896 by the London County Council with the Friern Barnet Urban District Council, and in pursuance of the agreement an outlet was provided for the sewage of this detached part of Clerkenwell into a sewer of the county council, and thence into the Friern Barnet sewers. The appellants then laid the sewer which was the subject of this complaint for the drainage of the houses and buildings which then were or might thereafter be erected on the Clerkenwell or London side of the lane. This sewer was completed in 1898.

The appellants charged a portion of the cost to sewer rates and apportioned the balance among the owners of the premises on the Clerkenwell side of the lane according to the respective frontages. The respondents refused to pay the sums apportioned on them as frontages, and a complaint was preferred under sections 52 and 53 of the Metropolis Management Amendment Act, 1862.

It was contended on behalf of the appellants that so much of Colney Hatch-lane, as is within the parish of Clerkenwell was a "new street" within the meaning of the Metropolis Management Acts; that it became a new street by reason of the erection of buildings fronting it as above mentioned; that in order to determine whether it had become a new street no regard could be had to the portion of the lane in the parish of Hornsey or to the buildings on the Hornsey side, these being in a different parish, district, and county, and subject to entirely different statutes.

It was contended, on behalf of the respondents, that Colney Hatch-lane, taken as a whole, had become a street in the ordinary sense of the term by reason of the buildings erected along it before 1856, and was an old street when the Metropolis Management Act, 1855, came into operation; that no part of such street could become a new street subsequently by the erection of additional buildings along it, and that the portion of the lane which is in Clerkenwell could not be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it was a new street within the meaning of the Metropolis Management Acts.

The justices found that Colney Hatch-lane taken as a whole was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and they were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street, and for these reasons they dismissed the summonses.

The question for the opinion of the court was whether that portion of Colney Hatch-lane which is in Clerkenwell could be dealt with by itself without regard to the portion which is in Hornsey, or to the buildings on the Hornsey side, for the purpose of determining whether it is a new street.

Section 52 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), provides: "Where any sewer shall, after the passing of this Act, be constructed by any vestry or district board, in or for the drainage of any new street, or of any house or houses erected since the 1st day of January, 1856, the expense of constructing such sewer and the works appertaining thereto . . . shall be borne and defrayed by the owners of such street or houses, and of the land bounding or abutting on such street respectively, and the said expenses shall be apportioned by the vestry or district board in such proportion as they may deem just."

Macmorran, Q.C. (*C. F. Pritchard* with him), for the appellants.—This lane is as to half in Middlesex, and as to the other half in London. The question is whether the Clerkenwell side, which is in London, became a "new street" since 1856. The justices were wrong in assuming that the highway must be treated as a whole. We see from the definitions of "street" in section 250 of the Act of 1855, and of "new street" in section 112 of the Act of 1862, that "street" and "new street" include parts of such street. The

position of this highway, which is in Clerkenwell, may be, and ought to be, regarded as a street in itself, and being a street it would be a new street by reason of the erection of the houses along it since 1856: *Pound* v. *Plumstead Board of Works*, 20 W. R. 177, L. R. 7 Q. B. 183. The lane, as a whole, was found to be a street before 1856, but this does not prevent the other side of this road from afterwards becoming a street, and a new street, by the subsequent erection of these houses. The boundary being in the centre of the road, the authorities on the Clerkenwell side could not go beyond the limit of their jurisdiction, and the result is precisely the same as if a fence had run longitudinally through the middle of this road along the boundary line. In that case there would have been on the Clerkenwell side of the road a continuous row of houses on one side and a fence on the other side of it, and that would constitute a street in itself: *Richards* v. *Kessick*, 57 L. J. M. C. 48. The whole lane ought not to be considered as one street; there were two streets—namely, a street on the Hornsey side with houses on one side and a fence on the other, and a street on the Clerkenwell side with these new houses on one side and the boundary line or fence on the other. The justices were therefore wrong in treating the whole as one road.

Alexander Glen, for the respondents.—The first point is whether this lane was a street, and then, if it was a street, whether it was a new street. In determining whether it was a street or not we have to look at its physical condition at the time in question. The justices were right in saying that the road ought to be looked at as a whole and that the half of the road on the Clerkenwell side could not be dealt with by itself. The Clerkenwell side of the street was simply the half of an old street, and having that characteristic once impressed on it, it cannot afterwards acquire a new character or become a new street. The question as to whether a road is a street is a question as to its physical character, and the justices having found as a fact that this road taken as a whole was a street before 1856, it could not afterwards become a new street by the erection of the houses on the Clerkenwell side: *Simmonds* v. *Fulham Vestry*, 48 W. R. 574, [1900] 2 Q. B. 188; *White* v. *Fulham Vestry*, 74 L. T. Rep. 425, 44 W. R. Dig. 108; *Fulham Board of Works* v. *Goodwin*, 1 Ex. D. 400.

Macmorran, Q.C., in reply.

Cur. adv. vult.

Nov. 16.—Lord ALVERSTONE, L.C.J.—This is an appeal from a decision of justices of the County of London sitting at Highgate, on summonses to enforce the payment of two sums of £130 odd and £7 odd, portions of the expense of making a certain sewer in Colney Hatch-lane, which had been charged on the respondents as frontagers. The facts are that Colney Hatch-lane is an old highway forming a boundary between a detached portion of the parish of St. James and St. John, Clerkenwell, in the county of London, and the parish and urban district of Hornsey, in the county of Middlesex. The actual boundary is in the centre of the lane. Before the year 1856 buildings had been erected on the Hornsey or Middlesex side of the lane along nearly the whole of its length, but on the Clerkenwell or London side of the lane there were at that time only about seven or eight buildings. The case then states the facts as to the construction of the sewer, and the justices say that they found that the lane, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation, and they were of opinion that that portion of the lane which is in Clerkenwell could not be dealt with by itself for the purpose of determining whether it was a new street. The expenses had been apportioned and the summonses taken out under sections 52 and 53 of the Act of 1862, whereby, if drainage is done in a new street, the expenses can be apportioned on the frontagers. I think there is a great deal to be said for the view of the appellants that this lane was, so far as the county of London and the parish of Clerkenwell are concerned, substantially a new street, and the sewer being put down in the new street it ought to have fallen within the rule which was applied in the *Plumstead case*. But we do not sit here to review findings of fact, and I might go further and say that there is no reason to doubt or even to criticize the findings of fact, and in this case the justices have found as a fact that Colney Hatch-lane had become a street before 1856. I think the street for this purpose must be taken to be the whole road, and I think the justices must be taken to have found that the portion of the street which is in Clerkenwell is included within the road which had become a street at the date in question, and I do not think it is open to the appellants to argue that for the purpose of this section this part of the road so forming part of the street can be regarded as having become a new street because building on that side of it has been extensively carried on since 1862. I think, in the face of these findings, we must come to the conclusion that the justices have arrived at a right conclusion in saying that they cannot treat the particular portion of Colney Hatch-lane which is in the county of London as a new street for the purposes of section 52 of the Act of 1862. For these reasons, I think the appeal must be dismissed with costs.

KENNEDY, J.—I am of the same opinion. We fully appreciate the suggestion for the appellants that practically this street may be treated for the purpose of Clerkenwell as a street of which one side is a line drawn at the boundary of the jurisdiction of Clerkenwell, running longitudinally through the highway. In the face of the finding of the magistrates, from which I see no reason to differ, in following what I may call the natural sense of the words "street" and "new street," we do not violate any interpretation of those terms as given by the courts in reference to kindred Acts of Parliament. I prefer to say that the view taken by the magistrates is right.

Appeal dismissed. Leave to appeal.

Solicitors for the appellants, *Boulton, Sons, & Sandeman.*

Solicitors for the respondents, *Tatham & Hardy.*

C. C. R.
(Lord Alverstone, L.C.J., and Wills, Wright, Kennedy, and Phillimore, JJ.) — Nov. 17.

THE QUEEN v. STODDART. (a.)

Criminal law—Betting—Keeping an office for receiving money in consideration of promise to pay on the event of a horse-race—"Coupon competition"—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.

The defendant was the proprietor of a newspaper published at her office, and sold for one penny, each number of which contained advertisements of a "coupon compe-

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

tition" and a number of forms or coupons to be cut out and used by intending competitors and sent to the defendant's office. Each competitor inserted in one or more coupons the names of horses which he thought likely to win or obtain places in a specified race or races, and a large money prize was paid by the defendant, after the races had been run, to the competitors whose guesses were correct. One coupon could be filled up and sent in free of charge by any purchaser of the newspaper; with each other coupon a penny stamp had to be sent to the defendant's office. Large sums were received by the defendant in this way.

The defendant was convicted upon an indictment under section 1 of the Betting Act, 1853, charging her with having kept an office for the purpose of receiving money as the consideration for a promise to pay money on an event or contingency of or relating to a horse-race.

Held, that whether or not the transaction amounted to betting the defendant had committed an offence under the section and was rightly convicted.

Case stated by Channell, J.

Ada Jane Stoddart was tried on the 30th of October, 1900, at the Central Criminal Court, on an indictment charging that she on divers days between the 23rd of March, and the 22nd of June, 1900, being the occupier of an office at 10, Red Lion-court, Fleet-street, in the City of London, unlawfully did open, keep, and use the said office for the purpose of money and valuable things being received by and on her behalf as the consideration for undertakings to pay thereafter money and valuable things on events relating to horse-races.

The defendant was proved to be the occupier of 10, Red Lion-court, Fleet-street, and to be the registered proprietor of a newspaper called *Sporting Luck*, which is published weekly at that office. It was also proved she personally took part in the management of the newspaper, but was assisted by her husband and others. Each issue of the newspaper contained an offer of a large sum of money to be divided among those persons who should correctly fill in, upon a sheet of coupons provided for the purpose in the newspaper, the names, in their proper order, of the first three, or, in some cases, four, horses in a specified race which was then about to take place, or with the names of the winning horses in three or more specified races. The sheet of coupons contained a number of separate lines (generally forty-nine), each of which was treated in the "coupon conditions" as a separate coupon, and bore a distinguishing number.

The "coupon conditions" included the following: "As many coupons as desired (not exceeding the limits stated) are allowed, but only one free coupon is permitted to be sent in by any one competitor Cash must accompany each batch of coupons, and, if not sent, the coupons will be disqualified. If more than one succeed in securing the prize, the money offered will be equally divided. Only No. 1 coupon in the sheet of coupons is allowed to be used free of charge. This coupon can be filled up and despatched to us, and will be accepted for competition without any charges or fee being sent with it. If subscribers desire to make more than one attempt, any number of extra coupons can be filled up if one penny stamp is forwarded with each of these coupons; and thus, if forty-nine different attempts are made, and forty-nine of the lines in our coupon sheet are filled up, 4s. must be remitted."

The events, the subject of the competition, varied every week, but in each case between the 30th of March and the 27th of June the events were horse-races. The prizes also varied, being usually £1,000 and sometimes £3,000. A large number of persons every week sent in coupons filled up in accordance with the conditions of the coupon competitions, and sent remittances of money. Large sums were so received by the defendant, and large sums were paid away by her in respect of the so-called prizes. One witness proved the receipt by himself of £1,000, being successful in one of sixty-eight coupons which he had sent in, and in respect of which he had paid 5s. 6d. Special arrangements were made by the Post Office for the delivery of letters at the office on Tuesday mornings, and on those days there were usually twenty to twenty-two sacks of letters delivered. Most of these were marked "Competition," and the business of dealing with the coupons and remittances required a much larger staff than would be required merely for the sale and publication of the newspaper. Large sums were paid by the defendant to her banking account every week, the total sum so paid in the year 1900 to the month of June being proved to be £63,000, but this would include sums received in respect of the newspaper other than sums received with coupons. In the newspaper of the 7th of September it was stated that £46,000 had been paid away in prizes since January.

Counsel for the prosecution contended that the use of the office for the receipt of the money paid by the so-called competitors in these competitions was a contravention of the second part of section 1 of the Betting Act, 1853. He admitted that the facts were identical with those proved in *Stoddart* v. *Sagar*, 44 W. R. 287, [1895] 2 Q. B. 474, but it was contended that that decision was wrong or only to be accounted for by the fact that in that case there had been a finding of the alderman acquitting the defendant. He stated that both sides had expressed a wish when before the magistrate in the present case that the decision in *Stoddart* v. *Sagar* might be reconsidered by the Court for Crown Cases Reserved. He relied on *Hart* v. *Hay, Nisbet, & Co.*, 37 Scott. L. R. 652.

Counsel for the defendant relied on *Stoddart* v. *Sagar*, and contended that the statute did not apply to a receipt of money unless the transaction was a bet, and that in this case there was no bet. Channell, J., held that if the money sent by the competitors with their coupons to the office (being all the pennies other than those which they paid for the newspaper) was the consideration for the promise by the defendant to pay the so-called prizes, depending as they did upon the events of horse-races, the case came within the statute, and he asked counsel on each side whether they desired any question of fact to be put to the jury. Neither counsel did so, and counsel for the defendant said that he would not ask the jury to find that the money received with the coupons was not the consideration for the promise to pay the prizes. The learned judge directed the jury that upon the facts proved, which were not disputed, the defendant had contravened the statute, and the jury on that direction found the defendant guilty.

Channell, J., agreed to state a case solely out of deference to the opinion of the judges as reported in *Stoddart* v. *Sagar*. He himself agreed entirely with the views of the Scotch judges (in *Hart* v. *Hay*), particularly with the last paragraph of the judgment of Lord Adam, in which he pointed out that the Act sets forth certain things that are declared to be a breach of the Act and that the things described were exactly what had been done in the case before him. They were also, in the opinion of Channell, J., what had been done in the present case. He also thought that if it was necessary that the promises or agreement to pay money referred to in the Act must be an agreement by way of wagering, these agreements in fact were so.

The jury were to be taken to have found that the money received with the coupons was the consideration for the defendant's promise to pay the so-called prizes.

Section 1 of Betting Act, 1853, provides as follows: "No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper, or any person using the same . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person, as aforesaid, as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any event or contingency as aforesaid."

Joseph Walton, Q.C. (*Kershaw* with him), for the defendant.—The prohibition in section 1 of the Betting Act, 1853, is confined to the keeping of houses for purposes connected with betting or wagering transactions. This is shown by the language of section 7, which prohibits advertisements of houses kept for the purpose of "making bets or wagers in manner aforesaid." These competitions are not betting or wagering transactions: *Caminada* v. *Hulton*, 39 W. R. 540, 60 L. J. M. C 116; *Stoddart* v. *Sagar*. The latter case was rightly decided and concludes the present case. The offer of the prizes was not a promise to pay on an event or contingency relating to a horse-race; the contingency was the correctness of the guess made by the competitor and the consideration for which the competitor paid his pennies was the right to make so many guesses. The transaction was of the nature of a sweepstake: *Reg.* v. *Hobbs*, 47 W. R. 79, [1898] 2 Q. B 647.

Horace Avory and *Mackay*, for the prosecution, were not called upon to argue.

Lord ALVERSTONE, L C.J.—In this case the defendant was convicted under section 1 of the Betting Act, 1853. [His lordship read the section, and continued:] The facts, which are not in dispute, are that the defendant having issued the newspaper, which had one free coupon in it, allowed persons to send in extra coupons, or extra choices, on payment of a penny for each choice. It is found as a fact, for the purpose of our decision, that the money received by the defendant at the office in respect of the coupons was received as the consideration for her promise to pay the prizes according to the terms set out in the newspaper, the prizes being dependent on the competitors filling up the coupons correctly with the names of the winners of a horse-race. It cannot, I think, be denied that the transaction comes within the precise words of the statute. But it is said by Mr. Walton that we are to put some limited construction on these words, and that unless we think that the transaction amounts to a bet this conviction ought not to stand.

In my view we ought not to put a limited construction on those words. I have no doubt in my own mind that the framers of the statute thought that there might be some transactions which could not properly be called bets, and yet would involve a promise to pay a sum of money on an event or contingency relating to a horse-race; and in my opinion we ought not to decline to give effect to plain words when the same section mentions both betting and also these other transactions, even assuming that there is any foundation for the argument that the transaction in question is something different from a bet. Speaking for myself, I am not able to see the distinction for the purposes of this section between the transaction with which we have to deal and ordinary betting. The person who pays the extra pence does so because the person to whom the money is paid gives a promise to pay a certain sum if the horse named by the person sending in the coupons wins the race. That seems to me to fulfil all the conditions which go to make up a bet. I do not think we can give effect to Mr Walton's very refined argument that the obligation to pay the money depends upon the correctness of the guessing. We were pressed with the decision of *Sagar* v. *Stoddart* but in my opinion it cannot be regarded as an authority against the view I am now taking. I agree that it would have been perfectly possible for the alderman who decided the questions of fact in that case to have drawn the same conclusion as the jury drew here with reference to the consideration for which the money was received by the defendant; but he did not draw that conclusion. And that is sufficient to distinguish that case from the present. I read the judgment of Wright, J., in that case as reserving for further consideration the very question which has arisen here. With regard to *Reg.* v. *Hobbs* I agree that there are *dicta* of great authority in that case which go to support the present defendant's contention. But there is a broad distinction between the two cases. There was in that case no promise by the defendant to pay any money at all. He was only the custodian of money subscribed by other people. He himself came under no personal promise to pay. The case of *Caminada* v. *Hulton* is distinguishable on the ground that *primâ facie* the consideration for which the purchaser of the newspaper paid his money was the newspaper itself, and there was no finding that it was in fact paid solely for the purpose of getting the benefit of the coupon.

Looking at the present case as a whole, I am clearly of opinion that there was upon the facts found a direct infringement of the statute, and that even if the argument could prevail that the transaction could not properly be regarded as a bet, still the offence is complete.

WILLS, J.—I am of the same opinion. I think that the transaction falls within the express words of section 1, the receiving of money "as or for the consideration for an assurance, undertaking, promise, or agreement" to pay money "on an event or contingency of or relating to" a horse-race.

It is said that the first section ought to be confined to betting, because the operation of other sections, such as section 7, is confined to "making bets or wagers in manner aforesaid," the argument might as reasonably be turned the other way, and to say that because several classes of transactions were referred to in section 1 therefore the words in section 7 "in manner aforesaid" brought in all the transactions referred to in section 1. To my mind this is as clear a case of betting pure and simple as can be imagined. It is mischievous to refine when in substance there is no doubt as to what has taken place. Supposing a person backs a chance conglomeration of names to the extent of £5, and pays that amount to the defendant; if successful he is to receive £1,000, if unsuccessful nothing. In substance, the defendant becomes a stakeholder until the race is over. Then if the winners are not as the backer guessed, the defendant retains the £5; if the guess is right, she pays not £1,000 plus £5, but £1,000 only, so that the bettor wins £995 only. It is clear that this would be a bet of £5 against £995 on the contingency of a horse-race. There is no distinction in substance

between that and the present transaction. It is true that the present transaction is complicated by the liability of the prize of £1,000 to be divided amongst several, but that does not alter the nature of the transaction. The view that I have expressed receives the high authority of two out of three judges of the Scottish court in *Hart* v. *Hay*—viz., the Lord Justice General and Lord Adam. On these grounds I am clearly of opinion that the offence prohibited by the statute has been committed.

WRIGHT, J.—I agree, for the reasons which have been stated by my lord, although I am not sure that for all purposes this transaction is "betting."

KENNEDY, J.—It is difficult to define what is meant by "bet." But however that may be I think this case is covered by the statute. In *Reg.* v. *Hobbs* the person convicted had not entered into any contractual relation with the persons who entered into the competition and the contingency on which money became payable by him was the contingency of the drawing, and not the contingency of the race. The decision was good upon both those grounds, but it does not govern the present case. Here money was paid in consideration of a promise to pay upon the event of a horse-race and the case clearly fell within the statute.

PHILLIMORE, J.—I agree.

Conviction affirmed.

Solicitor for the defendant, *J. Stanley Kent.*

Solicitors for the prosecution, *Malkin & Co.*

IN BANKRUPTCY.

Q. B. Div.
(Wright and Phillimore, JJ.) Nov. 19.

In re CLEMENTS.
Ex parte CLEMENTS. (*a.*)

Bankruptcy—Bankruptcy notice issued by trustee in bankruptcy of judgment creditor—"Person entitled to enforce a final judgment"—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 1—*R. S. C.,* 1883, *ord.* 17, *r.* 4; *ord.* 42, *r.* 23.

A trustee in the bankruptcy of a creditor who has obtained a final judgment may not issue a bankruptcy notice against the judgment debtor until he has obtained an order under ord. 42, *r.* 23, *declaring that he is entitled to issue execution.*

Appeal by the debtor from a decision of the registrar of the county court at Kingston refusing to set aside a bankruptcy notice.

On the 6th of July, 1899, a firm called Spencer & Co. signed judgment against the appellant for a sum of about £900. The appellant paid off part of the debt, leaving about £400 due upon the judgment. Spencer & Co. subsequently became bankrupt, and F. W. Davis, the respondent in the present appeal, was appointed trustee in the bankruptcy.

On the 13th of April, 1900, Davis obtained an order in the action of *Spencer & Co.* v. *Clements* under ord. 17, r. 4, "that F. W. Davis, the trustee of the estate of the above-named plaintiffs (Spencer & Co.), be joined as a party, and that all further proceedings be carried on between the added party and the defendant."

On the 28th of April, 1900, Davis issued and served a bankruptcy notice upon Clements. Clements applied to the registrar of the county court to set aside the bankruptcy notice as irregular. The registrar refused to set aside the bankruptcy notice. Clements thereupon appealed, contending that, as the respondent Davis had not obtained an order under ord. 42, r. 23, declaring that he was entitled to issue execution upon the judgment on which the bankruptcy notice was founded, he was therefore not a person entitled to enforce the judgment and had no power to issue a bankruptcy notice.

Willoughby Williams, for the appellant.

Herbert Reed, Q.C., and *Frank Mellor,* for the respondent.

WRIGHT, J.—Under the old law of bankruptcy, prior to and including the Bankruptcy Act of 1883, a trustee in the bankruptcy of a judgment creditor had no power to issue a bankruptcy notice because he was not "a creditor who has obtained final judgment" within section 4, sub-section 1 (*g*). of the Act of 1883. This was expressly decided in *Ex parte Harper, In re Goldring,* 37 W. R 228, 22 Q. B. D. 87, and *Ex parte Blanchett, In re Keeling,* 34 W. R. 538, 17 Q. B. D. 303; though it seems to have been held in *Ex parte Woodall, In re Woodall,* 32 W. R. 774, 13 Q. B. D. 479, that the executor or personal representative of a judgment creditor would have power to issue a bankruptcy notice, even though he had not been joined as a party to the action, provided that he had obtained leave to issue execution under ord. 42, r. 23.

Then comes the Bankruptcy Act, 1890, s. 1 of which provides that "Any person who is for the time being entitled to enforce a final judgment shall be deemed a creditor who has obtained a final judgment within the meaning of section four of the principal Act."

The true position of a trustee in bankruptcy under the Bankruptcy Act, 1890, and orders 17 and 42, is very difficult to work out, but it seems to me that a trustee in bankruptcy is not entitled to an order under ord. 42, r. 23, declaring that he is entitled to issue execution until he has first been joined as a party to the action by an order under ord. 17, r. 4. Ord. 42, r. 23, appears to me to assume that any party making an application thereunder is a party to the action in which he applies. In the present case the trustee in the bankruptcy was only added as a party to the action under ord. 17, r. 4, but has not obtained an order declaring that he is entitled to issue execution under ord. 42, r. 23. In my opinion it is necessary for him to do so before he can issue a bankruptcy notice. That order appears to contemplate that when there has been a change of parties by death or otherwise, the new party, if he desires to issue execution, is to apply to the court for leave so to do, and the court has discretion to grant or refuse the application. I think that the court might have granted the trustee an order under ord. 42, r. 23, upon an *ex parte* application, and then if Clements, the appellant here, had applied to set that order aside, the court could have inquired whether the plea of payment was good or not, and, upon the result of that inquiry, might have affirmed or set aside the order. Section 1 of the Bankruptcy Act, 1890, applies only to persons who have taken all steps that are necessary to enable them to enforce their judgments, and one of the steps they must take is to obtain an order under ord. 42, r. 23. I think, therefore, that this bankruptcy notice must be set aside.

PHILLIMORE, J., concurred.

Solicitors for the appellant, *Herbert Reeves & Co.*

Solicitors for the respondent, *Lindus & Horton.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Lunacy.

(Rigby, Vaughan Williams, and Romer, L.JJ.) Nov. 12, 16.

In re H. G. LANGDALE (A LUNATIC). (a.)

Lunacy — Power of master — Vesting order — Trust property—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 116-130, 136—*Lunacy Act,* 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-section* 1.

A Master in Lunacy has no power to make an order vesting in new trustees already appointed trust property standing in the names of old trustees, one of whom is a lunatic—the making of the order under such circumstances not being part of the "administration" or "management" of the lunatic's estate within section 27, *sub-section* 1, *of the Lunacy Act,* 1891, *which gives jurisdiction to the master.*

In re Fuller, ante, *p.* 90, [1900] 2 *Ch.* 551, *distinguished.*

Petition for an order vesting a sum of Consols which stood in the joint names of Langdale (who was of unsound mind) and another as trustees of a settlement, into the hands of the latter and a new trustee.

In 1884 Langdale and Manley were appointed trustees of a settlement.

In 1887 Langdale retired, and Henry Stourton was appointed trustee in his place.

On that occasion the sum of £430 11s. 3d. was overlooked and not transferred to the other trustees, the dividends being received by bankers under a power of attorney and placed to the credit of Langdale and Manley.

In 1896 Henry Stourton died, and in the same year Langdale became of unsound mind, and a committee of his person and a committee of his estate were appointed.

In September, 1900, Auberon Stourton was appointed the other trustee of the settlement.

A vesting order was now required to transfer this sum to the new trustees.

The petition came before the master, and he referred to one of the judges in Lunacy the question whether he had jurisdiction to make the order.

The judge referred the matter to the court.

Humphry, for the petitioners.—Since a master can make a vesting order when appointing new trustees, *In re Fuller, ante,* p. 90 [1900], 2 Ch. 551, he has also power to make a vesting order alone. And a vesting order under section 136, although not made under the "management and administration" sections (116-130) of the Act of 1890, was, nevertheless, "administration and management" within the meaning of section 27 of the Lunacy Act, 1891. The Bank of England must obey the order of the court (*In re Shortridge,* 43 W. R. 257, [1895] 1 Ch. 278), which also shows that section 129 extends to trust property. The power of the courts to make vesting orders has been enlarged by recent legislation—*e.g.,* Trustee Acts: *In re M.,* 47 W. R. 267, [1899] 1 Ch. 79.

Cur. adv. vult.

Nov. 16.—RIGBY, L.J.—The question is whether a vesting order can be made by the master under the circumstances of the present case. [His lordship, after stating the facts, continued:] Independently of the Act of 1890 I am unable to come to the conclusion that the making of a vesting order under such circumstances is any part of the "administration" or "management" of the lunatic's estate, and therefore *primâ facie* the words of section 27 of the Act of 1891, which give jurisdiction to the master, do not apply. I agree that, if we found such an order treated in the Act of 1890 as a matter of administration or management, we must regard it as within section 27, sub-section 1. *In re Fuller* was cited to us as an authority showing that the master has jurisdiction to make the order now asked for. In my opinion, that case does not justify us in so holding. I think that there the *ratio decidendi* was that the court found in the Act words actually giving jurisdiction to the master to make the order. That order was made under section 129 of the Act of 1890, which forms one of the group of sections headed "Management and Administration," and therefore it came in terms within section 127 of the Act of 1891. The jurisdiction to make a vesting order is statutory, and before the master can make such an order some words must be found which confer a statutory jurisdiction upon him. It is strange that neither when *In re Fuller* was before this court, nor on the hearing of the present case, was the important authority *In re Browne,* 43 W. R. 175, [1894] 3 Ch. 412, brought to our attention. It could not have been present to Mr. Humphry's mind when he addressed his argument to us, but he has very properly referred us to it since. We had, however, before he did so, considered that case, though I must confess it was not present to my mind when I took part in the decision of *In re Fuller* or during the argument of this case. *In re Browne* was decided by Lindley, Lopes, and Davey, L.JJ. An order had been made by a master for the appointment of a receiver of the dividends of some stock which belonged to a lady, "who through mental infirmity arising from age was incapable of managing her affairs." The Bank of England objected to act upon that order on the ground that the master had no jurisdiction to make it; but the court held that he had. From what the judges said, it is quite clear that we may assume that the words "administration and management" in section 27 of the Act of 1891, are not limited to the matter dealt with by sections 116 to 130 of the Act of 1890. Lindley, L.J., said: "The power to appoint a receiver is clearly a power relating to management and administration, and although not specially mentioned in the group of sections so headed, is within the general words with which section 116 commences. This being so, the power can be exercised by a master, and it need not be exercised by a judge in person. Soon after the Rules in Lunacy, 1892, had been made, a question arose whether a master had jurisdiction to make a vesting order under sections 133 *et seq* of the Lunacy Act, 1890; and, after carefully examining the Acts and rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly." And Davey, L.J., said: "I think that the Act means what it says, and that all powers and provisions relating to 'management and administration' which are found in Part IV. of the Act are included"—that is, in section 116, sub-section 1.

It is plain, therefore, that section 27 of the Act of 1891 is not confined to the specific powers of "management and administration" which are conferred in the group of sections 116-130 in the Act of 1890, and if we can find any power of management or administration outside that group the master would, by virtue of section 27 of the Act of 1891, have jurisdiction to exercise it. I am, however, satisfied that the order for which the petition asks (which would be made under section 136, sub-section 2) cannot properly be described as an order for the

(a.) Reported by A. GLYNNE-JONES, Esq., Barrister-at-Law.

administration or management of the lunatic's estate; and, if that be so, the master has no jurisdiction to make it. We have been urged not merely to follow *In re Fuller*, but to extend it. In that case it was held that an express power to do the very thing asked for was contained in the group of sections headed "Management and Administration," and that, therefore, it came within section 27, sub-section 1, of the Act of 1891. But it by no means follows that a power which is not included in any of that group of sections comes within section 27, sub-section 1. If it is a power of "management" or "administration," it will do so, not otherwise. In my opinion, therefore, the power to make the vesting order which is now asked for cannot be exercised by the master.

VAUGHAN WILLIAMS, L.J.—I agree.

ROMER, L.J.—I also agree.

Solicitors, *Gribble, Oddie, Sinclair, & Johnson.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Dec. 12.

In re SCOTT. (*a.*)

Inland revenue—Estate duty—Property passing on death—Devise by father to son—Death of son in lifetime of father—Payment of estate duty in respect of death of father—Liability to further estate duty in respect of death of son—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 33—*Finance Act,* 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (a).

A father by his will devised freehold property to his son, who died in the lifetime of the father, leaving a daughter who was living at the death of the father. By virtue of section 33 *of the Wills Act,* 1837, *the devise did not lapse, but took effect as if the son had survived the father. The son had by his will devised his residuary estate to trustees. Estate duty was duly paid on the devised freehold property as being property which passed on the death of the father.*

Held, that estate duty was also payable on the devised freehold property as being property which passed on the death of the son.

Judgment of Darling *and* Channell, JJ. (48 *W. R.* 205, [1900] 1 *Q. B.* 372), *affirmed.*

Appeal from the judgment of a Divisional Court (Darling and Channell, JJ.), on an appeal from the Commissioners of Inland Revenue brought by way of petition under section 10 of the Finance Act, 1894: 48 W. R. 205, [1900] 1 Q. B. 372.

The petition was brought by the executors and trustees of the will of John Scott, jun., against a claim made by the Commissioners of Inland Revenue for estate duty.

John Scott, jun., died on the 22nd of January, 1899, leaving a widow and daughter.

By his will he left his property to the petitioners in trust for the widow and daughter, and after the death of the widow for the daughter absolutely.

Probate of the will was granted to the widow on the 10th of March, 1899, and on her application for probate she delivered to the Commissioners of Inland Revenue an affidavit with schedules showing that the total net aggregate value of all property passing on the death of John Scott, jun., was £16,004 10s.

On the 12th of May, 1899, John Scott, sen., the father of John Scott, jun., died, having made a will dated the 5th of June, 1891, by which he devised freehold property valued at £80,000 to his son, John Scott, jun. By virtue of section 33 of the Wills Act, 1837, the son having died in his father's lifetime leaving issue alive, the devise did not lapse, but took effect as if the death of the son had happened immediately after the death of the father, John Scott, sen. Accordingly the freehold property passed to the petitioners as executors and trustees of the will of John Scott, jun. Estate duty was paid on this property in respect of the death of John Scott, sen.

The question now was whether a further estate duty was payable in respect of the property so devised as being property which also passed on the death of John Scott, jun.

Section 33 of the Wills Act, 1837, enacts: "That where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear in the will."

The Divisional Court held that estate duty was payable by the petitioners; 48 W. R. 205, [1900] 1 Q. B. 372.

The petitioners appealed.

Joseph Walton, Q.C., and *Edwardes Jones*, for the petitioners.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Vaughan Hawkins*, for the Crown.

Cur. adv. vult.

Dec. 12.—A. L. SMITH, M.R., read the following judgment: The point raised in this case is whether a second estate duty is payable to the Crown upon property valued at £80,000 under the Finance Act of 1894, in the following circumstances. Upon the 4th of May, 1896, John Scott, jun., whom I will call the son, made his will, whereby he appointed the petitioners his executors and trustees, and he devised and bequeathed to them all his residuary real and personal estate in trust, so far as is material, for his daughter Muriel Elsie Scott absolutely. Upon the 22nd of January, 1899, the son died, and probate of his will was taken out and all duties then payable upon the son's estate were thereupon paid by his executors to the Crown. John Scott, sen., whom I will call the father, died about four months after his son—viz., on the 12th of May, 1899—leaving a will dated the 5th of June, 1891, by which he devised to his son freehold property in the City of London of the value of £80,000. This estate of the father has been rightly charged with estate duty, it being property which passed upon the death of the father, and this duty has been paid; but the Crown now claims estate duty over again upon this £80,000, as having also passed upon the death of the son to his devisees under his will of the 4th of May, 1896, although it never did pass to these devisees until four months after the actual death of the son. It cannot be denied that estate duty under the Act may become payable over and over again upon the passing of property upon death at very short intervals of time, and, if the son in this case had died the day after his father instead of dying before him as he did, the £80,000 of property would have been chargeable with estate duty again when it passed upon the son's

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

death to his devisees. But in the present case the son died about four months before his father, and it is argued for the executors, the appellants, that the second estate duty which is claimed is therefore not payable under the Act of 1894. I agree that in the Act of 1894 the words "property passing upon the death of the deceased" *primâ facie* mean the natural and not the statutory or artificial death of the deceased; but there are other words in the Act which enlarge the words "property passing upon death," and which have to be dealt with, and they are these: Section 2 (1) (*a*)—"Property passing upon the death of the deceased shall be deemed to include the property following, that is to say, property of which the deceased was at the time of his death competent to dispose." It cannot be denied that property, by virtue of the Wills Act, 1837, to which a deceased is entitled at the time of his death, he is competent to dispose of, although he had it not at the date of his will; nor can it be denied that, if there had been no Wills Act, there would have been in the present case a lapse of the £80,000 of property, and the son would have taken nothing. I do not agree with counsel for the appellants when he says that the Wills Act, 1837, has nothing to do with the case in hand, for, in my judgment, it has, and it must be looked at to ascertain what it was that the son at the time of his death was competent to dispose of. For instance, it must be looked at to see whether the son was only competent to dispose of property of which he was possessed at the date of his will, as was the case as to real estate before the Wills Act, or of which he was possessed at the time of his death, which is the case since the passing of the Wills Act. When ascertaining what real estate he was competent to dispose of, and upon which taxation is to take place, surely the Wills Act must be looked at, for it plays a very important part in the investigation. Now section 24 of the Wills Act enacts that every will shall "take effect" as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; in other words, by the Wills Act a testator is competent to dispose of all the real and personal estate he possesses at the time of his death, and not only, as before the Wills Act, of the real estate he possessed at the date of his will. This may make a great difference when, for the matter of taxation, it has to be determined, as in this case, what the deceased was competent to dispose of; for this is made the subject of estate duty. Again, to see whether the son took anything under his father's will of which he was competent to dispose, the Wills Act must also be looked at, in order to see whether it has any effect upon what the son was competent to dispose of. And what do we find? We find, by section 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the contrary intention should appear by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no Wills Act, the son would have had nothing to dispose of. But the Wills Act enacts that the will of the father shall take effect as if the son had died immediately after his father—*i.e.*, that in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the Wills Act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the Act by which the appellants get rid of the lapse enacts that the will of the son shall "take effect" as if the son had died immediately after his father, that is, that the son in this case was competent to dispose of the £80,000 of property, subject to his father revoking his will, which he never did. If the appellants take the benefit of section 33, which they do, and thus obtain the £80,000 of property, they must take the burden also—*i.e.*, of paying the estate duty chargeable thereon. My brothers Collins and Stirling have shown me their judgments, and, having read them, I need, I think, write no more, excepting to say that I agree in their judgments, and that this appeal must be dismissed with costs.

COLLINS, L.J., read the following judgment: This case appears to me to present little difficulty when section 33 of the Wills Act is construed in what seems to me its obvious *primâ facie* meaning, and in accordance with the interpretation which, as I think, it has received through a series of authorities. There is no doubt that under section 1 and section 2, sub-section 1 (*a*), of the Finance Act, estate duty is payable upon the property in question, if, under the last sub-section John Scott, jun., was at the time of his death "competent to dispose of it." The property in question could clearly never have been his to dispose of in the events which happened but for the operation of section 33 of the Wills Act. The property was devised to him by his father, and, as he died in his father's lifetime, the devise would have lapsed, and could not, therefore, have come under any disposition made by him. But it seems to me equally clear that the effect of section 33 of the Wills Act is to confer upon him a right to dispose of it. It enacts that, in the events which have happened here, the devise of this property in his father's will shall not lapse, but shall take effect as if the death of John Scott, jun., had happened immediately after that of his father. Now, if John Scott, jun., had survived his father he would have taken the property devised and would have been competent to dispose of it. The right to dispose of it would have been an incident of his ownership, and it would have passed under a will made by him before his father's death. Unless all these consequences follow in like manner in the events which have happened here, the devise does not take effect, as the statute says it shall, as if the son had survived his father. What is the effect, then, in view of this legislation, of his actual death having taken place before his father's? Can it be said to deprive him of the benefit which the statute expressly confers upon him, and leave him under the same incapacity to dispose of the property as he was under before the Act? A will of the same date and in the same terms as that which he actually made would clearly have covered the property in question had he survived his father; and by the section the devise to him is to have the same effect as if he had survived. It follows that by the operation of the statute he was as to this particular class of property rendered competent to dispose of it as property falling in within the constructive period of his life. His capacity to dispose would end necessarily with his actual life, but as to this class of property his power of controlling it depends upon its falling in before his constructive, not his actual, death. It is said that at the date of his actual death he had no more than a *spes successionis*, which is a very different thing from the actual property, and that it is the actual property and not the *spes successionis* that he must be competent to dispose of in order to let in the operation of the Finance Act. But the statute by the fiction of his surviving his father postpones the period during which he may become entitled to property to a date after his father's death, and by that time the hope

had ripened into a reality. Its effect is to make him competent to dispose in his lifetime of something as to which he had only a *spes successionis* in his lifetime, provided it became a certainty, not as in the case of ordinary property before his natural death, but before the time named in the Act. It is inherent in the nature of the legislation itself that it cannot be determined at the time of the natural death whether he had or had not the power to dispose of certain property, but by the light of after events we know now that he had. The statute in moving forward the date from which the will speaks to a point of time when he was, in fact, incapable of volition has really only reapplied to a particular case the general principle of the third section, which makes it lawful for every person to dispose by will of property to which he is entitled at the time of his death, "notwithstanding that he may become entitled to the same subsequently to the date of his will." Thus, efficacy is given to the antecedent disposition subject to an event which cannot be determined till his death, and is not made to depend on any inference of adoption by the testator at the moment of his death of the existing disposition. That this is so is evident from the fact that a will made by a person who became a lunatic immediately afterwards and never recovered testamentary capacity would carry property to which he did not become entitled till after the execution of the will. Whether he was competent or incompetent to dispose of it when he made the disposition is made to depend on an after event. It becomes a good or bad disposition according to the event, but his competency at the time of making it is not affected. We merely learn by the event whether he was in fact competent or not to control the property by his disposition. The statute might just as well have drawn an arbitrary line at six months after the actual death; and the state of facts then would determine whether any disposition made by the testator as to particular property was effective or not. If it turns out to be effective, it must be because he was competent to make it when he made it, which must have been in his lifetime. I am of opinion, therefore, that John Scott, jun., was at the time of his actual death competent to dispose of the property in question. But, further, even if the true view of section 3 of the Wills Act is that in making the will embrace property falling in up to the death of the testator it assumes an exercise of volition by the testator, which may never in fact have taken place, after he has become entitled to the property, I see no difficulty in assuming that the same fiction applies in the case of the son who is brought to life again for the purposes of the 33rd section; and I should have no hesitation in holding that all fictions incident to conferring upon him testamentary capacity to dispose of the property in question must be included in and covered by the central fiction of his prolonged existence. Thus, then, John Scott, jun., by virtue of the Wills Act must be taken as having acquired the property in question with all its incidents, and he was, therefore, competent to dispose of it within the Finance Act. It is said that a fiction should not be extended so as to let in taxation, but I think full effect must be given to the fiction so as to carry out the purpose of the Wills Act itself, which was to vest the property in John Scott, jun., as though he had survived his father. I see no reason why the fiction which was introduced for the purpose of putting him in the position which his father's will intended him to be placed in, should be held to stop short of imposing the burden which would have been an incident of the property had he lived to claim the gift. Without the fiction his estate would have got nothing. The main argument for the appellants, which, as I understood it, was that the Wills Act merely imposes a particular construction on the father's will as though the provisions of the son's will were set out in it, seems to me to find no foundation whatever in the Act, which in terms treats the son as surviving and leaves the supervening rights to be worked out on that footing. Moreover, it seems to me, though counsel strenuously contended the contrary, that the point is decided by *Johnson* v. *Johnson*, 3 Hare 157, followed by *Winter* v. *Winter*, 5 Hare 306; *Wisden* v. *Wisden*, 2 W. R. 616, 2 Sm. & Giff. 396, and *Eager* v. *Furnivall*, 29 W. R. 649, 17 Ch. D. 115; as well as by *Perry* v. *Reg.*, 17 W. R. 382, L. R. 4 Ex. 27; and for the same reason *Lord Advocate* v. *Bogie*, [1894] A. C. 83, does not apply. I am of opinion therefore that the appeal must be dismissed.

STIRLING, L.J., read the following judgment: The facts which give rise to this appeal are shortly these. John Scott, sen., by his will dated the 5th of June, 1891, devised all other his freehold premises not therein before specifically devised, which should belong to him at his decease, unto and to the use of his son John Scott, jun., his heirs and assigns for ever. John Scott, sen., died on the 12th of May, 1899. In the meantime, on the 22nd of January, 1899, John Scott, jun., had died, having made a will by which he appointed the petitioners (the appellants) executors and trustees of his will, and devised and bequeathed to them all his residuary real and personal estate upon certain trusts which it is not necessary to state. As John Scott, jun., left issue living at the time of the death of John Scott, sen., the devise contained in the will of the latter in favour of John Scott, jun., did not lapse, but took effect as if the death of John Scott, jun., had happened immediately after the death of John Scott, sen.: see the Wills Act, s. 33. The subject-matter of this devise was of the value of £80,000, and estate duty was paid by the executors of John Scott, sen., on this as part of his estate. The Crown also claimed from the appellants and was paid by them estate duty on the same sum in addition to property of the value of £15,000, to which John Scott, jun., was entitled at the time of his death. The appellants afterwards presented a petition for the repayment of the estate duty on the £80,000. It was held by a Divisional Court, consisting of Darling and Channell, JJ., that the Crown was entitled to the duty, and from this decision the present appeal is brought.

By section 1 of the Finance Act, 1894, there is imposed in the case of every person dying after the 1st of August, 1894, estate duty "upon the principal value ascertained" as in the Act mentioned "of all property, real or personal, which passes on the death of such a person."

By section 2, sub-section 1, property passing on the death of the deceased is to be deemed to include, amongst other particulars, (*a*) "property of which the deceased was at the time of his death competent to dispose."

By section 22, sub-section 2 (*a*), "a person shall be deemed to be competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property."

It is contended on behalf of the Crown that, regard being had to the terms of the Wills Act, s. 33, John Scott, jun., had such a general power as enabled him to dispose of the property devised to him by his father's will, and consequently that this property fell within the terms of section 2, sub-section 1 (*a*), as being property of which he was at the time of his death competent to dispose. In my opinion this contention is right.

Section 33 of the Wills Act provides that "where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appear by the will." All the conditions referred to in this section occur in the present case.

This section differs in its terms from sections 24-31 inclusive. In these last-mentioned sections the Legislature has seen fit to provide that under certain circumstances a particular meaning shall be attributed to certain language which may be found in a will; in sections 32 and 33 the object of the Legislature is to give legal effect in a prescribed manner to certain testamentary gifts which, under the law as it stood at the time of the passing of the Act would have lapsed—*i.e.*, would have altogether failed. Neither in section 32 nor in section 33 does the Legislature enact that the will shall be read and construed as if it contained language which is not found in it; in both these sections it is enacted that testamentary gifts of the kind referred to shall not lapse but shall take effect. The words which follow point out what the effect is to be. In section 33 the effect is to be "as if the death of" the devisee or legatee "had happened immediately after the death of the testator." To ascertain the meaning of this, let me suppose that the testator by his will has, as in the present case, devised real estate in fee to a child who predeceases him. If the child had survived the testator, the will would have passed the real estate to that child in fee; and the Legislature prescribes that notwithstanding the death of the child the legal effect of the will shall be the same—that is to say, that the will shall pass the real estate to the child in fee. Such seems to me the natural meaning of the language of the Act, nor can I see any difficulty in understanding it. The Legislature has simply provided that in certain cases there shall be a posthumous addition to the property of a deceased person, the object of such provision being to place that additional property at the disposal of the deceased while still living.

At this point, in my judgment, the operation of the Wills Act ceases, and this additional property is left to go and devolve as part of the property of the deceased child. If the child while living entered for valuable consideration into any contract with reference to such property, as, for example, by way of sale, or mortgage, or by way of covenant in a marriage settlement, by such contract the property will be bound. If the child made a will by which such property is by appropriate language disposed of either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on. But the Wills Act does not contain any provision which directly confers any benefit on persons claiming under the child, whether those persons take by act *inter vivos* or by testamentary disposition or by operation of law. Still less does it contain any provision in favour of the Crown; and, if the Crown is entitled to estate duty on this property, appropriate language must be found in the Finance Act. That language I find in section 2, sub-section 1 (*a*), and section 22, sub-section 2 (*a*).

I have dwelt on this point at greater length than I otherwise should, because it is my misfortune to find myself in disagreement, or at least apparent disagreement, as to it with the opinion expressed by Channell, J., in the court below. I refer particularly to the passage beginning "What the Act does say."

The view which I have taken of the construction of section 33 of the Wills Act appears to me to be in accordance with authority. The leading case on the subject is *Johnson* v. *Johnson*. There the testator, Robert Johnson, devised and bequeathed to his son, Michael Payne Johnson, certain specific real estate and a share of his personal estate. Michael Payne Johnson died in his father's lifetime, leaving a widow and one child, the latter of whom survived the father. The son had made a will and codicil by which he gave, in substance, all his property to his wife; and the question was whether the property which was given to the son by his father's will passed by the son's will. Wigram, V.C., held that it did. He said: "Upon the construction of section 33 of the statute 1 Vict. c. 26, taken alone, a legatee within that section would take the same provision under his father's will, and with the same powers and incidents of property as if he had actually survived the testator." He also said: "Without admitting that the words of section 3 taken alone do not sufficiently describe a future accruing interest like that under consideration, I think the legatee has upon the construction of the whole Act a testamentary power over it. Sections 3 and 24 make the will operate from the death of the testator, and section 33 in effect declares that in the circumstances contemplated by that section the child shall be taken to have died on a day later than his natural death." That case, therefore, establishes that a devisee or legatee within section 33 has a testamentary power over property devised or bequeathed to him by his father's will, though he may die in his father's lifetime. *Winter* v. *Winter* is another decision to the like effect.

In *Pickersgill* v. *Rodger*, 5 Ch. D. 163, 25 W. R. Dig. 324, Sir George Jessel, M.R., speaking of section 33 of the Wills Act, says: "The result is this, that the child dying in the testator's lifetime has his estate augmented by the devise or bequest made to him by the testator; in other words, the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it."

In *Eager* v. *Furnivall*, Sir George Jessel, M.R., after citing and explaining *Johnson* v. *Johnson*, says: "That therefore decides that the property is either disposable by will or descends as in the case of an intestacy as in this case. That being so, then there is no doubt that the person to take would be the heir of the devisee, and under the Inheritance Act he takes as purchaser." This passage was in argument interpreted as meaning that the heir of the devisee would take as purchaser. Such an interpretation is directly contrary to the decision of Stuart, V.C., in *Wisden* v. *Wisden*, and inconsistent with what is laid down by Sir George Jessel himself in the immediately preceding context. I think that by "he" the learned judge meant the devisee himself, and not the heir of the devisee.

In the case of *In re Hensler*, 30 W. R. 482, 19 Ch. D. 612, a father by his will made a devise to his son who died in his father's lifetime leaving issue living at the time of his death, and having by his will devised all his real estate to his father. Hall, V.C., said: "By virtue of section 33 of the Wills Act the property passed under the devise in the father's will as if the devisee had died immediately after the death of the father. The effect of that is that I must consider the son to have

survived his father and taken as devisee. I must also consider that the property became subject to the son's will and included in the general gift therein contained. The son must be deemed to have had the property." And he made a declaration that the son took the property, but died intestate as to it, and that the son's heir-at-law was entitled.

In *Executors of Perry* v. *Reg.*, Robert Perry bequeathed his personal estate to his son Robert Cobbold Perry, who died in his father's lifetime; and it was held that the executors were liable for probate duty on the amount of the bequest. Kelly, C.B., says: "The legacy in this case, though in one sense it may be said to pass direct from Robert Perry to the legatee of Robert Cobbold Perry, still in law must be taken to pass through Robert Cobbold Perry, and forms part of the estate which his executors became possessed of under his will." This is a direct authority for the proposition that effect is to be given for the purposes of a taxing Act to the provisions of section 33 of the Wills Act.

The same explanation of the effect of the enactment is found in numerous text writers. For example, Lord St. Leonard in his treatise of the New Statutes relating to Property (2nd ed., 1862), p. 393, when commenting on section 33, says: "Under this provision . . . the devisee or legatee, although he die in the lifetime of the testator himself, takes the property and may dispose of it by his will from his issue who do not take by way of substitution."

The late Mr. Hayes in his Introduction to Conveyancing (5th ed., 1840), vol. 1, p. 406, says: "The existence of issue of the devisee or legatee is merely a collateral circumstance, for the property comprised in the devise or bequest is not given to such surviving issue, but is constituted part of the real or personal estate of the devisee or legatee, disposable by his or her will, and, if not so disposed of, transmissible to his or her real or personal representatives, unless intercepted by assignees in insolvency or bankruptcy." See also 1 Jarman on Wills (4th ed.), pp. 353-4; and Joshua Williams on the Law of Personal Property (5th ed., 1864), p. 324.

The main contention on behalf of the appellants was that the meaning of section 33 of the Wills Act is that in the cases to which it applies the will of the parent is to be read and construed as if it contained a clause providing that in the event of a child's death the property comprised in the gift to the child should go as if the child had died immediately after the testator, so that the property would not pass under the will of the child at all, but would pass directly under the will of the parent to the same persons as would have become entitled to it if the child had survived the parent. To this there are, in my opinion, three objections: First, it is based on a departure from the language of the Wills Act; secondly, it is not in accordance with the natural meaning of the actual language of the enactment; and, thirdly, it is at variance with the interpretation of that language found in the cases and in text-books of authority. This last consideration is one of great weight. It is, no doubt, of importance that every Act of Parliament, be it the Wills Act or the Finance Act, should be correctly interpreted; but it is also most important that a construction which has for a long series of years been placed on an enactment which involves the title to real estate should be adhered to. It is impossible to say what mischief might be done if it were now for the first time to be laid down that real estate to which section 33 of the Wills Act applies does not pass under the will of a child but does pass directly under that of the parent.

In the course of his able argument counsel for the appellants said more than once, and he appeared to attach importance to the observation, that section 33 of the Wills Act was based on a fiction, whereas the Finance Act dealt with facts; and it may be worth while to consider how far the element of fiction enters into the subject. The Finance Act imposes a duty on property over which a person has such a general power as would, if he were *sui juris*, enable him to dispose of the property. Whether, in a particular case, a person has or has not such a power is a question of law. In the case under consideration the law is to be ascertained from section 33 of the Wills Act, which prescribes that in certain cases the legal effect of a will shall be ascertained as if a person who predeceased the testator had in fact survived him. For the purpose of ascertaining the effect, a hypothesis, or, if you will, a fiction, is introduced, but beyond this there is nothing fictitious. The effect when ascertained by the statutory rule laid down by the Legislature must in a court of law be regarded as being no less a reality than if it were ascertained by the rules of the common law.

Counsel also urged that John Scott, jun., was not at the time of his death competent in fact to dispose of this property, because his father was still alive and could during his life deal with the property as he pleased, and might have revoked his will. It is undeniable that the father during his life was free to dispose of the property as he saw fit either by revoking his will or otherwise. It is also undeniable that if the father had in his lifetime seen fit to make another disposition of the property, any disposition made of it by the son would have been ineffectual. But why? Not from any want of competence on the part of the son to dispose of the property coming to him under the father's will, but because there would have been no property of the kind on which a disposition made by the son could operate — *e.g.*, if the son had by will given to A. B. all the property coming to him under his father's will, such a gift would have been within his competence, but would have failed if nothing ever came to the son under the father's will.

For these reasons I think the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the petitioners, *Crawley, Arnold, & Co.*

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) — Dec. 7.

In re WORSLEY.
Ex parte LAMBERT. (*a.*)

Married woman—Carrying on a trade—Bankruptcy—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5.

A married woman who has once carried on business apart from her husband continues, even after she has ceased to carry it on, to be subject to the bankruptcy laws in respect of debts incurred by her during the period of her trading.

In re Dagnall, 45 *W. R.* 79, [1896] 2 *Q. B.* 407, *followed.*

This was an appeal by the debtor, a married woman, against a receiving order made by Mr. Registrar Linklater.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

The appeal raised a question of some importance as to the construction of section 1, sub-section 5, of the Married Women's Property Act, 1882, which provides that "every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

W. H. Worsley, the husband of the debtor, carried on business as a furniture dealer and contractor at Manchester, and subsequently became bankrupt.

Shortly afterwards the business was purchased by the debtor, the money being provided out of her separate estate, and at the date of the transactions hereinafter referred to she was carrying on the business of a furniture polish merchant as the Uneedit Co. at Invermark, 115, Upper Brook-street, and an adjoining house known as 14, Dover-street, Manchester, the husband acting as the manager of the business.

In January, 1900, A. M. Lambert supplied the debtor with goods for the purposes of the business to the value of £174 18s., and on the 26th of January the debtor accepted four bills of exchange at three, six, nine, and twelve months respectively, each being for the sum of £43 14s. 6d.

Early in February the debtor sold the business to the Uneedit Polish and Sundries Syndicate (Limited), and on the 11th of February she left Manchester and joined her husband, who had recently obtained a situation in London and was then living in lodgings at 5, Bedford-place, Bloomsbury.

In April, 1900, Mr. and Mrs. Worsley left these lodgings without leaving any address and went to reside at Melrose-gardens, Notting-hill.

When the first two bills became due they were dishonoured, and Lambert sued the debtor upon them. Efforts were made to serve the writs on the debtor both at the Manchester address, which was found to be unoccupied, and at 5, Bedford-place, but without success, and ultimately Lambert obtained orders for substituted service of both writs.

The actions proceeded to judgment, and in October, 1900, Lambert presented a bankruptcy petition against the debtor in respect of these debts, the act of bankruptcy alleged being that the debtor was absenting herself with intent to defeat and delay her creditors.

Similar efforts were made to serve the petition upon her, but without effect, and on the 15th of October an order was made for substituted service thereof.

On the 15th of November a receiving order was made against her.

Muir Mackenzie, for the debtor, contended, first, that the debtor was not carrying on a trade separately from her husband within the Married Women's Property Act, 1882, s. 1, sub-section 5, so as to make her subject to the bankruptcy laws since she had ceased to carry on business at the time when it was sought to make her so subject—namely, at the date of the alleged act of bankruptcy. The case of *In re Dagnall*, 45 W. R. 79, [1896] 2 Q. B. 407, was inconsistent with a series of decisions under the Bankruptcy Act, 1869, where the words were "being a trader": *Ex parte Reynolds*, 31 W. R. 323; *Ex parte Schomberg*, 23 W. R. 204, L. R. 10 Ch. App. 172; *Ex parte McGeorge*, 30 W. R. 817, 20 Ch. D. 697. He contended, secondly, that there was no trading by the debtor apart from the husband at any time, inasmuch as the business was carried on at the matrimonial domicil; and, thirdly, that there was no absenting of the debtor to defeat creditors, she having merely sold the business and gone to live with her husband.

Reed, Q.C., and *Hansell*, for the petitioning creditor, were not called upon.

Lord ALVERSTONE, L.C.J., after deciding the two latter points against the debtor, said there remained the question as to the construction of section 1, sub-section 5, of the Married Women's Property Act, 1882. Their lordships were asked to overrule *In re Dagnall*. It was there decided that where there were still debts in connection with the business undischarged it was no answer to say that the married woman had given up business before the petition was presented. In this case the bills on which judgment had been obtained were accepted by the debtor trading as the Uneedit Co., and were current at the time of the alleged act of bankruptcy, and this case might be decided on that ground. It was said that *In re Dagnall* was wrong, and that the words "carrying on trade separately from her husband" were strictly limited to the time when the married woman was actually carrying on trade, and that if she ceased even by simply putting up the shutters she was not carrying on trade within the meaning of the section. But these bills were business obligations, and the debtor was trading as to these bills. In his opinion *In re Dagnall* was perfectly right. This was a case in which the Legislature had enacted that if a married woman having separate estate was carrying on trade separately from her husband she should be subject to the bankruptcy laws as if she was a *feme sole*, and there could be no doubt that if the debtor was a *feme sole* she would be subject to the bankruptcy laws in respect of these debts. It was said that because she was a married woman the words "carrying on trade separately from her husband" meant that she must be carrying on trade at the time in the sense of actually conducting the business. He did not think that the Legislature would have framed the enactment in this form if that had been the intention. In the other cases cited the court had to construe the words "being a trader" in the Bankruptcy Act, 1869, and he thought that the mere alteration in the language was sufficient to justify the decision at which this court had arrived. Moreover, the principle upon which the court was proceeding had been settled by Lord Eldon in *Ex parte Bamford*, 15 Ves. 449, which was a decision under the Bankruptcy Act of George III. He therefore came to the conclusion that this married woman was subject to the bankruptcy laws. The appeal would be dismissed.

RIGBY and VAUGHAN WILLIAMS, L.JJ., concurred.

Solicitors, *Leonard Weatherley; Bell, Brodrick, & Gray*.

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) } Nov. 5, 6.

BRITISH MOTOR SYNDICATE v. TAYLOR. (a.)

Patent — Infringement — Patented articles bought in England and sent abroad for sale—"Making use of" the invention—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *Schedule I., Form D —Damages—Assessment.*

The defendants having bought in England articles patented by the plaintiffs but manufactured by infringers, exported the articles to France for the purposes of sale there.

Held, that this was a "making use of" the plaintiffs' invention by the defendants, and constituted an infringement by the defendants of the plaintiffs' patent.

Minter v. Williams, 4 *A. & E.* 251, *and* United Horse

(a.) Reported by J. E. MORRIS, Esq., Barrister-at-Law.

Shoe and Nail Co. v. Stewart, 13 *App. Cas.* 401, 36 W. R. Dig. 63, *considered and explained.*

Held also, that in the circumstances of the case the measure of damages was what the defendants would have had to pay for the permission to do that which they wrongfully did.

Judgment of Stirling, J., 48 W. R., 345, [1900] 1 Ch. 577, *affirmed.*

Appeal from the decision of Stirling, J., reported 48 W. R. 345, [1900] 1 Ch. 577.

The plaintiffs were the owners of a patent for apparatus for starting gas motors, and on the 15th of November, 1897, brought the present action for infringement.

On the 4th of April, 1898, a judgment was taken by consent for an injunction and delivery up of the infringing articles; and for an inquiry as to what damages had been sustained by the plaintiffs by reason of the defendant's infringement of the letters patent. The master assessed the damages on the basis that the defendants had infringed in respect of twenty-seven articles, and that the plaintiffs were entitled to damages to the amount of £8 in respect of each.

The defendants contended that they had infringed as regards eight articles only, and that the amount of damages ought to be £3—the present trade price—instead of £8 in respect of each.

Stirling, J., held that there had been an infringement by the defendants in respect of the twenty-seven articles; but he varied the master's decision by assessing the damages at £5 per article instead of £8.

The defendants appealed.

As to the first question, the evidence showed that the defendants bought in England twenty-seven infringing articles; that they sold seven of them, and used one other in England; and that, as regards the remaining nineteen, they sent them abroad to their French house in Paris, where they sold them to various foreign firms. It was not denied that the defendants had infringed the plaintiffs' patent innocently in the sense that they were not aware at the time of their buying the infringing articles that the latter were the subject of a patent.

Bousfield, Q.C., Hume Williams, Q.C., and *Lainé,* for the appellants.

Moulton, Q.C., and *A. J. Walter,* for the respondents.

Lord ALVERSTONE, L.C.J., after stating the facts, continued: On these facts two important questions arise—first, whether there was evidence of infringement with regard to the nineteen articles; and, secondly, what is the measure of damages in respect of either the whole of the twenty-seven articles, or part of the twenty-seven? I will take the case of infringement first. I wish to state it as plainly as I can that I am clearly of opinion that there was evidence of infringement here with respect to the whole of the twenty-seven articles, the fact being that the defendants bought them with a view of realizing them, and that they did sell eight of them in this country. I come to the conclusion that they bought the whole of the twenty-seven for the purposes of sale here if opportunity arose. And I consider that there is no decision—certainly no principle—upon which we ought to hold that the fact that the defendants disposed of part of those which they bought by sale to customers abroad, without our knowing the circumstances at all in which they were sold, beyond the defendants saying they were sent out to their agents, enables us to say there is no infringement with regard to the nineteen. Under the words of the letters patent, the patentee has the sole right of making, using, exercising, and vending the said invention, and the letters patent further provide that the patentee shall have and enjoy the sole use, exercise, and full benefit of the invention, and all subjects are enjoined during the period of fourteen years from either directly or indirectly making use of, or putting in practice, the said invention, or any part of the same, or from imitating the same. Now it is said that the case of *Minter* v. *Williams,* 4 A. & E. 251, has decided that exposure for sale alone is not infringement. I will deal with *Minter* v. *Williams* as an authority in a moment. But I desire to say that I am satisfied from my own experience in these cases, and also from my reading of the books—and I have endeavoured to refresh my memory by looking at the old text-books since this case was first argued—that *Minter* v. *Williams* has never been considered to be an authority for such a proposition. And I think that it is quite plain, when you look at *Minter* v. *Williams,* that the learned judges who decided that case did not mean to lay down any such proposition. Not only was the point in that case purely a point of pleading, but in addition the judgment of Coleridge, J., points out that it did not appear from the demurrer—that is to say, from the pleadings as they stood, that the exposure for sale was necessarily injurious to the patentee. "It may, on the contrary," he says in his judgment, at p. 256, "be very beneficial; it is not, therefore, necessarily the vending which is exclusively granted to him." Those of us who are acquainted with the old systems of pleading will remember that on demurrer anything could be assumed consistent with the allegations in the pleadings for the purpose of dealing with the point. You might put any construction on the pleadings which they could possibly bear. To my mind that decision was solely a decision against the plaintiffs departing from the well-known form of count which had charged as a breach, the making, using, exercising, or vending, in the words of the patent, and against his adding a fourth count by using the words only "exposure for sale." Certainly it was never intended to lay down any rule of law that exposure for sale might not be an infringement. When the case was cited in *Oxley* v. *Holden,* 8 W. R. 626, 8 C. B. N. S. 666, Byles, J., used the following language: "The jury found that they"—the infringing articles—"were manufactured for sale, and the defendant endeavoured to sell them, and I told them, that being so, there had been a user of the patent." Now it is said by Mr. Hume Williams very naturally: "It is true; but there the defendants had manufactured." In my opinion on principle that can make no difference. A person buys a manufactured patented article which is manufactured by an infringer. He gets possession of that article, and thereby is able to use it for the purposes for which it was intended. The patentee alone should use it during the fourteen years, and I am quite satisfied that it makes no difference whether the defendant has manufactured it himself or whether he has purchased it from some person as a ready-made article. I think that the practice for years has been in accordance with this view. Any other view would be inconsistent with the case of *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.,* 32 W. R. 870, 26 Ch. D. 766, before Bacon, V.C., because there could be no injunction unless there was an infringement. In *United Telephone Co* v. *Sharples,* 33 W. R. 444, 29 Ch. D. 164, before Kay, J.—who, of course, was a judge of great experience in these matters—the whole point there argued was as to whether the possession for experimental purposes of articles imported from abroad was an infringement in breach of the patent, and he held that it was. I may, perhaps, be

permitted to say that in all my experience I have never heard this point suggested, and I have never heard *Minter* v. *Williams* cited as an authority for such a proposition; and I am quite satisfied that there must have been scores of cases in which the point could have been raised if that case had been so regarded as an authority. I should not hesitate to overrule *Minter* v. *Williams* if it were supposed to bear the construction which has been attempted to be put upon it. I do not think that, properly considered, it was intended to decide anything of the kind. I therefore hold that there was clear evidence of infringement in this case with regard to the whole of the twenty-seven articles. I have expressly abstained from saying anything with regard to the doubt on the point which was reserved by Lord Herschell in *Badische Anilin Und Soda Fabrik* v. *Basle Chemical Works, Bindschedler*, 46 W. R. 255, [1898] A. C. 200, at p. 208, because, in my opinion, the question of whether there is infringement by transporting from place to place depends entirely upon what is protected by the letters patent and what is the nature of the invention which has been used. Speaking for myself, I should equally wish to reserve consideration of that point. There may be transportation which would be no infringement. There may, on the other hand, be transportation, as in *Neilson* v. *Betts*, 19 W. R. 1121, L. R. 5 H. L. 1, which undoubtedly would involve infringement.

I now come to what is, to my mind, the more difficult question—whether or not the learned judge was right in assessing the sum of £5 each in respect of the whole of these infringing articles. I think it best to sweep away the points which have been raised which I do not think are open. I do not think that it is open to the defendants in this court to raise the question that, because judgment has been recovered against the persons from whom the infringing articles were bought in respect of those twenty-seven articles, they ought therefore not to pay damages themselves. I think that that might be a most substantial defence under certain circumstances, as was pointed out, in fact, by Wood V.C. in *Penn* v. *Jack*, 14 W. R. 760, L. R. 2 Eq. 314. If it had turned out that the plaintiffs had received what was equivalent to a royalty upon these twenty-seven articles, I think that very different questions might have arisen. That point is not before us. For the same reason I do not think that it is open to the defendants to raise the objection that the nineteen articles were sent abroad before action, and that therefore they do not constitute an infringement. I think that, once given that the purchase and possession with a view to sale are sufficient to constitute an infringement by user of the invention within the meaning of the patent, as in my opinion they do, then the defendants have not put themselves in a position to raise the other question with regard to *quantum*.

The only remaining question is whether or not there were materials before the learned judge in the court below upon which he could assess the sum of £5. I do not wish it to be thought that I support the view which was indicated as a possibility, and not put forward as a principle by Wood, V.C., in *Penn* v. *Jack*, that persons may be punished because they were infringers beyond the amount of damages which the plaintiff has really sustained. I doubt if that principle was ever acted upon, and I do not think that it would be good law if the attempt were made to set it up. I adopt entirely the language of Lord Russell, L.C.J., and of Collins, L.J., in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, 16 Rep. Pat. Cas. 209, which was cited in the judgment of Stirling, J., in the present case. Lord Russell, L.C.J., says: "The measure of damage may in such cases be the cost of the licence. It may be; but I think upon an examination of all these cases it will be found that underlying the measure of damage there is the assumption that if it had not been that the particular defendant manufactured the particular things, then that those particular things would have been manufactured by the plaintiff or his licensees"; and Collins, L.J., said: "The plaintiffs have to show, therefore, that they have sustained pecuniary loss, and, as far as the nature of the case may permit, the amount of that loss." I take the same view of the facts that Stirling, J., has adopted, and therefore I need say no more about them. I see no materials upon which I can properly come to the conclusion that the learned judge—adopting, in my opinion, the true principle, namely, of what the defendants would have to pay for the permission to do that which they wrongfully did, which is the test he lays down—was wrong in assessing the figure at £5. For these reasons, being particularly desirous that it should not be thought that we are deciding anything more than we have actually decided, I am of opinion that this appeal should be dismissed with costs.

RIGBY, L.J.—I am of the same opinion, and for the same reasons, which I do not propose to repeat in any way. All that I wish to say is that the case of *United Horse Shoe and Nail Co.* v. *Stewart & Co.*, 13 App. Cas. 401, 36 W. R. Dig. 63, in the House of Lords, was cited as though the House of Lords had given colour, at any rate, to the view, even if they had not decided it, that only articles sold were to be considered for the purpose of assessing damages. The House of Lords did not, and could not, entertain that question, for the pursuers could not, and did not, open it. The latter, for reasons which may have been bad, only sued in respect of the articles sold, and, therefore, in the House of Lords, it would have been quite impossible for anyone to suggest that they ought to be paid damages in respect of the articles not sold.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think that this case is an entirely satisfactory one. I have no doubt that, when hearing a case, one ought to apply all those rules which have been laid down for the purpose of giving finality to litigation. But, speaking for myself, I never decide a case with so much satisfaction when I decide it upon the ground that this or that substantial and relevant question, which has been argued before us, cannot, and ought not to, be dealt with because the point was not taken in the court of first instance. I cannot help feeling that, to a very great extent, that is what we are doing to-day. With regard to *Minter* v. *Williams* I think myself it was wrongly decided, and that we are not bound by it here. We have a right, and it is, indeed, our duty here, if we think *Minter* v. *Williams* is wrong, not to follow it. But I have no doubt whatever that the Court of Queen's Bench did decide, and intended to decide, the very point for which it was used as an authority here. It is said that what they decided was a mere point of pleading, but generally, if you wanted to get an abstract question decided in a clear and decisive manner, a demurrer to the old-fashioned common law declaration was the most conclusive decision which you could get. The declaration in *Minter* v. *Williams* employed all the words "use, vend, and exercise," and when counsel argued that case, the breach having been alleged as an "exposure for sale," he first argued that "exposure for sale" came within the term "vend," and he said that if it did not, it came within the term "use." That was his argument. To my mind, both Patteson, J., and Coleridge, J., intended to say that

the exposure for sale was neither vending nor using; but I quite agree with the other members of the court that that was not a satisfactory conclusion. I am not satisfied that mere possession of every patented article does constitute a user within the meaning of the words used in the letters patent. That must depend upon the nature of the article. It may amount to a user, and it may not. But here what is put forward is that there was not a mere user; that there was acquisition and possession of these articles for trade purposes with the intention of using them in trade. In my judgment, such an acquisition and such a possession of an article, whatever its nature may be, is a user. I agree, therefore, with Stirling, J., that there was a clear user in this case. With regard to the question whether any advantage can be taken by the defendants here of the fact that a judgment has been obtained against the manufacturers who did the original wrong, and as to whether those people who have bought from them are to be treated as buying from licensees, I wish to say nothing, because the question has not been raised here. But it does remain for us to consider as to what is the measure of damage in the case of a user of the kind that we have here. That is to say, we have got a user for trade purposes, as is evidenced by the admitted fact that the defendants did sell these articles. It is true that they sold them out of the country, but they sold the articles which they had possessed in this country. Is the court in such a case to assume that the measure of damages necessarily is the amount that the plaintiffs, the patent owners, ordinarily charged for a licence to vend or use their invention? I do not agree with the proposition that that necessarily is the measure of damages. It undoubtedly is the measure of damages if you have got a sale within the area covered by the patent. But whether or not it is the proper measure of damages in every case of an infringement by user is a question which, if I had to decide it, I should like to consider further, because I have no doubt myself that, whatever is the measure used, what has to be measured is the actual damage sustained by the plaintiffs whose patent has been infringed. But I do not think that it is open to us to consider this matter, because, at the time of the trial, all the twenty-seven articles which were purchased from the manufacturers, who were the infringers, were dealt with upon the same basis. No distinction was made or drawn before Stirling, J., between those articles which had been sold in this country and those which had been sold abroad. In my judgment, if you have got a user of the nature which has been proved here, coupled with a sale in England, the measure of damages applied by Stirling, J., was the right one—that is to say, the measure of the ordinary charge by the patentees for a licence for such a vending or user. In regard to what my lord has said about the amount of £5, I entirely agree that we cannot go into that question. It is a question eminently for the learned judge who tried the case.

Appeal dismissed.

Solicitors for the appellants, *Everett & Hodgkinson*, for *Parker Woodward*, Nottingham.

Solicitors for the respondents, *Norris, Allens, & Chapman.*

High Court of Justice.

Chan. Div. Byrne, J. } Nov. 23; Dec 11.

TURNER v. SMITH. (a.)

Mortgage—Appropriation by mortgagor's agent of money intended to be applied in discharge of mortgage—Subsequent transfer of mortgage debt and security to mortgagor's agent, followed by transfer by him to an assignee without privity of mortgagor—Account between mortgagor and mortgagee—Reconveyance by assignee to mortgagor.

A mortgagor of a house put her solicitor in funds for the express purpose of paying off the mortgage. The solicitor did not pay off the mortgage, but appropriated the funds to his own use. He continued to pay the interest due under the mortgage. The mortgagor did not ask for the title deeds or a reconveyance of the legal estate. The solicitor took a transfer of the mortgage debt and security to himself, and the following day transferred the same to the defendant, who took the transfer in good faith, but made no inquiry as to the state of the account between mortgagor and mortgagee. The solicitor absconded, and, on the mortgagee applying to the mortgagor for interest, the fraud was discovered by both.

Held, that the charge on the property ceased to exist the moment that the debt and security were transferred to the solicitor, and that the transferee from him took subject to the account between mortgagor and mortgagee at the date of his transfer, and was accordingly bound to reconvey the property to the mortgagor, subject only to the costs, of reconveyance.

This was an action to establish the right of the plaintiff as mortgagor to have a reconveyance and delivery up of the title-deeds of certain mortgaged property upon payment of costs of reconveyance.

On the 23rd of December, 1879, the plaintiff, being then owner in fee simple of No. 1, Queensborough-terrace, Bayswater, by a memorandum in writing charged the property with repayment to James Ingram, Cartmell Harrison, and James Croft of £1,000 and interest at 4½ per cent., and by another memorandum in writing dated the 26th of October, 1880, she further charged the property to the same persons with repayment of £500 and interest at the same rate.

By deed of settlement dated the 11th of June, 1881, made on the marriage of the plaintiff with the Rev. T. J. Guest, the property was conveyed subject to the memoranda of charge to uses under which the plaintiff became legal tenant for life in possession. By deed, dated the 20th of November, 1886, made between Messrs. Ingram, Harrison, & Croft of the first part; the Rev. T. J. Guest and the plaintiff, then his wife, of the second part; and Cartmell Harrion of the third part; and Messrs. Freeman of the fourth part—the mortgage debt of £1,500 and interest was transferred, and the property was conveyed to Messrs. Freeman, by way of mortgage, to secure the same debt and interest.

By deed dated the 23rd of December, 1886, the mortgage was transferred by Messrs. Freeman to Messrs. Maul, and by them to William Negus, the last transfer being dated the 30th of January, 1891.

The mortgage debt and security were transferred on the 8th of December, 1893, from Negus to Mary Foster, and by her again on the 20th of February, 1896, to T. J. Hamp. All the transfers subsequent to that to Messrs. Freeman were effected without any refer-

(a.) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

ence to the mortgagor, the plaintiff, who was not a party to any of the deeds. No notice of them was given to her, nor were any inquiries made of her as to the state of the account or otherwise.

In the months of February and April, 1892, and while the mortgage was still vested in Negus, the plaintiff put Cartmell Harrison, who was acting as her solicitor, in funds for the purpose of paying off the mortgage, which he undertook to do, but did not do. He cheated his client, appropriated the money, and maintained the cheat by continuing to pay interest on the mortgage as it became due to the mortgagee for the time being.

No inquiry was made in 1892 or subsequently by the plaintiff for any reconveyance or receipt by the mortgagee, nor for the deeds relating to the property. She left the whole matter in the hands of her solicitor, Cartmell Harrison, and as she never paid any more interest, and was not charged in account with any by Harrison, her suspicions were not aroused in any way.

In January, 1896, while the mortgage was still vested in Mary Foster, Negus, who was acting as her solicitor, pressed Harrison, who had been paying the interest as if on behalf of his client the plaintiff, for payment off of the mortgage debt, and this resulted in the transfer to Hamp, a client of Negus.

At the end of May, 1897, Negus gave notice on behalf of Hamp to Harrison calling in the mortgage; for on the 1st of June, 1897, Harrison wrote to Negus: "I return the notice. You do not say when the money is to be paid off; I presume in six months."

Harrison then represented to Negus that he was arranging a transfer, for on the 2nd of September, 1897, he wrote: "My dear Negus,—Hamp.—I return you this draft transfer approved. The money, however, will not be in for some little time." Harrison then apparently had been negotiating with J. W. Smith to become transferee of some mortgage although there was no evidence to show that he identified the particular mortgage he intended to obtain a transfer of, but on the 20th of September, 1897, he wrote to Negus to this effect "We shall be prepared to complete the transfer on the 1st of October."

On the 1st of October, 1897, Harrison again wrote: "My dear Negus, —Queensborough-terrace. — For some reason or other (I don't know what) my client did not send his cheque as he promised to do to-day, but I have written to him to ask him to see me on Monday morning, when I shall no doubt get it and complete"; and on the same day he writes to J. W. Smith: "My dear Sir,—I am disappointed at not hearing from or seeing you. I shall be coming up on Monday and will come by the 9.53 train so as to have the opportunity of seeing you." Mr. J. W. Smith forwarded to Harrison £1,500 on or before the 4th of October, 1897, as the latter acknowledged receipt of a cheque for the amount on that day and the cheque was duly paid in to Harrison's private account at Drummund's on the following day, the 5th of October.

By deed of transfer dated the 4th of October, 1897, Hamp transferred the mortgage debt and property to Harrison, and on the following day, the 5th of October, 1897, Harrison transferred to J. W. Smith and the defendant; the whole interest of J. W. Smith and the defendant was now vested in the defendant. The deeds were handed over by Harrison to the Messrs. Smith, and as Harrison continued to pay interest to them until April, 1899, their suspicions were not aroused and no questions were raised until December, 1899, when, Harrison having absconded, application was made to the plaintiff for payment of the half-year's interest which became due the October previous.

Norton, Q.C., and *Rasleigh*, for the plaintiff, referred to *Matthews* v. *Wallwyn*, 4 Ves. 118; *Williams* v. *Sorrell*, 4 Ves. 389; *Norrish* v. *Marshall*, 5 Madd. 475; *Lord Southampton's case*, 29 W. R. 210, 16 Ch. D. 178; *Dixon* v. *Winch*, 48, W. R. 612, [1900] 1 Ch. 736, at p. 742; *Gordon* v. *James*, 34 W. R. 217, 30 Ch. D. 249.

Rowden, Q.C., and *Phillpotts*, for the defendant, referred to *Heath* v. *Crealock*, 23 W. R. 95, L. R. 10 Ch. App. 22; *Harman* v. *Richards*, 10 Hare 81; *Thurston* v. *Nottingham, &c.*, *ante*, p. 56, [1901] 1 Ch. 88.

Dec. 11.—BYRNE, J.—The real question is, which of two innocent parties, the plaintiff or defendant, is to suffer for the frauds of Cartmell Harrison; the plaintiff claiming that, upon the transfer to Cartmell Harrison by Hamp, the mortgage debt was discharged, and that by taking a transfer without the privity of the mortgagor, the transferees, Messrs. Smith, became bound by the state of account as then existing between their transferor and the mortgagor, and that therefore the defendant cannot claim to hold the property as against the plaintiff. On the other hand it is contended that the plaintiff, by her neglect in not seeing that she obtained a reconveyance or receipt for the mortgage-money and by not asking for the deeds, put it into the power of Harrison to commit the fraud and give colour to the false representations which were made in the transfer to Messrs. Smith as to the subsistence of the mortgage debt. It is also suggested that the two transfers of the 4th and 5th of October, 1897, must be looked upon as part of one transaction, and that the transfer to Harrison ought not to be regarded as representing anything more than part of the machinery for transferring the debt and security from Hamp to Messrs. Smith, and not as representing any real transaction. Up to the date of the transfer to Cartmell Harrison, the plaintiff admits that as between herself and the subsequent transferees there was a valid and subsisting debt and mortgage security in as much as no part of the debt had been paid, although Harrison, the plaintiff's agent, had received the money for the express purpose and with the obligation of paying off the then mortgagee in the year 1893. The effect in law of taking a transfer of a mortgage without the privity of the mortgagor has been so recently summed up by Cozens-Hardy, J., in the case of *Dixon* v. *Winch*, [1900] 1 Ch. 736, that I cannot do better than adopt his words, which are to be found at p. 742 of the report. [His lordship then read from the report beginning with the words "It is well settled," and concluding with the words "Lord Southampton's estate."] I need not refer to the expression of opinion which follows, because the learned judge recognizes the law as stated, nor need I go further into the decision in that case either in the court of first instance or in the Court of Appeal, as it turned on very special facts which differ from those in the present case. Starting with the statement of the law as above, it appears to me that, assuming the transfer to Harrison to have operated as an assignment or conveyance to him in his personal capacity, and not in the capacity of trustee for Smith, the result must follow that the mortgage debt immediately became discharged, and that he held the property as trustee for the plaintiff, the principle being, as stated by Sir J. Leach in *Norrish* v. *Marshall*, 5 Madd. 475, at p. 481, "that as against an assignee without notice" (meaning without notice to the mortgagor) "the mortgagor has the same rights as he has against the mortgagee, and whatever he can claim in the way of set-off or

mutual credit as against the mortgagee he can claim equally against the assignee."

There is no evidence that Harrison had agreed to invest Smith's money in a particular mortgage, and although it is not very easy to understand why Harrison took the transfer to himself only to retransfer it on the following day, the fact remains that he did take a transfer to himself, and it may be that, being uncertain whether he should get the money from Smith, he obtained the transfer to himself before receiving the cheque. He certainly did so before the cheque was credited to him. The money paid by Harrison to Negus was paid by cheque drawn on the account of the firm of Ingram & Harrison at Messrs. Hoare's, by cheque debited to the firm on the 5th of October, and I am unable to hold that at the time of the transfer to himself he had constituted himself a trustee of the particular security for the Messrs. Smith. I think therefore that the latter having taken the transfer from Harrison without the privity of the mortgagor, the defendant can only hold it against the latter, subject to the state of account between Harrison and the mortgagor. As between Harrison and the mortgagor the mortgage debt was non-existent. It appears to me that the mortgagor never lost her right to redeem, and that directly her agent, who had received the amount to pay off the mortgage, became himself the transferee of the mortgage, the debt was extinguished, and no transferee from him could treat the debt as a subsisting charge upon the property. In the result I think the plaintiff is entitled to succeed and to have a reconveyance.

Solicitors, *Beachcroft, Thompson, Hay, & Ledward; R. T. Harding*, for *Chandler*, Basingstoke.

Chan. Div. Buckley, J. } Nov. 19-21, 29.

LISLE *v.* REEVE. (*a.*)

Mortgage — Redemption — Once a mortgage always a mortgage—Option to lender to enter into partnership with the mortgagor upon terms affecting the property—Option to be exercised within time limited for redemption—Conditional sale—Exercise of option—Sale or mortgage.

Prior to July, 1898, *plaintiffs advanced to defendant £5,000 upon the security of a ship and other property, upon the terms of an agreement made between them on the 23rd of April*, 1896, *whereby the money was not to be called in or paid for two years, and the plaintiffs might at any time within the two years elect to enter into partnership with the defendant upon the terms of their releasing the mortgage debt and the ship and other property becoming partnership assets.*

On the 9th of July, 1898, *another agreement was entered into between the plaintiffs and defendant. It recited the agreement of* 1896; *that the plaintiffs had not entered into partnership; that the plaintiffs had applied for, and the defendant was unable to pay, the £5,000, and had requested the plaintiffs to extend the term of two years for a further period of five years; and it was thereby agreed* (1) *that the plaintiffs might, within five years, elect to enter into partnership with the defendant;* (2) *that the plaintiffs should in that event release the defendant from payment of the £5,000 and transfer the mortgaged property for the purposes of the partnership;* (3) *that the capital of the partnership property should belong to defendant and plaintiffs in equal shares.*

In February, 1900, *the plaintiffs exercised their option, and communicated to the defendant their election to enter into partnership with him, but he refused to comply, alleging that the effect of the agreement was to render the property irredeemable, and that it was an illegal clog on the equity of redemption.*

Held, that the agreement amounted in law to a conditional sale of the property; that the condition was valid; and, on the condition being satisfied, the purchase took effect, the doctrine of equity as to clogging an equity of redemption not having any application in such a case.

Observations upon the nature of an equity of redemption and the doctrine of equity as to clogging an equity of redemption.

Action.

By an agreement dated the 23rd of April, 1896, and made between the plaintiffs, G. Lisle and others, trading as J. H. Bentham & Co., of the one part, and the defendant, H. Reeve, trading as Clarke & Reeve, of the other part, the plaintiffs agreed to lend the defendant £3,000 and such further sums, not exceeding £2,000, as the defendant should require, and these sums were to be a first mortgage on the defendant's steamship *The Norfolk*.

The further advances were only to be made within two years from the 23rd of April, 1896 The £3,000 and further advances to be secured by the mortgage, were to be made payable at six months from the date of the mortgage (which was, in fact, the 4th of July, 1896). The £3,000 was to bear interest at 5½ per cent. from that date. The further advances were to be free of interest.

The plaintiffs were not to call in, and the defendant was not to compel the plaintiffs to receive, the principal moneys before the expiration of two years from the date of the mortgage if interest was regularly paid. If at any time within two years from the making of the agreement (23rd of April, 1896) the plaintiffs should elect to enter into partnership with the defendant they were to be at liberty to do so upon the terms that, *inter alia*, the plaintiffs should relieve the defendant from the payment of the £3,000 and further advances, if made, and if the whole £2,000 had not been advanced should make up the £2,000, and the plaintiffs should transfer the ship, free from the mortgage, for the purposes of the partnership. The capital of the partnership was to be represented by *The Norfolk* and some other property described in the schedule to the agreement, and the ship and property were to belong to the defendant and the plaintiffs in equal shares. They were to share the profits and losses of the partnership equally, and the partnership was to continue until determined by six months' notice on either side.

On the 4th of July, 1896, the defendant executed to the plaintiffs a statutory mortgage of *The Norfolk* to secure an account current, the particulars of which were therein stated to be described in a receipt and agreement of even date. No date for payment was named in the mortgage. The receipt and agreement were introduced by reference. There was a receipt or memorandum not of even date, but dated the 16th of July, 1896, showing that £3,783 was the amount in fact then advanced and secured by the mortgage. The receipt bore internal evidence that, although dated the 16th of July, 1896, it was the receipt stated in the mortgage of the 4th of July, 1896, to be of even date with the mortgage, for it spoke of the 4th of July, 1898, as being "two years from the date hereof." This was, therefore, the receipt referred to in the statutory mortgage. It named the 4th of July, 1898, as the date of repayment. There was also a deed of the 4th of July, 1896,

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

between the defendant of the one part and the plaintiffs of the other part, which, after reciting that the defendant, there called "the mortgagor," was the owner of *The Norfolk*, and that he had applied to the plaintiffs, there called "the mortgagees," for £5,000, to be secured on the ship and her freight and insurances, and that he had by a deed-poll of even date mortgaged the ship, it was witnessed that the mortgagor assigned to the mortgagees all charter-parties, bills of lading, and documents under which freight might be earned, and all policies of insurance of the ship by way of security, and he covenanted for payment of the £5,000 on demand. [In his lordship's judgment all the instruments above stated evidently formed part of one transaction, and it was unnecessary to comment upon the fact that in the receipt the obligation was to pay on the 4th of July, 1898, while in the deed of covenant it was to pay on demand.] On the 23rd of April, 1898, the two years within which the plaintiffs were under the agreement of the 23rd of April, 1896, entitled to elect to enter into partnership with the defendant expired. They had not elected to enter into partnership. The whole sum of £5,000 had been advanced, but no part of it had been repaid. Under these circumstances, as his lordship found, there clearly existed after the 23rd of April, 1898, the relation of mortgagor and mortgagees between the parties, so far as the transaction of 1896 was concerned. On the 4th of July, 1898, there existed a legal, and subsequently there was an equitable, right in the defendant to redeem the plaintiffs.

In this state of facts further transactions took place between the parties in 1898. There was executed on the 27th of June, 1898, an indenture between the defendant, therein called "the mortgagor," of the one part, and the plaintiffs, therein called "the mortgagees," of the other part, which recited that the mortgagees had advanced the mortgagor £2,000, in consideration of which the mortgagor covenanted for payment of that sum on the 27th of December, 1898, with interest at 5 per cent., and conveyed to the mortgagees by way of security certain wharves at Norwich and at Great Yarmouth, subject to a proviso for redemption on payment of the £2,000 on the 27th of December, 1898. This sum of £2,000 was part of the above-mentioned sum of £5,000. The last-mentioned deed was a further security for part of the above-mentioned debt of £5,000, and gave time until the 27th of December, 1898, for payment of that sum of £2,000. On the same 27th of June, 1898, the defendant executed to the plaintiffs a mortgage of a policy of assurance for £3,000 by way of security to them against a guarantee which they had given to the defendant's bankers for a sum of £1,000, part of the defendant's overdraft.

It was in this state of things that the instrument was executed upon which the contention in this case arose. It was an agreement, dated the 9th of July, 1898, made between the plaintiffs of the one part and the defendant of the other part. It recited the agreement of the 23rd of April, 1896, shortly, and insufficiently, as it seemed to his lordship, for the purposes of the instrument, for, although it recited that under that agreement the further advances were to be made within two years from April, 1896, and that the election to enter into partnership was to be made within the same time, it did not recite that under that agreement the loan was for a period of two years from the 4th of July, 1896. It then recited that the plaintiffs had advanced the defendant £5,000, which had been secured by the first mortgage on *The Norfolk*, and by a second mortgage on the wharves, dated the 27th of June, 1898 (a statement which was inaccurate), and by an assignment of the life policy for £3,000 (which was not, in fact, the case), and that the plaintiffs had not up to date entered into partnership with the defendant. It then recited as follows: "And whereas the said term of two years so fixed by the said agreement, having on the 23rd of April last expired, and Bentham & Co. having made an application to Reeve for the repayment of the said sum of £5,000, with interest thereon, and Reeve not being in a position to comply therewith, has requested Bentham & Co. to extend the said term of two years for a further period of five years, which they, the said Bentham & Co., have agreed to do upon Reeve entering into this agreement and paying interest upon the said sum of £5,000, or any further sums, at £5 per cent. per annum, and upon the terms hereinafter appearing." And by the operative part it was agreed and declared as follows: "(1) If at any time within the said further period of five years from the making of this agreement Bentham & Co. shall elect to enter into partnership with Reeve in the said business, carried on by him under the style of Clarke & Reeve, as aforesaid, they shall be at liberty to do so, and the partnership shall be upon the terms hereinafter appearing; (2) Bentham & Co. shall release Reeve from the payment of the said sum of £5,000, and shall transfer the said ship, free from the said mortgage, for the purposes of the said partnership. And, in consideration of Bentham & Co. doing these things, Reeve shall undertake and satisfy all liabilities, mortgages, and otherwise in connection with the wharves and plant of the said business of Clarke & Reeve, and Reeve shall be entitled to all accounts and book debts of the said business outstanding at the time of such partnership being entered into, but all current contracts existing at that time shall be apportioned between Reeve and the new partnership; (3) the capital shall be represented by the ships and other property set out in the schedule hereunder written and at present used by Reeve in the said business of Clarke & Reeve, or other the ships and property used by him in the said business at the time of such election as aforesaid, and the said ships and property shall belong to Reeve and Bentham & Co. in equal shares; (4) the profits and losses of the new partnership shall be divided and borne between Reeve and Bentham & Co. in equal shares; (5) the new partnership shall continue until determined by six calendar months' notice on either side or shall be for such term as the parties mutually agree upon. . . . (8) Reeve shall not during the said period of five years from the date hereof in any way incumber or dispose of the said property used by him in the said business of Clarke & Reeve without the consent of Bentham & Co. in writing." Notwithstanding the form of the recital as to the two years, his lordship held that the agreement of the 9th of July, 1898, extended the period of the loan for a further five years, and that the second mortgage of the 27th of June, 1898 (which had given six months from that date for repayment of the £2,000), and this agreement of the 9th of July, 1898, which gave time for the whole £5,000 for five years —*i.e.*, until the 9th of July, 1903—and contained the terms of the new arrangement between the parties, formed in reality parts of one transaction. On the 24th of February, 1900 (during the currency of the five years), the plaintiffs exercised the option reserved to them by the agreement of the 9th of July, 1898, and elected to enter into partnership with the defendant. The defendant, however, refused to enter into partnership.

The plaintiffs brought the present action for specific performance of the agreement of the 9th of July, 1898, or, alternatively, for damages for the breach of it, and in the latter case for payment also of the £5,000 and interest, and claiming in default of

payment to enforce their securities by foreclosure or sale. The defendant, by paragraph 5 of his defence, pleaded as follows: The effect of the agreement of the 9th of July, 1898, taken with the other securities mentioned in the statement of claim, was to render the property comprised in the latter irredeemable, and was an illegal clog on the equity of redemption"; and by his counterclaim he asked for a declaration that the agreement of the 9th of July, 1898, was not binding on him, and that the same might be delivered up to be cancelled. And he also claimed to redeem the mortgage of the 4th of July, 1896. and the mortgage and assignment of the 27th of June, 1898, upon the footing that they stood as security only for £5,000 and interest at 5 per cent. from the 31st of December, 1899.

Astbury, Q.C., and *R. J. Parker*, for the plaintiffs.—First, this is not a mortgage transaction, but one relating to a security in existence and subsequent to it. Secondly, there is no clog on the equity of redemption, (*a*) because the option only exists during the time the parties are in legal contractual relation, and the equity to redeem has not arisen; (*b*) because, even if the clause were operative during the equity of redemption, if any, it does not prevent the mortgagor from redeeming. It is binding on him, but has no effect *in rem* on the ship. It would be otherwise if the security had been land, but the ship is only affected by the partnership when it arises. *Gossip* v. *Wright*, 11 W. R. 648, 32 L. J. Ch. 648, at p. 653, shows that the mortgagee may sell his equity of redemption to the mortgagor, and the observations of Kindersley, V.C., apply. *Santley* v. *Wilde*, 47 W. R. 297, 48 W. R. 90, [1899] 1 Ch. 747, [1899] 2 Ch. 474, was a case in which the mortgagor never could in fact redeem, but the parties were in legal relation throughout, and it was held there was no clog. The equity of redemption only comes into operation after the period for redemption at law—original or extended—has expired: *Brown* v. *Cole*, 14 Sim. 427; Fisher on Mortgages (5th ed.), p. 668; *Burrowes* v. *Molloy*, 2 Jo. & Lat. 521; *Teevan* v. *Smith*, 30 W. R. 716, 20 Ch. D. 724, at p. 729. That was the view acted on by the Lord Keeper in *Bonham* v. *Newcomb*, 1 Vern. 232. Cases like *Gossip* v. *Wright* and *Perry* v. *Meddowcroft*, 4 Beav. 197, show that the transaction objected to was not really one of loan. The consideration to the plaintiffs in the first transaction was the option, and if that were exercised the transaction was a partnership one; if the option was not exercised, the transaction was a mortgage. In order to carry out the agreement the mortgagees must do what is in substance equivalent to reconveying. The court ought not to extend the clog doctrine.

They also cited *Rice* v. *Noakes*, 48 W. R. 110, 629, [1900] 1 Ch. 213, [1900] 2 Ch. 445; and *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307.

H. Terrell, Q.C., and *Martelli*, for the defendant.—The question is, is this a mortgage or not a mortgage? If once a mortgage, then always a mortgage, and the clog rule applies. These transactions must all be looked at as one, and that a mortgage. *Price* v. *Perrie*, 2 Freem. 258; *Willett* v. *Winnell*, 1 Vern. 488; and *In re Edwards' Estate*, 11 Ir. Ch. Rep. 367, are conclusive in our favour on the clog question. There is no distinction in the cases according as estate has or has not become absolute at law. *Jennings* v. *Ward*, 2 Vern. 520, goes too far, but is not overruled. The mortgagor must, when the equity of redemption arises, be able to get back his property unaltered. The mortgage here is not security for a partnership. That distinguishes this case from *Santley* v. *Wilde*. The partnership is a purely collateral obligation, and clogs the equity of redemption, just as the "tie" did in *Rice* v. *Noakes*.

They also cited *Salt* v. *Marquis of Northampton*, 40 W. R. 529, [1892] A. C. 1; and *Bovill* v. *Endle*, 44 W. R. 523, [1896] 1 Ch. 648.

Astbury, Q.C., replied.

Cur. adv. vult.

Nov. 29. — BUCKLEY, J., after stating the facts substantially as above set forth, proceeded as follows: The question I have to determine is, What is the true effect of the agreement of the 9th of July, 1898? The plaintiffs contend that no question as to a clog on the equity of redemption arises, because the transaction of July, 1898, was not a mortgage transaction at all. They say that at the date of the execution of the agreement of the 9th of July, 1898, there existed certain securities in respect of which the plaintiffs and defendant stood towards each other in the relation of mortgagees and mortgagor; that mortgagee and mortgagor may, after the execution of the mortgage, enter into any arrangement as to the equity of redemption which they think proper *Gossip* v. *Wright*, and that the arrangement of the 9th of July, 1898, was of that character. They contend that the real question for consideration is whether the transaction of 1898 was, in the events which happened, a conditional sale, which, by the performance of the condition, became a sale, or whether it was a mortgage. They contend that it was the former. The proposition, broadly stated, which the plaintiffs put forward is that, if a contract, as to which a question arises whether it is a mortgage or not, include a condition subsequent which is to be satisfied, if at all, before the right of redemption arises at law, and upon the satisfaction of which there is never to be any right to redeem at law, then the transaction is in fact a conditional sale, and there is no equity of redemption which can be clogged, because there was, in the events which happened, never any right to redeem at law. They say that it is only upon default of satisfaction of the condition within the time that the transaction becomes a mortgage transaction—in other words, that, if the condition is satisfied, then the instrument is never "once a mortgage" for the purposes of the maxim, "Once a mortgage, always a mortgage." The operation of the agreement of the 9th of July, 1898, seems to have been this: The plaintiffs were then the holders of the statutory mortgage of the 4th of July, 1896, upon *The Norfolk*, and the second mortgage of the 27th of June, 1898, upon the wharves. These stood as security respectively for £5,000 and for £2,000, part of the £5,000, moneys lent by the plaintiffs to the defendant. For repayment of these moneys the plaintiffs gave time until the 9th of July, 1903, and until that date arrived there could be no default by the defendant in payment of the money at the time fixed by the contract. In other words, there could not, until the 9th of July, 1903, arise in the plaintiffs, if the transaction was a mortgage, an absolute right to the property at law, or any right in the defendant to redeem in equity. If, during the currency of this period of five years—*i.e.*, before the 9th of July, 1903—the plaintiffs did (as in fact they did) elect to enter into partnership with the defendant, then the debt of £5,000 and interest was to cease to exist, and the properties mortgaged and other properties were to become assets of a partnership in which the plaintiffs and defendant were to be interested in equal shares. The substance of this is that in this event the plaintiffs, by becoming partners, were to become purchasers from the defendant of one-half of the properties included in

the mortgages, and the purchase-money was to be the £5,000 and interest. If they availed themselves of this option, there could be no right to redeem at law, for no right of redemption arises till 1903, and before that time arrives, the condition being satisfied, the purchase has taken effect. The question is whether such a condition is valid. Now, the plaintiffs argued that the transaction of 1898 could not be a transaction between mortgagor and mortgagee, for that the loan of £5,000 was not then being made, but had been made long previously, and that the bargain was only one for giving time for the payment of an existing loan. I do not accede to this argument. I think that the same principles must apply where an existing mortgage is used as security for new terms of a bargain of loan as where a mortgage is then executed for the first time. But then the plaintiffs say—"Assume that this was a mortgage transaction, still it was subject to a condition, and it is valid in a mortgage transaction to introduce a condition subsequent to be satisfied, if at all, before the time arrives at which the estate becomes absolute at law, and which, if satisfied, makes the transaction a sale and not a mortgage; and that this is a case of that sort." Now an equity of redemption is a right upon equitable terms to redeem after the legal time for redemption has expired and after the estate has become absolute at law. An equity of redemption is an equitable right additional to and super-imposed upon the legal right to redeem. When the estate has become absolute at law, equity intervenes and says that even then the estate which has become absolute at law is meant to be, and ought to be, treated as being a security only. If, however, there is no legal right of redemption, there is no right which equity can extend. In other words, an equity of redemption can never exist unless there exists a legal right of redemption. To ascertain, therefore, whether there is an equity of redemption, the first step is to ascertain whether, according to the contract, and having regard to all the terms of the contract, there is a legal right to redemption. If there is not, then the transaction is not a mortgage for the purpose of the maxim "Once a mortgage, always a mortgage." It seems to me that the terms of the contract as to a legal right to redemption may include a condition subsequent so expressed that, if the condition is satisfied before the date for legal redemption arrives, there shall be no right of redemption at law. Thus, suppose that A. lends £1,000 to B. upon a covenant by B. for repayment with interest at 5 per cent. at the expiration of six months, with an agreement that if A. at any time within three months elects to purchase Blackacre from B. for £1,000 and interest to date then A. shall be entitled to become such purchaser and the loan and interest shall be set off against the purchase-money, but that in default of such notice A. shall be entitled to a charge on Blackacre for the loan and interest, and B. will on demand execute to him a legal mortgage with a proviso for redemption on payment of the loan and interest at the expiration of the six months. Then, suppose that A., within the three months, gives the notice. In such a case, by the terms of the bargain, there never has arisen in B., according to the stipulations of the contract, any legal right to redeem, because, before the end of the six months, the estate has by purchase become the property of A., and the debt has been extinguished. Then, suppose the transaction takes the form of an ordinary mortgage by covenant for payment at the expiration of six months, and a conveyance subject to a proviso for redemption at the end of the six months, but with a stipulation that if A. at any time within the six months elects to purchase as above he shall be entitled to do so, and the debt shall be set off against the purchase-money. I do not see that this differs from the former case. In this latter case again no right of redemption ever arises under the contract. There is nothing to which equity can add a larger right of redemption. The case seems to me to differ totally from a case in which the bargain is that if B. does not redeem at the end of six months he shall not redeem at all. In that case there is a legal right of redemption, and equity will not suffer a contract which provides that the legal right shall be exercised according to its terms or not at all. But a contract which is that in an event there shall be no right to redeem at law seems to me to be good. It is a conditional sale. It seems to me, therefore, that the proposition is well founded that if by a condition subsequent contained in the instrument, and which is to be performed at a time before the legal right of redemption arises, the lender may at his option become, and does by exercise of the option become, purchaser, so that the date for redemption at law never arrives, then there is no legal, and consequently no equitable, right of redemption. In such case the transaction is valid as a conditional sale and the doctrine of clogging the equity of redemption can have no operation. Now that, as it seems to me, is the present case. The defendant, according to the terms of the bargain, could never have redeemed adversely to the plaintiffs before 1903. In 1900 the plaintiffs availed themselves of an option by which they became in substance purchasers of half the property included in the security, upon the terms that the debt should be released. It seems to me that this is valid as a conditional sale. Under these circumstances the question of clogging the equity of redemption does not arise. What, then, is the relief to which the plaintiffs are entitled? They stand, in my judgment, in the position of purchasers who have paid their purchase-money and whose vendor refuses to convey. The effect of his refusal was not to remit the parties to the position in which they would have stood if the option had never been exercised so that the plaintiffs reverted to the position of lenders of a loan not to be paid off or called in till 1903, with rights of foreclosure and redemption to arise at that date, nor to give the plaintiffs a present right of foreclosure, nor the defendant a present right of redemption, but was to give to the plaintiffs the rights of purchasers who have paid their purchase-money and whose vendor refuses to convey. Their right is, I think, to repayment of the purchase-money and damages for breach of the contract. The purchase-money is £5,000 with interest at 5 per cent., but there must not be added to this amount six months' interest in lieu of notice or mortgagees' costs, for the right of the plaintiffs is not as mortgagees but as purchasers. The defendant delivered his defence on the 17th of May, 1900, and by paragraph 4 pleads that he bring £5,125 into court in satisfaction. All interest on the £5,000 has been paid to the 31st of December, 1899. This £5,125, therefore, was at the date of payment into court sufficient to answer the purchase-money as consisting of £5,000 and interest from the 31st of December, 1899. The plaintiffs sue for specific performance or damages. They do not now ask for specific performance, but ask for damages. They are entitled, I think, to an order for payment out of court of the £5,125 and an inquiry as to damages. The defendant is, I think, entitled to an order for reconveyances of the properties comprised in the statutory mortgage of the 4th of July, 1896, and in the second mortgage of the wharves of the 27th of June, 1898. I say nothing of the mortgage by assignment of the life policies for £3,000; that was security

for another debt—namely, the guarantee of the overdraft. The judgment, therefore, which I pronounce is a declaration that upon the 24th of February, 1900, the plaintiffs became entitled to enter into partnership with the defendant upon the terms of the agreement of the 9th of July, 1898, and that the refusal of the defendant to enter into that partnership was a breach of the agreement; an order for payment out of court to the plaintiffs of the sum of £5,125 paid into court by the defendant; an inquiry as to damages sustained by the plaintiffs by breach of the contract; an order for reconveyance by the plaintiffs to the defendant of the properties comprised in the mortgage of the 4th of July, 1896, of *The Norfolk* and the second mortgage of the 27th of June, 1898, of the wharves. It remains to deal with the costs of the action. The whole question between the parties was whether the plaintiffs were right in suing for breach of the contract of the 9th of July, 1898, or whether the defendant was right in saying that that agreement was not binding on the parties and ought to be delivered up to be cancelled. In this contest the plaintiffs have succeeded and the defendant has failed. I think the costs must follow the event and that the defendant must pay the costs of the action and counterclaim.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Rowcliffes, Rawle, & Co.*, for *Appleby*, Newcastle-on-Tyne.

Solicitors for the defendant, *Cattarns & De Vesian.*

Q. B. Div.
(Kennedy and Phillimore, JJ.) Nov. 27.

In the Matter of VERNON'S ESTATE DUTY. (*a.*)

Inland revenue—Estate duty—Interest in expectancy—Sale or mortgage—Value of property passing on death of tenant for life—Deduction—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-section* 3.

The petitioner, being then a tenant in tail in remainder, by indenture executed before the date of the Finance Act, 1894, *created, for good consideration, an annuity or clear yearly rent-charge, charged upon and to issue out of the settled property, with power to enforce payment by entry, distress, and sale. On the death of the tenant for life in* 1896, *the petitioner claimed* (1) *to deduct from the value of the property passing to him on the death the capitalized value of the annuity, on the ground that it represented the sale of an interest in expectancy, on which, by section* 21, *sub-section* 3, *of the Finance Act,* 1894, *no estate duty was payable; or* (2), *in the alternative, if the transaction was not a sale, but a mortgage, that, under the same section, estate duty was only payable on the value of the equity of redemption.*

Held, that the transaction was not a sale, but a mortgage; and that estate duty was payable by the petitioner on the whole value of the settled property, without any deduction in respect of the value of the annuity.

Petition of Bertie Wentworth Vernon on appeal from the Commissioners of Inland Revenue under section 10, sub-section 1, of the Finance Act, 1894, pursuant to rule 3 of the Rules of the Supreme Court under that section.

1. Levenson Vernon, formerly of Stoke Park, in the County of Northampton, duly made and executed his will on the 9th of December, 1826, and the will was duly proved on the 18th of April, 1832.

2. Sir Henry Frederick Cooke duly made and executed his will on the 26th of July, 1834, and the will was proved on the 3rd of May, 1837.

3. From the 27th day of September, 1889, to the 25th day of November, 1896, Colonel George Augustus Vernon was the tenant for life of the property comprised in the said wills, and the petitioner was the owner of the whole interest in expectancy in the said properties.

4. (i.) By an indenture dated the 15th of October, 1877, and made between the petitioner of the one part, and John Pike and Alexander Howden of the other part, the petitioner sold and granted to John Pike and Alexander Howden an annuity or clear yearly rent-charge of £684 charged upon and to issue out of the property comprised in the said wills and in the accounts hereinafter mentioned, with power to the purchasers to enforce payment of such annuity or yearly rent-charge by entry, distress, and sale.

(ii.) By an indenture dated the 30th of June, 1880, and made between the petitioner of the one part, and John Pike and Alexander Howden of the other part, the petitioner sold and granted to John Pike and Alexander Howden an annuity or clear yearly rent-charge of £568 charged upon and to issue out of the said property in like manner and with like powers as aforesaid.

(iii.) By an indenture dated the 21st of October, 1887, and made between the petitioner of the one part, and the National Life Assurance Society of the other part, in consideration of an annuity of £800 to be paid to the petitioner during the joint lives of himself and the survivor of William Frederick Vernon, the first life tenant of the said properties comprised in the wills aforesaid and the said George Augustus Vernon, the petitioner charged and secured on his interest in expectancy in the said properties a sum of £10,555 to be paid upon the death without issue of the said William Frederick Vernon or George Augustus Vernon, whichever event should first happen.

(iv.) By indentures dated the 30th of October, 1890, and the 9th of May, 1892, respectively, and made between the petitioner of the first part, Isabella Eliza Vernon of the second part, and the National Life Assurance Society of the third part, the petitioner mortgaged his interest in expectancy in the said properties for sums of £52,600 and £3,000 respectively.

The aforesaid sales and mortgages were made *bonâ fide* and for full consideration in money or money's worth upon the said dates respectively.

5. Since the death of Colonel George Augustus Vernon, which happened on the 26th of November, 1896, the trustees of the said wills as to part of the property comprised therein, and as to the remainder the petitioner, as the person to whom the properties comprised in the aforesaid wills passed and as accountable for the estate duty, delivered to the Commissioners of Inland Revenue accounts and affidavits in respect thereof and the aggregate value of the said properties was shown and accepted by the commissioners at £86,069 0s. 8d. From that sum for the purpose of assessing the principal value of the property passing on the death of the said George Augustus Vernon within the meaning of the said Act, and upon which estate duty was payable by the petitioner, the petitioner claimed to deduct the following sums—viz.:

(1) £8,827, the agreed capitalized value of the annuity or clear yearly rent-charge referred to in paragraph 4 (i.).

(2) £7,023, the agreed capitalized value of the annuity or clear yearly rent-charge referred to in paragraph 4 (ii.).

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

(3) The sums of £10,555 and £55,600, the amounts secured by the mortgages referred to in paragraph 4 (iii.) and (iv.).

The Commissioners of Inland Revenue having disallowed the said deductions, and the claim of the petitioner that in the circumstances aforesaid the principal value of the property in respect of which estate duty is payable by him is the value of the equity of redemption in such property, the petitioner prayed that the said deductions might be allowed on the grounds:

(1) That each of the said sums of £8,827 and £7,023 represents the sale of an interest in expectancy made *bonâ fide* and for full consideration as aforesaid before the commencement of the said Act, and that by reason of section 1 and section 21, sub-section 3, no estate duty is payable in respect of such interests in expectancy so sold as aforesaid.

(2) That in the alternative the said sums of £8,827 and £7,023 represent, and the sums £10,555 and £55,600 are, sums charged by way of mortgage upon an interest in expectancy before the commencement of the Act, *bonâ fide* and for full consideration, and by reason of section 1 and section 21, sub-section 3, such several sums should be deducted in ascertaining the principal value of property passing on the death of the said George Augustus Vernon within the meaning of the Act and that estate duty is payable under the said Act by the petitioner in respect only of the value of the equity of redemption in the said property.

(3) That by reason of section 1 and section 21, sub-section 3, of the said Act the benefit arising or accruing to the petitioner after the commencement and within the meaning of the said Act, section 2 (1) (*b*), on the cesser of the interest of the said George Augustus Vernon in the property extended only to the value of the equity of redemption of the property after making the aggregate deductions aforesaid from the principal value, and that in so far as the principal of the property has been diminished by the said respective sums of £8,827, £7,023, £10,555, and £55,600, the petitioner has not derived, nor has anyone derived benefit therefrom within the meaning of the Act by reason of the death of George Augustus Vernon.

The petitioner prayed for a declaration that for the purpose of ascertaining the principal value of the property on which estate duty was payable by him he was entitled to deduct the sums amounting together to £82,000 from the sum of £86,069 0s. 8d., and was only liable to pay estate duty on the balance after such deductions have been made, or in any event that estate duty was only payable, and the property charged therewith, to the extent of £4,069.

It was admitted by the petitioner that the Stoke Park estate was part of the property comprised in the deeds of the 15th of October, 1877, and the 30th of June, 1880, creating the annuities, and stood charged with the annuities at the death of George Augustus Vernon. The petitioner further admitted that by deed of the 20th of February, 1890, the deceased released his life interest in the Stoke Park estate to the petitioner, and that estate duty had not been paid or claimed by the commissioners in respect of Stoke Park estate as being deemed to pass on the death of the deceased. The principal value of the Stoke Park estate at the death of the deceased was £12,521.

The Finance Act, 1894: Section 1.—In the case of every person dying after the commencement of this part of the Act there shall, save as hereinafter expressly provided, be levied and paid upon the principal value, ascertained as hereinafter provided, of all property real and personal, settled or not settled, which passes on the death of such person a duty called "estate duty." . . .

Section 2 (1).—Property passing on the death of the deceased shall be deemed to include the following—that is to say: (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest. . . .

Section 21 (3).—Where an interest in expectancy in any property has, before the commencement of this part of this Act, been *bonâ fide* sold or mortgaged for full consideration in money or money's worth, then no other duty on such property shall be payable by the purchaser or the mortgagee when the interest falls into possession, than would have been payable if this Act had not been passed; and in the case of a mortgage any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee.

Haldane, Q.C., and *Germaine*, for the petitioner.

Sir R. Finlay, A.G., *Sir E. Carson, S.G.*, and *Vaughan Hawkins*, for the Crown.

KENNEDY, J.—We are both of opinion in this case that our judgment must be for the Crown and against the petitioner, and I will shortly state my reasons for coming to that conclusion.

The material facts are few, and are very clearly set out in the petition. The petitioner, Bertie Wentworth Vernon, had an interest after the interest of the tenant for life, Colonel George Augustus Vernon, in certain properties comprised in certain wills of an early date in the present century, and he was the owner of the whole interest in expectancy in those properties subject to the life interest. While his interest remained in expectancy, he, in effect, took the benefit of that expectancy and forestalled the receipt of moneys under it in the manner stated in the fourth paragraph of the petition.

By indentures dated the 15th of October, 1877, and the 3rd of June, 1880, he purported to make a grant to trustees for certain insurance companies of an annuity or clear yearly rent-charge of £684 charged upon the property comprised in the wills, and a further annuity or clear yearly rent-charge of £568, also charged upon the property comprised in the wills for the consideration therein appearing. Further, on the 21st of October, 1887, by deed he charged and secured upon his interest in expectancy in the properties the sum of £10,555 in consideration of an annuity granted to him of £800, to be paid during certain joint lives; and, lastly, on the 30th of October, 1890, and on the 9th of May, 1892, he mortgaged his interest in expectancy to the National Life Insurance Society for £52,600 and £3,000. The tenant for life died, and the interest of the petitioner became an interest in possession. Thereupon a question arose between him and the Inland Revenue authorities as to what duty he had to pay and upon what property he had to pay it. The value of these properties when the reversion fell in is set out in paragraph 5 of the petition. The petitioner, in substance, is seeking a declaration that for the purpose of ascertaining the principal value of the property on which the estate duty is payable by him he is entitled to deduct altogether from the total value, which is £86,069 0s. 8d., the sum of £82,000, being, according to him, moneys which do not constitute property in his hands liable to estate duty and passing upon the death within the meaning of the Act of 1894.

It is clearly settled, and practically is not disputed here, that, as laid down by Lord Watson in *Earl Cowley* v. *Commissioners of Inland Revenue*, 47

W. R. 525, [1899] A. C. 198, the fact that the petitioner had by his own act anticipated his interest in the reversion by dealing with it beforehand and receiving these moneys, is no reason in itself for the property not being chargeable with estate duty in respect of that property. It is sought, however, in this case to bring the petitioner within what is claimed as a benefit to which he is entitled under section 21, sub-section 3—that is to say, to treat him as a person who, in regard to the indentures of the 15th of October, 1877, and the 3rd of June, 1880, was a person who had actually sold, not mortgaged, his interests; and, taking all the dealings together, to the extent of the amounts which were so disposed of, it is contended that under section 21, sub-section 3, the petitioner is liable only to the duty in respect of that which remains after all has been satisfied out of his reversion, according to the contracts which he had made; in other words, that under section 21, sub-section 3, the only property in respect of which he is liable to be called upon to pay duty is the equity of redemption in this property. With regard to the point that the indentures of 1877 and 1880 are sales and not mortgages, I am of opinion that the case of the petitioner fails; I do not think that those transactions can be treated as sales in which the persons with whom the petitioner was thereby contracting by deed became purchasers. I think that they were of the nature of mortgages; certainly that they were not sales which created the relation of vendor and purchaser. Looking at the section itself, it appears to me that, read altogether and looking at the effect of the Act, it is a section for the protection of persons who have entered into relations with the owners of property for full consideration, but that it was not intended to afford protection to the owners of the property, who as mortgagors or settlors had dealt with these persons. It was considered a hardship that, when a bargain had been made for full consideration in money or money's worth, the increase of duty payable under the various provisions of this Act should fall upon such persons when they came into possession of the property in expectancy which they had bought or of which they had become mortgagees. The section is, in my opinion, to be read simply as relieving them, and not as affecting the *quantum* of property upon which the mortgagor of the expectancy in the property is, upon the property passing on the death of the tenant for life, liable to pay. The section runs thus: "Where an interest in expectancy in any property has, before the commencement of this part of this Act, been *bonâ fide* sold or mortgaged for full consideration in money's worth, then no other duty on such property shall be payable by the purchaser or mortgagee when the interest falls into possession than would have been payable if this Act had not been passed." Only the old duty in amount is to be payable. Then it proceeds: "And in the case of a mortgage, any higher duty payable by the mortgagor shall rank as a charge subsequent to that of the mortgagee." The section is not dealing there with the relief of the mortgagor, making him liable to duty only upon an equity of redemption; it does not affect or touch that interest at all. What it does touch is the interest of the mortgagee, by not making him subject, as he would have been but for the proviso, to a charge upon the subject-matter of the security for the higher duty which is imposed by the Act. It appears to me, therefore, that the petitioner does not bring himself within sub-section 3. The principle upon which he is liable for the whole seems to me to be clearly stated by Lord Watson in *Lord Cowley's case*, which has been referred to, and it appears to me that the claim fails. It is said—and I myself share with my brother the feeling of the importance of reading the section with a view to such possible contingency—that it may be possible in this case that the result of our decision will be that the mortgagor may actually have to pay in duty a sum which will exceed anything he can get out of the actual benefit derived by him, and I certainly think that where anything approaching a possible hardship arising from legislation of a subsequent date is shown one ought to scrutinize very carefully the Act to see whether it does not also contain something which would prevent a hardship of that kind, or at any rate a loss of that kind, falling upon the mortgagor. I cannot find any such provision in the Act, and that being so, speaking for myself, the existence of a hardship would not prevent me from holding that on the true construction of the section the petitioner's case fails. It is quite true, as the Solicitor-General said, that owing to subsequent legislation there may occur hardships, if they can be so called, losses, in fact, falling upon persons who are not specially provided for by way of compensation, and who could not foresee legislation which comes upon them subsequently, and which, if they could have foreseen it, would have affected the terms of prior bargains; but at the same time one would be reluctant to suppose that the Legislature had not dealt with any reasonable case of hardship, and one would anxiously seek to find in the terms of the Act of Parliament some provision that would prevent its arising. In my opinion it is impossible fairly so to find any such provision in this section, and, therefore, whatever the result may be, I feel bound to come to the conclusion which I have stated. I will only add that, looking to the fact that the Stoke Park property was transferred to this petitioner in such a way that, in accordance with the decided cases it cannot be treated as property that passed to him on the death, and that that property is one of those properties upon which the annuities are chargeable, it is possible that no such hardship as was suggested will occur. In my opinion this petition fails.

PHILLIMORE, J.—After the elucidation which the facts and the law in this case have received in the argument at the bar, I am satisfied that our judgment should be for the Crown. The case of the petitioner is rested on section 21, sub-section 3, of the Finance Act, 1894. In the first place it is said that the particular transactions by which he anticipated his reversionary interest were sales by him and purchases by the recipients. I am quite clear that they were not so. I think they are mortgages, I am quite clear they are not sales. If they are not sales they are either mortgages or they do not come under the provision of section 21 at all. Assuming, as perhaps would be rather the more favourable view for the petitioner, that they are mortgages, then it seems to me obvious that the last clause of sub-section 3 does not help him. That clause does not deal with any personal payment by the mortgagor; it does not protect the mortgagor at all, it simply protects the mortgagee; it does not impose a duty upon the mortgagor, nor does it take it away from the mortgagor; but it assumes that the duty is already payable. Therefore, but for one point which I am going to mention, the case might be disposed of in the very shortest possible manner. Mortgagors are not specially protected, only vendors are; and the petitioner is either a mortgagor or he is not within the section at all. My difficulty arises upon a possible state of things pointed out by Mr. Haldane, and it seems to me it must be so, both under the Finance Act, 1894, and still more under the Finance Act, 1900. Cases may arise where, owing to all the

property being liable for duty and the rate of duty being very high, the rate upon the mortgaged property which the mortgagor expected would have to bear the duty would be more than the balance of the equity of redemption; and it has been suggested on the part of the petitioner as a grievance, and it has been boldly accepted, at any rate by the Solicitor-General, on behalf of the Crown, that nevertheless a mortgagor in that case might have to be personally accountable. Well, I presume that the personal liability of a mortgagor in cases like this rests upon section 8, sub-section 4; at any rate no other clause fixing the liability has been suggested and I have not been able to find one. He is only liable to the extent to which any property passes a beneficial interest in possession; it may be that in these circumstances the right way to put the case would be to say that nothing passed to him, that only a *damnosa hereditas* passed to him and no beneficial interest whatever. At present we have not heard that matter thoroughly argued. I cannot but think that it never was the intention of the statute, and it is not to be found within the statute, that a man who really receives nothing shall have what otherwise would have been a beneficial estate turned into a debt upon the death of his predecessor under the settlement. If that be the case with regard to instruments by which he anticipates his reversion with knowledge of the Finance Act, and I am inclined to think it would be so even with regard to such instruments, I am almost certain that if any attempt were made to make a man a debtor to the Crown in respect of transactions prudently and reasonably executed before the passing of the Finance Act, and to say that though at the time he had the reasonable expectation of being able to pay all his debts to the Crown and satisfy the incumbrances which he has created, he is to be made a debtor to the Crown by reason of a statute passed retrospectively at a time when he cannot avoid his previous transactions, I feel satisfied if the Crown ever attempts to push that contention, a way would be found of showing that the Crown must be mistaken. However, in this case I go a good deal further on the facts than my learned brother. If the facts were as my learned brother has left them I should still be in difficulty, because I think that if sub-section 4 of section 8 applies in the way I have suggested, it is not for the taxpayer to show that he is not beneficially interested, but for the Crown to show that he is; but I think upon these documents the Crown does show that there is a beneficial interest left to the taxpayer. It is true that only £4,064 remains of this particular estate, and it is true that at the rate of 6 per cent., which we are told is the rate of duty on the gross property, mortgaged and unmortgaged, of this estate, the duty would amount to £5,164 or £1,100 more than the residue. But it appears upon the deeds and the admissions that two annuities, the capitalized value of which is £15,000 odd, are also charged upon the Stoke estate, which, having been surrendered in the lifetime of the tenant for life, is not subject to duty; and that the Stoke Park estate is worth some such figure as £12,000; thus, putting £2,000 or £3,000 only of these securities upon the Stoke Park estate, as might very well be done, there is a beneficial residue left to the mortgagor, and it is upon that ground, and upon that ground only, as at present advised, that I find judgment for the Crown.

Judgment for the Crown.

Solicitors for the petitioner, *Ford & Co.*

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Romer, L.JJ.) — Dec. 19.

ATTORNEY-GENERAL *v.* WILSON. (*a.*)

Practice—Transfer—Crown—Prerogative of—Action by Attorney-General—Relator—Choice of tribunal.

The fiat of the Attorney-General merely authorizes the relator to proceed with a matter involving public interests, but does not clothe him with any prerogative of the Crown. Nor is it the practice of the Attorney-General, on issuing his fiat, to exercise any discretion as to the tribunal before which the action should be tried.

The court has, therefore, the same discretion in dealing with an application for change of tribunal as if the tribunal had been elected by the relator suing as plaintiff.

Appeal from Kekewich, J.

The action was brought in the Chancery Division by the Attorney-General at the relation of the Corporation of Sunderland and by the corporation as co-plaintiffs to obtain a mandatory injunction against the defendants to restore the surface of a highway.

The defendants applied to have the action transferred to the Queen's Bench for trial at the Durham Assizes without a jury, on the ground that it was desirable there should be a view of the *locus in quo.*

Kekewich, J., though he considered that on the balance of convenience the action ought to be transferred, felt himself bound to dismiss the application on the ground that the Attorney-General having deliberately in the exercise of his discretion chosen to commence the action in the Chancery Division, had thereby exercised a prerogative of the Crown, with which the court could not interfere.

The defendants appealed.

On the opening of the appeal, Renshaw, Q.C., stated on behalf of the defendants that he was authorized by the Attorney-General to say that when he granted his fiat he had exercised no discretion as to the division in which the action should be tried.

It was not the practice of the Attorney-General on granting his fiat to look into the case so as to exercise any such discretion, and it would be a burden on him if he were expected to do so.

Renshaw, Q.C., and *Shortt*, for the appellants, referred to *Jenkins* v. *Bushby*, 39 W. R. 321, [1891] 1 Ch. 484; *Attorney-General* v. *Vivian*, 1 Russ. 226; *President of Magdalen College, Oxford* v. *Attorney-General*, 5 W. R. 716; 6 H. L. Cas. 189; 28 & 29 Vict. c. 104, s. 2.

A. Glen (*Warrington, Q.C.*, with him), *contrà*, referred to *Attorney-General* v. *Cockermouth Local Board*, 22 W. R. 619, 18 Eq. 172; *Attorney-General* v. *Barker*, 20 W. R. 509, L. R. 7 Ex. 177; *Attorney-General* v. *Constable*, 27 W. R. 661, 4 Ex. D. 172; *Dixon* v. *Farrer*, 35 W. R. 95, 17 Q. B. D. 658.

Renshaw, Q.C., was not called on to reply.

RIGBY, L.J.—In this case Kekewich, J., thought that, on the merits properly so called, he would have sent the case for trial to the Queen's Bench, without deciding whether it should be tried with or without a jury, leaving all that to be determined in the Queen's Bench Division. But he felt himself bound to refuse the application for a transfer because he supposed that her Majesty's Attorney had elected the Chancery Division as the tribunal in which he chose to have the

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

case tried, and that in doing so he was exercising a prerogative of the Crown, with which the court had no right to interfere. Now we have it from the Attorney-General that he never intended to exercise any such prerogative, and that he does not wish to interfere with the discretion of the court in any way. But even without that information I should have arrived at the same conclusion, for from all I know of the practice of the Attorney-General, it has never been the practice of the Attorney-General to exercise in that manner the prerogative of the Crown, assuming him to have it. All that the Attorney-General does is to authorize by his fiat the relators to proceed with a matter involving public interests. He does not clothe them with the prerogative of the Crown. The relators take the steps they think proper, but they take them with no greater sanction than if they were acting as plaintiffs. I come, therefore, to the conclusion that the Attorney-General has not exercised his election, and that therefore the question of election by him is altogether out of the case. That seems to me to put an end to the question without going into questions which may be of importance as to what would have taken place if he had elected. I think we are bound to treat the case as if it were only an election by the plaintiffs, who are also relators, to bring this action where it has been brought. That being so, I see no reason to differ from the opinion which I understand to be held by Kekewich, J., on the merits of the case, and I think we ought now to make the order for the transfer which he would have made if he had not felt himself hampered by the prerogative of the Crown.

VAUGHAN WILLIAMS, L.J.—I agree. Assuming that the Attorney-General was an actor in this case, and assuming that he has chosen his court—which, I take it, the Attorney-General in a case in which the Crown was interested would have a right to do—it seems to me plain from what we now know that if there was any right in the Attorney-General to object to the transfer of these proceedings he has waived that right.

ROMER, L.J.—I agree. I have nothing to add.

Solicitors, *Crossman, Prichard, Crossman, & Black*, for *Kidson, McKenzies, & Kidson*, Sunderland; *Johnson, Weatherall, & Sturt*, for *F. M. Bewey*, Sunderland.

Appeal.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) Nov. 16.

HOUGHTON *v.* SUTTON HEATH AND LEA GREEN COLLIERIES CO. (*a.*)

Master and servant—Employer's liability—Accident—Compensation—"Earnings"—Deduction from wages—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., cl.* 1 (a).

A workman was employed as a miner, and, in the course of such employment, was killed by an accident. In accordance with the practice of the mine, a sum of sixpence was always deducted from his weekly wages to defray the cost of the oil for a lamp used by him at his work, the oil being provided by the employers.

On an application for compensation under the Workmen's Compensation Act, 1897, *the county court judge decided that the sixpence a week for oil could not be deducted in ascertaining the weekly "earnings" of the deceased, and that compensation must be based upon the full amount of the wages.*

Held, on appeal, that the principle on which the county court judge based his award was correct.

This was an appeal by the defendants from an appeal of the judge of the St. Helens and Widnes County Court in proceedings for compensation under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who met his death owing to an accident arising out of and in the course of his employment by the defendants on or about a mine.

At the time of the accident the deceased's wages were £1 10s. 11d. a week. It was the rule of the employers to deduct a sum of sixpence from the workmen's weekly wages in order to defray the cost of the oil which they supplied to the men for the lamps with which they worked. The workmen, therefore, were actually paid in cash £1 10s. 5d. a week, and not £1 10s. 11d.

The question arose, What were the weekly "earnings" of the deceased?

The defendants contended that they were the lesser sum.

The learned county court judge held that the sixpence a week for oil could not be deducted in ascertaining the weekly "earnings" of the deceased, and that compensation must be based upon the sum of £1 10s. 11d.

From this decision the defendants now appealed.

Ruegg, Q.C. (*S. H. Leonard* with him), for the appellants.—The county court judge was wrong in holding that weekly earnings means the full nominal amount of the wages. A workman's earnings are what he actually receives; they are the balance of gain over expenditure and must be distinguished from "wages." The sixpence deduction for the oil was a necessary condition to the workman's receiving the amount he earned.

Counsel cited *Noel* v. *Redruth Foundry Co*, 44 W. R. 407, [1896] 1 Q. B. 453.

Montague Lush, for the respondent.—The question is, what were the earnings of the deceased. In each case it is a question of fact. Earnings are really the same as wages In the present case oil was bought by the workmen from the employer as a matter of convenience. It would have been just the same if they bought it at a shop. Earnings are not to be ascertained by deducting from wages the cost of what the workman has to spend in order to earn his wages. Moreover this deduction for the oil was an illegal deduction within the Truck Act, 1896 (59 & 60 Vict. c. 44), s. 3.

Ruegg, Q.C., replied.

A. L. SMITH, M.R.—In this case I cannot say the decision of the county court judge was wrong, though there is much to be said on both sides. The point is a small one, and is this: The deceased was a miner, and at the date of the accident was receiving £1 10s. 11d. per week as wages; that was the amount to which he was entitled. In order to do his work he had to supply himself with lamp oil. Are his earnings any the less *quoad* what he receives from his employers because he has to meet a certain expense in order to earn the £1 10s. 11d.? I think that the county court judge was right in saying that that expense could not be deducted from his wages in ascertaining his earnings. His wages or earnings were not the less because of this deduction. If we were to say that this sixpence a week reduced the weekly earnings by that amount, I do not see where we could draw a line, and employers might whittle away the weekly earnings of the workmen by deductions from their wages for all sorts of necessaries supplied by them. I think, therefore, that we cannot over-

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

rule the decision of the county court judge, and that this appeal fails and must be dismissed.

COLLINS, L.J.—I am of the same opinion. I have not been able to elicit from counsel for the appellants any principle which, while excluding the cost of the workman's tools and general equipment for work, would include as a matter to be deducted in ascertaining earnings the cost of the oil for his lamp. The appellants do not contend that deductions should be made from the wages for the expense to which the workman is put for things necessary to enable him to do his work, such as the cost of food, clothes, and getting to and from his work. On what principle can we make a distinction between the oil which produces the light by which the miner is enabled to see the coal on which he is working and the tool with which he is cutting that coal? I fail to see on what principle the cost of the one can be deducted but not the cost of the other. The matter must be looked at from the employers' point of view as well as from that of the workman. The employer pays the whole amount in one way or another, and I think that should be taken into consideration. I think, therefore, that the county court judge was right in taking the full amount of the wages as the basis of the award. I agree, therefore, that this appeal must be dismissed.

STIRLING, L.J.—I also agree that we ought not to overrule the decision of the county court judge. The question before us arises as to a deduction of sixpence a week made in respect of oil used by a workman to enable him to see to do his work. There was a bargain between the employers and the deceased that the latter should receive £1 10s. 11d. a week for wages, he providing the necessary oil for the lamp used in his work, in the same way as a workman provides the necessary tools or clothes. I do not find any evidence in the case to show that the deceased could not, if he chose, buy the oil where he pleased. If he had bought it elsewhere, and not from his employers, it could hardly have been contended that the cost thereof ought to be deducted from his wages in arriving at his earnings. If, as a matter of convenience, he bought the oil of his employers, I cannot see any more reason why the cost should be deducted.

Appeal dismissed.

Solicitors for the appellants, *W. Norton Ellen*, for *Edwin Peace*, Liverpool.

Solicitors for the respondent, *Smiles & Litchfield*, for *J. Massey*, St. Helens.

From Chan. Div. (Lord Alverstone, M.R., and Rigby and Collins, L.JJ.) — July 12; Aug. 3, 1900.

In re GRAINGER.
DAWSON *v.* HIGGINS. (*a*.)

Will—Construction—Specific legacy—Charge of legacies—Undisposed of residue—Exoneration.

Where a testator has bequeathed a specific fund charged with pecuniary legacies, and has made no general residuary bequest, the legatee of the residue of the specific fund is not entitled to have the undisposed of general residuary estate resorted to for payment of the said pecuniary legacies, which, in the circumstances, must be treated as specific legacies.

The testator, Monsignor John Grainger, by his will dated the 31st of May, 1895, after giving a number of general pecuniary legacies, gave and bequeathed "all the residue and remainder of the sum of £9,187 lent on mortgage to Sir John Lawson . . . and of the sum of £4,000 lent on mortgage to Mrs. Alicia Kirk . . . after payment of my just debts and funeral expenses, and the expense of proving this my will," to certain canons regular of the Lateran.

At the date of the will the testator's property consisted only of the two mortgage debts, which were just sufficient for the payment of the debts, legacies, and funeral expenses. Subsequently the testator became possessed of considerable personal estate, but as there was no gift of residue this was undisposed of.

The Court of Appeal (48 W. R. 673, where the facts of the case are fully stated) held that the general pecuniary legacies were payable out of the mortgage funds, and that there was an intestacy with respect to the residuary property which the testator had at the date of his death.

By leave of the court the appeal was restored to the paper for further argument upon the question whether the canons were entitled to throw upon the undisposed of personalty any part of the pecuniary legacies satisfied out of the mortgage debts bequeathed to the canons.

Jenkins, Q.C., and *W. M. Cann*, for the canons.—These legacies should be paid first out of undisposed of personalty. If that does not suffice, recourse must be had to the mortgage debts, but it is submitted that exoneration by the testator of his general personal estate does not operate in favour of persons who do not take under the will: *Holford* v. *Wood*, 4 Ves. 76; *Howse* v. *Chapman*, 4 Ves. 542; *Hewett* v. *Snare*, 1 De G. & Sm. 333; *Newbegin* v. *Bell*, 23 Beav. 386, 6 W. R. Dig. 3; *Choat* v. *Yeats*, 1 Jac. & W. 102.

Theobald, Q.C., and *J. Fischer Williams*.—If a particular fund is charged with debts that fund must be applied for payment of debts before the residue, where there is a residuary gift. If the residuary gift lapses the residue becomes the primary fund for payment of debts, because the oneration was only for the purposes of the will, and the purposes having failed the oneration fails also. But if a particular fund is charged with debts and there is no disposition of residue, the testator must be taken to have declared his intention of not disposing of the residue, but as he has directed his debts to be paid out of a particular fund, the oneration must be intended to benefit his next-of-kin, and effect should be given to his intention: *Kilford* v. *Blaney*, 34 W. R. 109, 31 Ch. D. 56; *Milnes* v. *Slater*, 8 Ves. 295; *Dacre* v. *Patrickson*, 8 W. R. 647.

Ingpen, Q.C., for the plaintiff.

Jenkins, Q.C., replied.

Cur. adv. vult.

Aug. 3.—RIGBY, L.J., read the judgment of the court (Lord ALVERSTONE, M.R., and RIGBY and COLLINS, L.JJ.).—The order of the court on the former occasion treats the words "all the residue and remainder" in the bequest to the canons as indicating that the pecuniary legacies preceding are to be paid out of the mortgage debts before the canons take anything. It has not yet been in terms decided whether the legacies are specific or demonstrative. Since, however, the construction adopted treats the testator as directing, in the case of each legacy, the payment of money (the amount or value of the legacy) out of money (the mortgage debts), the legacies should be deemed to be specific. The result would be that they would be subject to abatement or ademption to the extent, if any, that the amount of the mortgage debts

(*a*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

remaining unpaid might turn out insufficient to provide for them in full, but would even in that case have no other fund to resort to.

It has been formally admitted on the part of the next-of-kin that, if there were any debts paid out of that portion of the specific assets which would otherwise have gone to the canons, the latter would be entitled to be recouped the amount paid out of the personalty undisposed, and we have not to deal with that question.

But it is contended that the canons are entitled to throw upon the undisposed of personalty any part of the legacies satisfied out of the mortgage debts. There is no foundation for this claim. It has been attempted to support it by cases in which there has been a charge upon, or a trust to sell real estate or specific personal estate for payment of debts or legacies under circumstances which make the charge or trust auxiliary only to the general personal estate treated as the primary fund. This can certainly be done in general where debts are concerned, and under very special directions where legacies are concerned. But none of such cases properly interpreted have any application here. Assume, for instance, that the money value of the legacies amount to four-fifths of the mortgage debts, then four-fifths are given to the legatees. There will be one-fifth, and no more in any case, to go, after payment thereout of debts, to the canons. By what process of reasoning they can convert a legacy of one-fifth only into a larger legacy for any purpose of recoupment or any other purpose it is impossible to say. The existence of undisposed of personalty is altogether insufficient and indeed irrelevant. It is possible that the testator might have given them more if he had had fewer legacies to provide for, but he has not done so. The application of the canons must be dismissed, and they must pay the costs of the application.

Solicitors, *Collyer & Davis*; *Withalls & Belton*; *Blount, Lynch, & Petre.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Nov. 6, 16.

JOHNSON *v.* BRAGGE. (*a.*)

Frauds, Statute of — Marriage settlement — Mistake— Parol evidence—Non-execution of power—Rectification —29 Car. 2, c. 3, s. 4.

In an action for the rectification of a marriage settlement, parol evidence of a mistake made in drawing up the settlement was offered.

Held, that the Statute of Frauds was no valid defence, as such an action was not one seeking "to charge any person upon any agreement made upon consideration of marriage" within section 4 of the statute.

The plaintiff in this action was Eliza Madeline Florence Johnson, widow, and formerly the wife of John Walter Hawkesworth.

The defendants were the trustees of the plaintiff's marriage settlement, and the children of that marriage or persons claiming under them.

In July, 1865, letters passed between J. W. Hawkesworth and his solicitor, William Rowcliffe, relative to the settlement of the former's property upon his intended wife, the present plaintiff.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-at-Law.

The marriage took place on the 7th of August, 1865, and on the 5th of August, 1865, articles of agreement for a marriage settlement were made. The property of the husband was therein stated to consist of two sums, not exceeding £4,000 and £7,000 respectively, to which he was entitled under his grandfather's will.

The trusts were for the husband for life, then for the wife for life, and subject thereto for the children as therein mentioned, with the usual powers of appointment.

Under his grandfather's will the husband was entitled to the sum of £4,000 (and other contingent interests), and under a settlement made by his parents in December, 1864, he had power to appoint the income of certain trust funds (which amounted to about £7,000) to his wife for life, and the principal sum to his children.

On the marriage of a daughter in 1891, the husband and wife appointed one-eighth part of sums comprised in the articles to her.

In January, 1898, the husband and wife appointed trustees of the settlement, and further appointed, after the death of the survivor of them, in favour of the other seven children of the marriage.

On the death of the husband in January, 1898, the question of the construction of the settlement arose, and it was held by North, J., in 1899, that the articles did not operate as an exercise of the power of appointment in favour of the plaintiff contained in the settlement of December, 1864, nor affect the funds settled at that time.

In the present action the plaintiff asked for the rectification of the settlement of August, 1865, and so far as necessary of the deed of the 15th of January, 1898, by the insertion of words the effect of which would be to give the plaintiff a life interest in the £7,000.

Vernon Smith, Q.C., and *Gatey*, for the plaintiff.—The Statute of Frauds did not apply, as it was not sought "to charge any person upon any agreement made upon consideration of marriage," within section 4. An accidental slip had been made and parol evidence was admissible. The court will assist an imperfect or defective execution of a power: *Shannon* v. *Bradstreet*, 1 Sch. & Lef. 52, at pp. 60, 63.

Eve, Q.C., and *R. J. Parker*, for some of the defendants, argued that the Statute of Frauds was a good defence. There was no part performance: *Olley* v. *Fisher*, 35 W. R. 301, 34 Ch. D. 367. Relief cannot be given against a non-execution as distinct from an imperfect execution of the power, and particularly after the death of the donee of the power.

Counsel referred to *Tollet* v. *Tollet*, 2 P. Wms. 489; Farwell on Powers (2nd ed.), pp. 333, 335, 336; *Coffin* v. *Cooper*, 13 W. R. 571, 2 Dr. & Sm. 365; *Palmer* v. *Locke*, 28 W. R. 926, 15 Ch. D. 294.

Edward Ford and *Curtis Price*, for other defendants.

COZENS-HARDY, J., said that he was satisfied a mistake had been made, as, on the evidence, it was clear that all the parties to the settlement of 1864 intended that it should operate in favour of the intended wife, and until recently believed that the power of appointment had been exercised. Parol evidence had been held admissible in an action to rectify a mistake in a marriage settlement for upwards of a century and a-half, notwithstanding the Statute of Frauds. The action was not one seeking to charge any person upon any agreement made upon consideration of marriage within the meaning of section 4. As for the other objection, that the court would not assist a non-execution of the power, he held that the deed of August, 1865, being under seal, was a valid

appointment of the funds held to be comprised therein, and no further deed would be required.

Therefore he would make a declaration rectifying the settlement of August, 1865, by adding the words necessary to execute the power of appointment over the sum of £7,000.

Solicitors, *Skewes-Cox, Nash, & Co.*, for the plaintiff; *Nye, Moreton, & Clowes*, for *J. K. Nye & Treacher*, Brighton; *Arkcoll, Cockell, & Chadwick*, for the defendants.

Chan. Div.
Cozens-Hardy, J. } July 6, 1900.

SACCHARIN CORPORATION (LIMITED) v. REITMEYER & CO. (a.)

Patent — Infringement — "Exercise" — Delivery of patented article abroad.

Where defendants entered into contracts in the United Kingdom for the delivery by them abroad to an English company of saccharin made abroad, by means of a process patented in England by the plaintiffs, and where such saccharin was delivered at foreign ports,

Held, that the defendants were not exercising the invention so as to cause the infringement of the patent by such delivery, and that the knowledge of the defendants as to the ultimate destination of the saccharin was immaterial.

This was an action brought by the Saccharin Corporation (Limited) against Messrs. R. Reitmeyer & Co. for the infringement of a patent (No. 25,273 of 1894), and also of other patents for the manufacture of a substance called toluene-sulpho-chlorides.

The patent was in the usual form giving the sole authority to the patentee to "make, use, exercise, and vend" the substance within the United Kingdom.

The defendants made an agreement with the Chemicals and Drug Co. (Limited), of Manchester, to deliver at Hamburg, saccharin, some of which was proved on evidence to have been manufactured by means of the plaintiffs' patent.

The plaintiffs claimed damages for the infringement of their patent.

Moulton, Q.C., Cripps, Q.C., J. G. Graham, and *Colefax*, for plaintiffs.—The question is whether Reitmeyer is liable for the sale; he has tried to throw the formal infringement on the Chemical and Drugs Co. (Limited), but he "exercised" the plaintiffs' invention: *Grainger* v. *Gough*, 44 W. R. 561 [1896], A. C. 325.

Lord Robert Cecil, Q.C., and *A. J. Walter*, for the defendant.—No infringement of a British patent is possible by an act outside the United Kingdom. Further, the patent was not for the manufacture of saccharin, but for that of toluene-sulpho-chloride, which was only made use of in the manufacture of saccharin. This case was to be distinguished from *Elmslie* v. *Boursier*. 18 W. R. 665, L. R. 9 Eq. 217, and *Von Heyden* v. *Neustadt*, 28 W. R. 496, 14 Ch. D. 230.

Moulton, Q.C., replied.

COZENS-HARDY, J.—The plaintiffs rely in their particulars upon the defendant's transaction with reference to certain parcels of saccharin which were ordered by the defendant as commission agent or merchant in 1897 from certain persons on the Continent, and were delivered by the vendors at foreign ports direct to the order of the Chemicals and Drugs Co. (Limited), the purchasers. The orders were given by the Chemicals and Drugs Co. (Limted) to the defendant in England. The goods were contracted to be delivered, and were in fact delivered to the company at Continental ports. The defendant got his profit as commission agent or merchant in respect of the transactions. As to these parcels I think I must hold, in the absence of any evidence to the contrary, that the plaintiffs have established that one case of saccharin was manufactured according to the plaintiffs' patent. The next contention for the defence is that the patent in question is not one for the manufacture of saccharin, but only for the manufacture of toluene-sulpho-chlorides, a chemical substance used in the manufacture of saccharin, and that therefore there is no infringement. It seems to me that this point has really been decided against the defendant by Buckley, J, in the recent case of the *Saccharin Corporation (Limited)* v. *Anglo-Continental Chemical Works (Limited)*, 48 W. R. 444, 17 Rep. Pat. Cas. 307.

It is said that the defendant has "exercised" the invention within the jurisdiction. It is remarkable that this word, which had been found in letters patent at least since 1621, so far as I am aware, has never been construed. I think, however, that it can only mean "put in practice." I do not think it can be taken to cover a transaction such as that with which I have to deal.

The defendant as a commission agent contracted for delivery to the purchasers at a German port. He had no interest whatever in the case. He had no right to control its destination. I assume that he knew or suspected that the greater part of the stuff would find its way into this country, but I cannot regard that as material. The acts done by the defendant on the Continent were lawful there, and—being done on the Continent—were not unlawful here.

The plaintiffs have sought to extend the principle laid down in *Elmslie* v. *Boursier* and *Von Heyden* v. *Neustadt*, that the importation into and sale in England of an article manufactured abroad according to a process protected by an English patent is an infringement of the English patent to a case where the defendant has neither imported into nor sold in England. I am not disposed for the first time thus to extend the rights of a patentee, and I dismiss the action.

Solicitors for plaintiffs, *J. H. & J. Y. Johnson*.

Solicitors for defendants, *Deacon, Gibson, & Metcalf*.

Chan. Div.
Farwell, J. } Dec. 7.

In re KERLY AND OTHERS (SOLICITORS). (a.)

Practice—Solicitor's undertaking to enter appearance in lieu of service of writ—Delay exceeding twelve months —Authority of client to solicitor—Writ of attachment —R. S. C. ord. 8, r. 1; ord. 9, r. 1; ord. 12, r. 18.

A written undertaking by a solicitor to enter an appearance in due course for a client on whose behalf he accepts service of a writ and who authorizes him to give the undertaking is a contract of the client made by his agent to which the ordinary limitation of time (six years) in the Statute of Limitations applies. It is therefore binding upon the solicitor where a delay exceeding twelve months has been caused by unsuccessful negotiations, and there is nothing in the Rules of the

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law

Supreme Court entitling the solicitor to say that after twelve months the writ is no longer efficacious.

This was in form a motion that a writ of attachment might be issued against a firm of solicitors, but although it was put in that form to be argued, there was no sort of imputation against the solicitors.

An action was commenced on the 23rd of February, 1899, by the present applicant, Mrs. Anderson, as executrix of William Alfred Anderson, against Tarbutt and Quentin, asking for an account of profits made on a certain sale, and for an order for payment and so on with alternative relief. That writ contained in the margin this note: "We accept service for the defendants Tarbutt and Quentin, and will enter an appearance in due course. (Signed) Kerly, Son, & Verden, the 24th of February, 1899."

Various negotiations for settlement took place, and finally in March, 1899, there was a consent given to extend the time for entering appearance to the 30th of April, 1899.

From that time until October, 1900, nothing was done, the delay being explained by an affidavit stating that the persons interested or able to advise the plaintiff were in Johannesburg, with which place communication had been difficult.

In October, 1900, the negotiations were put an end to by the refusal of the plaintiff to accept an offer which had been made by the defendants on the 24th of February, 1899.

The plaintiff's advisers then called upon Messrs. Kerly, Son, & Verden to enter an appearance for the defendants pursuant to their undertaking. Correspondence ensued, the result of which was that the respondents contended that, owing to the time that had elapsed, the action had expired, and their undertaking had ceased to be binding upon them.

The respondents having refused to perform their undertaking, this motion was launched with the object of compelling them to do so.

In answer to the motion, they said that they had applied to their clients for instructions as to entering an appearance for them, and the clients had informed them that, in view of the long delay on the part of the plaintiff, they regarded the action as at an end, and directed the respondents not to enter an appearance. They also stated that since the service of the notice of motion the defendants had, at their request, instructed them to do what the court though fit under the circumstances to direct. It appeared that the real object of the refusal of the defendants to allow appearance to be entered was to oblige the plaintiff to commence another action, to which they would be able to plead the Statute of Limitations, as the original course of action arose in 1893 or early in 1894.

The real question was, what period of time was sufficient to put an end to the solicitors' undertaking; it depended, to some extent, upon ord. 8, r. 1 (set out in judgment below), and upon ord. 9, r. 1, providing that no service of writ shall be required when the defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance in writing.

Upjohn, Q.C., and *Gore-Browne*, for the applicant.

Jenkins, Q.C., and *D. M. Kerly*, for the respondents.—The plaintiff, after allowing so much time to go by, must put them into a position to perform the undertaking. The limit for the service of a writ being one year from the date of the writ, that limit must be taken to apply to the performance of a solicitor's undertaking which is in lieu of personal service.

FARWELL, J., after stating the facts, said that he did not propose to deal with the question on the point of the delay dealt with by the affidavit referred to. He continued as follows: I am taking it simply that there has been a delay of eighteen months or thereabouts. I should mention this, that if the writ lapses now, in all probability a new writ would be met by a plea of the Statute of Limitations, which does not apply, so far as I can see, and apparently would not apply to the cause of the action under the present writ. I mention that to show that there is substance in the application, so far as the clients are concerned. I mention, also, that in this case the clients have very properly stated that so far as they are concerned they submit to do what the court thinks right; but I am determining the matter on the footing of the strict rights of the parties irrespective of any such submission. Mr. Jenkins' first point is that there is no writ at all now to be appeared to. For that he relies on ord. 8, r. 1, which says, "No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the court or a judge for leave to renew the writ; and the court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons may order that the original or concurrent writ of summons be renewed for six months," and so on. In my opinion that means that the original writ of summons shall be in force for the purpose of service for twelve months and no more, not that the writ loses all its efficacy altogether for every purpose; so that, to put the case which I suggested to Mr. Jenkins, if the writ be issued and appearance be entered and the parties arrange or without arrangement allow the matter to drop for, say, eighteen months, in my opinion the writ still remains, and would be efficacious, and the statement of claim may go on, subject, of course, to the provisions of the rule which was referred to, as to giving a month's notice before further steps are taken after allowing matters to remain for twelve months without any step. So far, therefore, as the first point is concerned, in my opinion it is not a sound point.

Then the real question that I have to consider is, What is the effect of the undertaking to enter an appearance? Ord. 9, r. 1, provides that no service of a writ shall be required when the defendant by his solicitor undertakes in writing to accept service and enter an appearance. The meaning of that rule is that many persons do not like being personally served, and it was intended to provide that their solicitors may (being duly authorized) undertake to accept service for them—that is to say, as their agents, and enter into a contract to appear. It has this difference—and so far as I can see this difference only—from an ordinary contract—namely, that the agent, under the provisions of ord. 18, r. 12, can be imprisoned if the court thinks fit for not performing his portion of that contract. The contract is the contract of the defendant; the solicitor is the agent duly authorized to make the contract. That being so, if I am right in that, it appears to me that the contract remains a binding contract, and the only limitation I can see is that suggested by the plaintiff's counsel—viz., six years. Mr. Kerly suggested that there was some sort of analogy to be derived from the renewal of the writ within twelve months, and that ought to be the time—one year and not six years. I cannot see any reason for applying such a rule as that to what is, in my judgment, a mere contract. The defendants contract to enter the appearance, and I see no reason why they should not do it. It is suggested that the clients might have said to their solicitors, "We no

longer choose to employ you; you must not enter an appearance for us." The answer to that, in my opinion, is this: the defendants did at the date authorize them to act as their solicitors, and as their solicitors to undertake to enter an appearance. It is their contract to enter an appearance, and they cannot subject their agent, whom they have authorized to enter an appearance, to imprisonment because they now say, "True, we gave you that authority to enter into a contract, but we now refuse to allow you to carry it out as far as you are concerned, although you will be imprisoned if you do not." If the defendants in this case had taken the course which I am glad to find they did not, of refusing to allow the solicitors to enter the appearance, it would be ineffectual, because, in my judgment, the solicitors would be bound to enter an appearance, and the clients would be bound by the authority they had already given and the contract they had already entered into to appear, which was a good acceptance. The real answer to the delay is that each party is equally in a position to put an end to it. If after the 30th of April the defendants had chosen to write to the other side saying that this must either come to an end or the plaintiff must come to some special terms, they would be in a position then to enter their appearance and to apply to dismiss the action for want of prosecution, or take any of the other steps in the process of the court. I see no reason for saying there is any equity one way or the other. It seems to me to be a mere question of the construction of the rules of the court, which I have already dealt with, and the performance of the contract to enter an appearance, to which the ordinary Statute of Limitations applies.

Solicitors, *Loughborough, Gedge, Nisbet, & Drew; Kerly, Son, & Verden.*

Chan. Div.
Farwell, J. } Nov. 15, 16, 20.

COOK *v.* CONSERVATORS OF MITCHAM COMMON. (*a.*)

Common — Scheme for regulation under Metropolitan Commons Act, 1866 (29 & 30 *Vict. c.* 122), *and Metropolitan Commons Amendment Act,* 1869 (32 & 33 *Vict. c.* 107) — *Metropolitan Commons (Mitcham) Supplemental Act,* 1891 (54 & 55 *Vict. c. xxvi.*)— *Land delineated in the plan.*

An Act of Parliament confirming a scheme under the Metropolitan Commons Act, 1866, *and the Metropolitan Commons Amendment Act,* 1869, *provided, by section* 17, *that the conservators should maintain the commons as delineated on a plan free of all encroachment. Section* 37 *was a saving clause as regards estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the commons as could or might have been enjoyed if the scheme had not been confirmed by Act of Parliament.*

Held, that, where land was delineated on the plan, it could not be denied that it was subject to the provisions of the scheme of the Act; and that it was then too late for any person to set up for the first time a claim of ownership in fee to such land or any part thereof.

Action.

The plaintiff claimed to be the owner in fee of a piece of land on Mitcham Common.

The defendants, the conservators, were constituted by a scheme framed under the Metropolitan Commons Acts, 1866 and 1869, which scheme was dated the 31st of December, 1890, and was confirmed by the Metropolitan Commons (Mitcham) Supplemental Act, 1891.

The scheme embodied a plan showing by the colour green the lands made subject to the scheme, and the piece of land in question was shown in this plan, and thereon coloured green.

The plaintiff claimed under a copyhold grant, dated 1855, by the lord of the manor of Biggin and Tamworth, and a deed of enfranchisement by the same lord enlarging the copyhold into a freehold.

There had been various dealings with the piece of land in question since 1855, and it was conveyed to the plaintiff in fee simple by a deed dated the 4th of November, 1899.

The plaintiff alleged that the scheme of the 31st of December, 1890, purported to have included his property as portion of the common subject thereto, and contended that such inclusion was altogether wrongful as having been *ultra vires.*

The plaintiff claimed (1) a declaration that the piece of ground in question, although ostensibly comprised in and subject to the regulation scheme, was not in fact comprised in or subject to that scheme; (2) an injunction restraining the defendants from continuing certain notice boards upon the soil of the plaintiff's land.

Upjohn, Q.C., and *A. Brown,* for the plaintiff.

Butcher, Q.C., and *Austen Cartmell,* for the defendants.

FARWELL, J., in giving judgment, said that the action was by a plaintiff who had purchased at Mitcham, in November, 1899, a piece of land which had, since the 31st of December, 1890, been subject to the provisions of a scheme under the Metropolitan Commons Acts. His lordship then referred to the relief which was asked by the plaintiff and to the defences raised by the conservators. He would assume that the plaintiff had proved his title to the fee, starting with a grant from the lord of the manor in 1855, and on that assumption he had to determine the rights of the parties having regard to the provisions of the scheme and the Acts under which it was made. The Metropolitan Commons Act, 1866, defined a "common" as meaning "land subject at the passing of this Act to any right of common." The object of the Act was to preserve open spaces for the public at large. Section 6 provided that a scheme for the establishment of local management with a view to the expenditure of money on the drainage, levelling, and improvement of a metropolitan common and to the making of bye-laws and regulations for the prevention of nuisances and the preservation of order thereon, might be made under the Act on a memorial in that behalf presented to the commissioners by the lord of the manor or by any commoners or by the local authority. Section 7 provided for an inquiry into the memorial; section 8 for the preparation of a draft scheme; section 9 for its printing and publication; section 10 for the reception of objections and suggestions respecting the scheme; section 11 for inquiry into the scheme by public sittings; and section 12 for the report of an assistant commissioner. All these sections provided for complete publicity in the settlement of the scheme; and by section 13, after a period of two months from the first publication of the draft scheme, on the receipt of the assistant commissioner's report, the commissioners were to proceed to consider objections or suggestions and thereupon they were to finally settle and approve of the scheme. Section 14 further provided that the scheme was to state what rights were affected thereby and whether the scheme was consented to by persons whose rights were affected. That

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

provision was comprehensive and referred to all classes of rights, including a claim to the fee simple of land comprised in the scheme. Down to this point in the Act, therefore, every step was taken for ensuring the fullest publicity. It was essential for the success of the scheme that the limits of the common affected should be settled. Section 15 provided that no estate, interest, or right of a profitable or beneficial nature in, over, or affecting a common should, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme without compensation to be ascertained and provided as therein mentioned. Section 16 provided for an appeal against the determination of the commissioners by any person claiming an estate, right, or interest in the common who was dissatisfied therewith, and gave him the right to bring an action at law. The scheme was next to be printed, certified, and published, and annual reports relating to such schemes were to be laid before Parliament. Down to that point the scheme had no operation, but by section 22 the scheme was to have full operation when and as confirmed by Act of Parliament, with such modifications, if any, as to Parliament seemed fit. The scheme in question had been duly confirmed by Parliament. It was practically in a common form and had the force of an Act of Parliament. The Metropolitan Commons (Mitcham) Supplemental Act, 1891, Schedule, provided (clause 1) that "the pieces of land with the ponds and roads thereon commonly called or known by the names of Mitcham Common . . . situate in the parishes of Mitcham . . . as the same are delineated in a plan deposited with the Board of Agriculture and thereon coloured green shall henceforth for all the purposes of this scheme be regulated and managed by a body of conservators." That clause contained a clear statement of the land to be affected, and was a most material provision. Then clause 17 provided that the conservators (subject to clause 39) should maintain the commons as delineated in the plan free of all encroachment, and should not permit any trespass on or partial or other enclosure of any part thereof. That was a positive enactment directing the conservators to do what his lordship was now asked to restrain them from doing. Clause 37 was a saving clause, upon which counsel for the plaintiff had relied. It ran as follows: "Saving always to all persons and bodies politic and corporate, and their respective heirs, successors . . . all such estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the commons or any part thereof as they or any of them had before the confirmation of this scheme by Act of Parliament, or could or might have enjoyed if this scheme had not been confirmed by Act of Parliament." In his lordship's opinion, that clause was not intended to refer to a right to deny that any particular piece of land was within the scheme, but rather to rights of a profitable or beneficial nature over the common. That construction was confirmed by clauses 38 and 39, which dealt expressly with the claims of persons who alleged that certain pieces of land were freehold. It was open to the commissioners to consider such claims, and they were bound to state under section 14 of the Act of 1866 what claims were thus made, and they had so stated. As regards those persons, it was open to them under section 16 to bring actions, or to settle with the commissioners on terms, or to leave it to Parliament to deal with in the scheme. It could not be said that persons who chose to stand by and do nothing were to be in a better position than those who asserted their rights. To such persons the maxim *Vigilantibus non dormientibus jura subveniunt* applied. Parliament did not intend that if persons did not come in and object to the scheme at the time they should be allowed to do so after a lapse of nine years. He considered that the case of the *Conservators of Chislehurst Common* v. *Newton* (1887), which was an unreported case, decided by Chitty, J., applied to the present case. The plaintiffs' case therefore failed.

Solicitors for the plaintiff, *Ward, Perks, & McKay* for *Streeter & Howe*, Croydon.

Solicitors for the defendants, *Edridge & Newnham.*

Chan. Div. Joyce, J. } Nov. 5, 6, 14.

In re HARE AND O'MORE'S CONTRACT. (a.)

Vendor and purchaser — Contract — Misdescription in particulars—Auctioneer's statement—Compensation—Specific performance.

A material misdescription in the particulars of a property sold by auction may be corrected by the auctioneer's verbal statement at the sale, and if this is done the purchaser will not be entitled to specific performance with compensation, even if he did not hear the auctioneer's statement; in such a case the vendor is entitled to annul the sale, notwithstanding the existence of a condition that a misstatement in the particulars should not annul the sale, but form the subject of compensation.

Manser v. Back, 6 *Hare* 443, *applied.*

Summons under the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78).

The property in question formed Lot 5 of a quantity of landed property sold by auction at Birmingham on the 23rd of March, 1900.

In the particulars of sale Lot 4 was described as consisting of "four capital private houses, each with hall entrance, garden, and outbuildings in the rear," and Lot 5 as "four similar houses adjoining the last lot."

The plaintiff purchased Lot 5 at the auction without having previously made an examination of the houses comprised in it, in reliance on the statement in the particulars that they were similar to the houses in Lot 4, which he had seen.

Having subsequently discovered that Lot 5 differed from Lot 4 in that the houses comprised in the former had no entrance halls, and had privies instead of water-closets, he claimed that he was entitled to £77 compensation from the vendor.

The conditions of sale provided that any error, misstatement, or omission in the particulars should not annul the sale, but if pointed out before completion should form the subject of compensation.

The defendant (the vendor) in his defence alleged that the mistake had been verbally corrected by the auctioneer at the sale, and that the latter had at that time stated that the difference in the rentals of Lots 4 and 5 was due to the absence of entrance halls and water-closets in the houses contained in the latter.

The plaintiff then took out the present summons asking for a declaration that he was entitled to the compensation claimed.

At the hearing of the summons in chambers before Stirling, J., it appeared that there was a serious conflict of evidence on the question whether the alleged correction had been made or not, and the summons was therefore adjourned into court in order that the witnesses might be orally examined.

The case now came on for trial.

(a.) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

The plaintiff and others present at the sale stated that they had heard no such correction made by the auctioneer as had been alleged, while the auctioneer and several other witnesses testified to the making of the correction.

Jolly, for the plaintiff.—Under the conditions the plaintiff is not entitled to repudiate his contract; he could only ask for compensation; and this is clearly a case in which compensation should be allowed. At law the verbal evidence of the auctioneer is not admissible to vary the terms of the written contract contained in the particulars (*Gunnis* v. *Erhart*, 1 H. Bl. 289, approved in *Ogilvie* v. *Foljambe*, 3 Mer. 53; Dart on Vendors and Purchasers, 124), and in equity it would be admissible only to show that the purchaser did not come with clean hands. The court will enforce specific performance, with compensation, in a case of mistake unless the purchaser himself contributed to the mistake. In any case the evidence is not admissible against a purchaser who did not hear the auctioneer's statement, and thus the case differs from *In re Edwards to Daniel Sykes & Son*, 62 L. T. Rep. 445, 38 W. R. Dig. 206. *Manser* v. *Back*, 6 Hare 443, is distinguishable because it was decided on other grounds than that of mistake. *Lett* v. *Randall*, 49 L. T. Rep. 71, 31 W. R. Dig. 209, is in point, because in that case the condition as to compensation was the same as in this.

E. P. Hewitt, for the defendant.—*Gunnis* v. *Erhart* was an action on the case at law; evidence of the nature of that in the present case was admitted in *Winch* v. *Winchester*, 1 V. & B. 375. There is no misdescription in the particulars, because the houses were in reality similar to those in Lot 4. Even if there was any error it applies only to the entrance halls, because the difference between water-closets and privies is immaterial. Since there is a conflict of evidence, the plaintiff could not compel specific performance with compensation: *Townshend* v. *Stangroom*, 6 Ves. 328; Sugden on Vendors and Purchasers, 161, 162 (14th ed.). In the present case there can be no doubt that the statement alleged was made, and the purchaser heard it. In *Manser* v. *Back* the particulars were altered, and the purchaser never heard of the alterations. Evidence of the alterations was admitted, and the court refused to decree specific performance of the contract as described in the unaltered particulars against the vendor. *Lett* v. *Randall* is distinguishable, because it related to misdescription as to the term of a lease. This summons ought to be dismissed.

Jolly replied.

Cur. adv. vult.

Nov 14.—JOYCE, J., after stating the facts, continued as follows: It is clear that Lots 4 and 5, whether similar or not, were not alike in all respects, for the houses in Lot 5 had not entrance halls or water-closets, while those in Lot 4 had both. That seems to me to be a material difference affecting the value of the property; if it had not been so, I do not see why the defendant's solicitor and auctioneer were so particular in asserting that the difference was mentioned at the sale. There was therefore, by inadvertence or otherwise, a material misdescription in the contract. Now, I find as a fact that the auctioneer made a distinct statement as to the difference between Lot 5 and Lot 4, and that this statement was made not once only, but more than once, but I cannot say that the purchaser heard the statement made. This being so, the question is whether the circumstances of the case are such as to render it inequitable that the contract should be specifically enforced and the vendor ordered to allow a compensation out of the purchase-money for the difference between Lots 4 and 5. The case of *Manser* v. *Back* was cited to me, and I reserved judgment in order to consider it, because I thought it might not have been followed, or not be law. Now I think that *Manser* v. *Back* is a distinct authority for the vendor to be let off his contract in such a case as the present; and I find that the case was cited with approval by James, L.J., in *Tamplin* v. *James*, 29 W. R. 311, 15 Ch. D. 217, and it is cited by all the text-books as good law, and, if I may say so, I entirely agree with them. The conclusion to which I am compelled to come is that the vendor cannot be ordered to complete his contract with compensation. *Lett* v. *Randall*, which was cited to me, does not affect this case, for all that the court there held was that the mere fact that the purchaser knew of the misdescription did not prevent him from enforcing the contract. The case is the same as regards *In re Edwards, Daniel Sykes & Son* (*Limited*), which was referred to, for in that case there was no evidence that the purchaser did not hear the verbal statement of the auctioneer, and Chitty, J., held that he must be taken to have heard it. I hold, therefore, that the vendor cannot be compelled to allow compensation; there must be rescission of the contract and return of the deposit, and I give the purchaser the costs of investigating the title down to the time when the auctioneer's statement was procured.

Solicitors, *Sharpe, Parker, Pritchards, & Barham*, for *Lowe & Jolly*, Birmingham; *Preston, Stow, & Preston*, for *Jacob Rowlands & Son*, Birmingham.

Q. B. Div. (Wills, J.) — Dec 3.

GRESWOLDE-WILLIAMS AND OTHERS v. BARNEBY. (*a*.)

Vendor and purchaser — Sale of land — Warranty — Particulars of sale—Conveyance.

Where land is sold by auction with a warranty that it answers a certain description and a conveyance is afterwards executed which contains no covenant corresponding to the warranty, no action can be brought upon the warranty.

Action for damages for breach of contract.

The plaintiffs, by their statement of claim, stated that on the 26th of July, 1898, the plaintiffs agreed to purchase from the defendant the fee simple of an estate known as Bredenbury Court, in the county of Hereford, for the sum of £30,000; that, by the said agreement for sale, the defendant contracted and warranted that the mansion-house and the estate, and the sanitary arrangements thereof, were in perfect order, and that the sanitary arrangements were thoroughly overhauled and reconstructed in 1894-5; that, by a conveyance dated the 3rd of December, 1898, the fee of the estate was conveyed by the trustee of the fee and the defendant to the plaintiffs; and that the mansion-house and estate were in no respect in such state and condition as the defendant contracted and warranted that they should be.

It appeared from the opening speech of the counsel for the plaintiffs that the property was bought by auction, that passages in the terms of the alleged warranty appeared in the particulars of sale used at the auction, but that there was no covenant in the conveyance that the mansion or estate, or the sanitary arrangements thereof were in good order.

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

It was assumed, for the purpose of the argument, that the statements in the particulars of sale did amount to a warranty.

Sir Edward Clarke, Q.C., and *H. Tindal Atkinson*, for the defendant.—Assuming that the plaintiffs could establish the warranty, they have shown no case in their statement of claim. After the conveyance no action could be brought for a misrepresentation with regard to the property unless that misrepresentation was false and fraudulent. In *Evans* v. *Bicknell*, 6 Ves. 174, at p. 183, Lord Eldon said: "It is a very old head of equity that if a representation is made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false." That proposition has been made the basis of all the cases since. In *Meyer* v. *Everth*, 4 Camp. 22, sugar was sold under a sale note; and Lord Ellenborough said: "When goods are sold in this way, I think evidence might be admissible to show that, at the time of the sale, a sample was fraudulently exhibited to deceive the buyers, whereby the plaintiff had been induced to purchase the commodity, which turned out of greatly inferior quality and value. But when the sale note is silent as to the sample I cannot permit it to be incorporated into the contract." See also on this point *Freeman* v. *Baker*, 5 B. & Ad. 797, and *Brownlie* v. *Campbell*, 5 App. Cas. 925, 29 W. R. Dig. 232. In *Leggott* v. *Barrett*, 28 W. R. 962, 15 Ch. D. 306, James, L.J., said, "I cannot help saying that I think it is very important, according to my view of the law of contracts, both at common law and in equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself . . . unless there be a suit for rescinding the deed on the ground of fraud or for altering it on the ground of mistake." Brett, L.J., expressed himself to the same effect. The principle here laid down was confirmed in *Palmer* v. *Johnson*, 13 Q. B. D. 35, 32 W. R. Dig. 221; *Joliffe* v. *Baker*, 11 Q. B. D. 255, 31 W. R. Dig. 209. In the absence of any collateral agreement intended by the parties to subsist notwithstanding the conveyance, no claim can be made for anything which is not shown in the conveyance. There being nothing in the particulars of sale indicating any such collateral agreement, the plaintiff's case must fail.

Danckwerts, Q.C., and *Willes Chitty*, for the plaintiffs.—The cases cited by Sir Edward Clarke, with the exception of *Palmer* v. *Johnson*, are *nihil ad rem*. Those cases dealt with misrepresentations. The case is different where, as here, it is assumed that there was a warranty. The old Court of Chancery could not give damages. But if there, a vendor or vendee brought an action for specific performance, and the subject-matter of the contract did not answer the description in the particulars of the contract of sale, then at the election of the vendee the vendor could always be compelled to convey what he had with compensation. If, however, the contract had already been carried out, then the court of equity would have no jurisdiction to enforce the contract in an action for damages and the parties would have to resort to a court of law: see *Hughes* v. *Jones*, 10 W. R. 139, 3 De G. F. & J. 307; *Cordingley* v. *Cheeseborough*, 4 De G. F. & J. 379, 10 W. R. Ch. Ch. Dig. 79; *Hill* v. *Buckley*, 17 Ves. 394; and *Newham* v. *May*, 13 Price 749. Now, at common law there were two cases in which you could maintain an action after conveyance. The first was where there was a false and fraudulent misrepresentation which did not constitute a warranty; and the second was where there was superadded to the contract to convey a warranty that the subject-matter of the conveyance should answer a particular description: see Sugden on Vendors and Purchasers, chap. 13, s. 2, par. 18; *Early* v. *Garret*, 4 Man. & Ry. 687, and *Ross* v. *Hetsham*, 15 W. R. 259, L. R. 2 Ex. 72. In *Palmer* v. *Johnson* Bowen, L.J., said: "Now it is commonly said that where there is a preliminary contract for sale which has afterwards ended in the execution of a formal deed, you must look to the deed only for the terms of the contract; but it seems to me one cannot lay down any rule which is to apply to all such cases, but must endeavour to see what was the contract according to the true intention of the parties. Suppose the parties should make a parol contract, with the intention that it should afterwards be reduced into writing and that that which is reduced into writing shall be the only contract, then, of course, one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract, they might agree that that should exist, notwitstanding it was not in the contract, which was put into writing. In the same way when one is dealing with a deed by which property has been conveyed, one must see if it covers the whole ground of the preliminary contract." Bowen, L.J., expressed the same views in *Clarke* v. *Ramuz*, [1891] 2 Q. B. 456, 40 W. R. Dig. 274. A warranty is something outside the promise to convey the property, and is not, therefore, merged in the conveyance. This is good sense as well as good law, because otherwise a vendor need only put the purchaser to sleep till after the conveyance and then snap his fingers at him. [WILLS, J.—The warranty might be incorporated in the conveyance.] That is not the office of a conveyance. The purchaser is entitled to rely on the warranty. This is not the usual case, because in modern times it is usually provided in particulars of sale that compensation is to be paid for certain errors, and that for the rest the purchaser is to take the subject-matter of the sale with all faults.

Sir Edward Clarke, Q.C., replied.

WILLS, J.—I am of opinion that the plaintiffs cannot maintain their action in this case. A number of authorities have been cited. I do not propose to go through them, but it appears to me that the result is that this case is an illustration of a broad principle of law which is perfectly well known and is constantly acted upon—namely, that where a preliminary contract of any description, whether verbal or written, is intended to be superseded by, and is in fact superseded by, one of a superior character, then the later contract—the superior contract—prevails, and the stipulations in the earlier one can no longer be relied upon.

That proposition is laid down with great distinctness in the case of *Leggott* v. *Barrett*, 28 W. R. 962. It seems to me that all matters connected with the description and warranty, if one existed, of the subject-matter of the conveyance in this case were put an end to by the conveyance afterwards entered into. The conveyance was intended to be the contract between two parties. If there was a stipulation containing a warranty as to anything bearing upon the condition of the premises, and if that stipulation was intended to survive, there was no reason why it should not have found a place in the conveyance. A great many of the cases that have been cited seem to me to be *nihil ad rem*. Great stress has been laid upon certain expressions of Bowen, L.J., in *Palmer* v. *Johnson* and in *Clarke* v. *Ramuz*, but

one must look at the facts with regard to which those expressions were used. They are totally dissimilar from the present case, and I cannot think for a moment that Bowen, L.J., intended to throw any doubt upon the general principle laid down in *Leggott* v. *Barrett*, which seems to me to have been the settled law in this country for a great many years.

I am fortified in this view by the consideration that if Mr. Danckwerts' contention were right, actions of this kind would have been as familiar in the courts of justice as actions for breach of promise of marriage, because the state of things which is complained of must have been perpetually occurring ever since auctioneers first indulged in high-flown language and descriptions in their particulars of sale, and yet there is no trace of any such actions in the books. It seems to me that that is pretty nearly conclusive of the matter, for if the contract under which Mr. Danckwerts claims in the present case could be maintained the courts would be flooded with actions. Therefore I have come to the conclusion that my judgment must be for the defendant.

Judgment for the defendant.

Solicitors for the plaintiff, *Maples & Teesdale.*

Solicitors for the defendant, *Dolling & Smith*, for *A. Hunt.*

Q. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 15.

BROADBENT (*Appellant*) *v.* SHEPHERD (*Respondent*). (*a.*)

Public health — Nuisance—Liability to abate—Structural defects—Collector of rents—"Owner"—Liability of collector—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 4, 94, 95.

A collector of the rents of property who is acting merely as agent for another person, is "owner" within sections 4 *and* 94 *of the Public Health Act,* 1875, *and may be served with a notice under the latter section and required to abate nuisances on the premises arising from structural defects.*

Case stated by justices of the peace for the West Riding of the county of York.

At the petty sessions held on the 27th of June, 1900, at Castleford, a complaint was preferred by the appellant on behalf of the Castleford Urban District Council, against the respondent as agent for the owner of Nos. 75 to 91, Regent-street, Castleford, under section 95 of the Public Health Act, 1875, for that a notice was served on the respondent requiring him to abate a certain nuisance on the above premises, and that he had made default with the requisitions thereof—that is to say, that he had not provided earthenware trapped gulleys, under fall pipes, and connected same to sewer, and other specified things.

It was admitted by the appellant that the nuisances were caused by structural defects.

No attempt had been made by the appellant to ascertain the real owner of the property, and the respondent, the rent collector or agent, stated that he had never been asked for the name of the owner. Two notices had been sent by post addressed to one Mr. Doukersley, of Huddersfield, as owner, and Mr. Shepherd (the respondent) as agent. The notice addressed to Mr. Doukersley had been returned through the post with a statement that it could not be delivered.

It was contended by the appellant that the definition clause (section 4) of the Public Health Act, 1875 (notwithstanding the special provision in section 94 which throws the responsibility of structural defects on the actual owner) included all agents and receivers and collectors of rent, as owners, and relieved the appellant from the responsibility of ascertaining the ownership of the property.

The justices took the view that it was not the intention of the Act to create two owners under the special provision in section 94; that the respondent was a mere rent collector, and that the definition clause extending ownership to agents was only intended to apply where it was not inconsistent with the context; that the definition clause relied on by the appellant was governed by the earlier portion of it —namely: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them," and that the appellant ought to have served the proper owner with the notice and summoned him for default.

The justices accordingly dismissed the complaint.

The question of law for the opinion of the court was whether the "owner" in that portion of section 94 of the Public Health Act, 1875, which refers to structural defects, includes a mere collector of rent or agent.

Section 4 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), provides: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them: "Owner," means the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

Section 94 provides: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose: Provided, first, that where the nuisance arises from the want or defective construction of any structural convenience, or where there is no occupier of the premises, notice under this section shall be served on the owner."

Then section 95 enables proceedings to be taken against the person on whom a notice has been served.

Macmorran, Q.C. (*Scholefield*, with him), for the appellant.—The justices were wrong in holding that a rent collector was not the "owner" for the purpose of abating nuisances arising from structural defects. The definition of "owner" in section 4 expressly includes a person who collects the rent of property, whether on his own account or as agent, and that definition clearly applies in cases coming under section 94. A collector of rents was held to be "owner" within a similar definition in the Nuisances Removal Act, 1855, in the case of *Cook* v. *Montagu*, 20 W. R. 624, L. R. 7 Q. B. 418, decided in 1872; and in that case Blackburn, J., lays down the principle on which the definition of "owner" proceeds in such cases. In *Mayor of St. Helens* v. *Kirkham*, 34 W. R. 440, 16 Q. B. D. 403, an agent employed to collect rents was held to be an "owner," when the question was as to the liability for paving expenses; and this was followed in the case of *Tottenham Local Board* v.

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Williamson, 62 L. J. Q. B. 322, 69 L. T. N. S. 51. 41 W. R. Dig. 125. The respondent, therefore, as the collector of the rents of this property was "owner" for the purpose of being served with this notice.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—I think this case must go back to the magistrates. That there might be no difficulty in enforcing these provisions of the Act, the word "owner" is expressly defined in section 4 as including the person who receives for the time being the rack-rent of the property, "whether on his own account, or as agent or trustee for any person." It has been held that this definition as "owner" includes a person who collects the rents of property when the question was as to the liability for paving expenses. If so, I certainly think it ought also to be applied where the question is as to the abating of nuisances. I therefore think this case must go back to the magistates.

KENNEDY, J.—I agree.

Appeal allowed.

Solicitor for the appellant, *G. T. Thurnell*, for *Claude Kemp*, Castleford.

Q. B. Div. (Wright, J.) July 21; Aug. 4, 1900.

WARREN *v.* BROWN.

Light—Prescription—Extent of right—User of premises—Purpose requiring extraordinary quantity of light.

The plaintiffs' windows had enjoyed the access of an extraordinary quantity of light for over twenty years; during the earlier part of that time they had been used for a business requiring ordinary light only; during the latter part and at the time of the obstruction complained of they had been used for a business requiring an extraordinary quantity of light. The defendant, by erecting a building, diminished the access of light to the windows but left sufficient light for ordinary purposes.

Held, that the plaintiffs had no cause of action.

Further consideration.

The plaintiffs in this action claimed an injunction and damages in respect of a diminution of the light coming to the plaintiffs' factory, caused by a building recently erected by the defendant.

The plaintiffs were the owners and the tenant of a factory at Leicester built in the year 1860 and containing windows which until the erection of the defendant's building enjoyed the access of light in greater quantity than was necessary for ordinary purposes. Until 1884 the factory was used for the manufacture of boots and shoes, which requires only an ordinary amount of light; after that year it was used for the manufacture of hosiery, which requires an extraordinary amount of light.

The defendant's building was erected in 1899 and diminished the access of light to the plaintiffs' windows, but still permitted the access of sufficient light for ordinary purposes.

The action was heard at the Leicester assizes before Wright, J., who reserved the case for further consideration.

Hugo Young, Q.C., and *W. H. Stevenson*, for the plaintiffs.—The owner of ancient windows is entitled to so much of the light enjoyed during the statutory period as is required for any business for the time being carried on there: *Dent* v. *Auction Mart Co.*, 14 W. R. 709, L. R. 2 Eq. 238, at p. 250; *City of London Brewery Co.* v. *Tennant*, 22 W. R. 172, L. R. 9 Ch. App. 212. It is not necessary that the business requiring extraordinary light should have been carried on throughout the statutory period. The decision of Malins, V.C., to the contrary in *Lanfranchi* v. *Mackenzie*, 15 W. R. 614, L. R. 4 Eq. 421, was based on *Martin* v. *Goble*, 1 Camp 320, which has been overruled by *Moore* v. *Hall*, 26 W. R. 401, 3 Q. B. D. 178.

They also referred to *Aynsley* v. *Glover*, 23 W. R. 147, 459, L. R. 18 Eq. 544, L. R. 10 Ch. App. 283; *Corbett* v. *Jonas*, [1892] 3 Ch. 137, 41 W. R. Dig. 117; *Leech* v. *Schweder*, 22 W. R. 633, L. R. 9 Ch. App. 463; *Birmingham, &c., Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295; *Clifford* v. *Holt*, [1899] 1 Ch. 698, 47 W. R. Dig. 103.

Stanger, Q.C., and *Neilson*, for the defendant.—Ancient lights carry with them the right to as much light as is necessary for ordinary purposes and no more: *Kelk* v. *Pearson*, 19 W. R. 665, L. R. 6 Ch. App. 809; *City of London Brewery Co.* v. *Tennant*; *Dickinson* v. *Harbottle*, 28 L. T. Rep. 186, 21 W. R. Dig. 116. *Corbett* v. *Jonas* was a case of derogation from a grant. The rule is that if forty-five degrees of sky are left open the owner of the lights is to be presumed to be suffering no injury.

Cur. adv. vult.

Aug. 4.—WRIGHT, J.—This case raises a question of general importance in relation to ancient lights—namely, whether the right which is acquired by statutory prescription is a right to a continuance of substantially the whole quantity of light which has come to the windows during the twenty years, or is limited to a sufficient quantity of light for all ordinary purposes of inhabitancy or business. It seems strange that such a question should be still open for discussion, but there is a considerable body of authority in favour of either proposition.

The facts are these: The plaintiffs, as the owners and tenants of a building in the town of Leicester, claim damages and an injunction in respect of obstruction of the access of light to windows more than twenty years old. At the trial the claim was limited to two rooms—one on the ground floor and the other above the former, both facing to the south. For a length of about 17ft. in front of these rooms the defendant has raised his own building from a height of about 20½ft. to about 26ft., but has set it back 2 or 3ft., so that the width of the street between the two buildings, which was about 17ft., is now about 19ft. Four out of five windows in each of the two rooms are opposite to that part of the defendant's building which I have mentioned. These windows are large and high. Those of them which are on the ground floor have been glazed with fluted glass for about half their height from the bottom. In addition to the front light both rooms receive much side light, especially from the east and south-east, from a wide street running north and south at a distance of about 50ft. to 70ft. Light is not in any direction cut off by very high buildings. To the south-east the defendant has taken down a high chimney stack which to some extent used to interrupt the light from that quarter.

I find that the defendant has not obstructed or diminished to any material extent, if at all, the light coming to the upper of the two rooms in question. As regards the four windows on the ground floor, I find that the defendant has materially diminished the light which the plaintiffs have enjoyed for those windows for twenty years past, but that abundant light remains for all ordinary purposes of inhabitancy or business. The room in its present state is better

(*a.*) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

lighted than the ground floor front rooms in many of the principal streets.

The plaintiff Baum has during some years, but much less than twenty, carried on, as tenant of the premises in question, and particularly in the ground floor room in question, a manufacture of hosiery by means of machinery which requires a very exceptional quantity and quality of light for the continual and accurate adjustment of filaments to fine needles moving at speed in bundles of some hundreds. Before this manufacture was established a different industry —manufacture of boots and shoes, requiring good, but not special or extraordinary, light—was carried on there.

I find that the defendant has, by the acts complained of, diminished the light so that it is now materially insufficient during some part of the day for the special requirements of the plaintiff Baum's industry.

I find that the plaintiffs' premises have throughout the twenty years before action been suitable for such a manufacture as that now carried on by Baum, and that this kind of manufacture is and has long been common in the district, and has for twenty years past required more light than most other industries, but not until the last few years in so high a degree as at present, the older machines having been less delicate and complicated. I think that the light as it now exists would have been sufficient for any but the most recent kind of machines.

In my judgment no sufficient case for a mandatory injunction is made out in my view of the plaintiffs' rights. The inconvenience to which the plaintiff Baum was subjected can be, and to a great extent it has been, obviated by the removal of the machines to the upper room, and in any case it can be remedied by some increased expenditure for gas. The question is whether the plaintiffs are entitled to damages. If they are I assess the amount at £100 for the tenant and £200 for the reversioners. There are scarcely any authorities bearing on the question until 1865. It appears from *Aldred's case*, 9 Rep. 57*a*, that the nature of the cause of action on the case for infringement of rights to light was not clearly settled. It is classed with actions for nuisance, and the pleading closes with the words, "*Quod messagium horridâ tenebritate obscuratum fuit*"; but a prescription is alleged. In *Luttrell's case*, 4 Rep. 8, it is laid down that (as was afterwards established by *Yates* v. *Jack*, 14 W. R. 618, L. R. 1 Ch. 295, and other cases) "If a man has an old window to his hall and afterwards he converts the hall into a parlour or any other use, yet it is not lawful for his neighbour to stop it, for he shall prescribe to have the light in such part of his house." In 1752, in *Fishmongers Co.* v. *East India Co*, 1 Dick. 164, Lord Hardwicke said: "It is not sufficient to say it will alter the plaintiffs' lights, for then no vacant piece of ground could be built on in the city, and here will be 17 ft. distance, and the law says it must be so near as to be a nuisance. It is true the value of the plaintiffs' house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground." In 1808, in *Martin* v. *Goble*, 1 Camp. 320, a malthouse with ancient windows had been occupied for some years as a poorhouse. McDonald, C.B., directed the jury that "the house was entitled to the degree of light necessary for a malthouse, not for a dwelling-house. The converting it from one into the other could not affect the rights of the owners of the adjoining ground. No man could, by any act of his, suddenly impose a new restriction upon his neighbour." In *Attorney-General* v. *Nichol*, 16 Ves. 338, Lord Eldon, L.C., says: "There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained or an action upon the case, which, however, might be maintained in many cases which would not support an injunction." In *Back* v. *Stacey*, 2 C. & P. 465, Best, C.J., directed the jury that in order to ground an action there must be a "substantial privation of light sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." In the forty years after *Back* v. *Stacey* there seem to have been few or no decisions bearing on the question; but in 1865, in *Clarke* v. *Clark*, 14 W. R. 115, L. R. 1 Ch. App. 16, Lord Cranworth refused an injunction in a case in which exceptionally good light had been materially diminished, saying that the plaintiff must show such an obstruction "as to cause material inconvenience to the occupiers of the house in the ordinary occupations of life." He proceeded to draw a distinction between town and country which has not been fully adopted in later cases. In *Durell* v. *Pritchard*, 14 W. R. 212, L. R. 1 Ch. App. 244, and *Robson* v. *Whittingham*, 14 W. R. 291, L. R. 1 Ch. 442, Knight-Bruce and Turner, L.JJ., adopted the language of Lord Cranworth. In *Yates* v. *Jack* Lord Cranworth established the rule which has ever since that case been recognized as settled, so far, at any rate, as ordinary purposes of inhabitancy or business are concerned, that the owner of ancient lights is entitled to have them protected without reference to the particular purposes for which they were enjoyed during the twenty years, and he does not apparently draw any distinction between ordinary and extraordinary purposes. In the same year in *Dent* v. *Auction Mart Co.* Wood, V.C., established another rule, that an injunction should not be granted in equity unless it is a proper one for substantial damages at law. He adopted the ruling of Best, C.J., in *Back* v. *Stacey* with a material emendation of "or" for "and." In the same year in *Martin* v. *Headon*, 14 W. R. 723, L. R. 2 Eq. 425, Kindersley, V.C., laid it down that "Whenever it is shown that the comfort or enjoyment of a man or his family in the occupation of his house is seriously interfered with, and still more where he is prevented from carrying on his business with the same degree of convenience and advantage as theretofore . . . there is sufficient ground for the interference of this court." In 1867 in *Calcraft* v. *Thompson*, 15 W. R. 387, Lord Chelmsford approved the ruling of Best, C.J., in *Back* v. *Stacey*, but not, as it seems, of the emendation proposed by Wood, V.C. He adopts the language of Lord Cranworth in *Yates* v. *Jack*, that the right conferred by the statute "is an absolute and indefeasible right to the light without reference to the purpose for which it is used. . . . The right which is gradually ripening, and which after twenty years' enjoyment is absolutely acquired, is a right to have the light freely admitted to the house through an aperture of certain dimensions. The particular use to which the house is applied during the period in which the right is thus growing never enters at all into consideration. When the full statutory time is accomplished the measure of the right is exactly that (neither more or less) which has been uniformly enjoyed previously." Later in the same year, in *Lanfranchi* v. *Mackenzie* it was held by Malins, V.C., that where ancient windows had received an extraordinary amount of light during the twenty years and the plaintiff had used it for a purpose requiring an extraordinary light (examination of silks) for only a portion of that period, he had no right to an

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criticized the judgment of James, L.J., in *City of London Brewery Co.* v. *Tennant* denying that Lord Selborne concurred in it. None of the reports of that case, however, seem to support that denial, nor does the alteration which Christian, L.J., suggests should be made in James, L.J.'s, statement of the law apparently conflict with what James, L.J., intended to state, or affect the present question. The alteration merely embodies the rule that the plaintiff's right is not limited to the particular use to which his premises had been actually put before the obstruction. There remains the case of *Lazarus* v. *Artistic Photographic Co.*, 45 W. R. 614, [1897] 2 Ch. 214, in which Kekewich, J., declined to follow *Lanfranchi* v. *Mackenzie*, and held that the plaintiff was entitled to be protected in the enjoyment of extraordinary light for photographic purposes, although he had not been using it for those or other purposes requiring extraordinary light for the full period of twenty years. No reference is made in the report of the case to either of the decisions of the Court of Appeal.

In this state of the authorities, I think I must take it that the law is as laid down in *City of London Brewery Co.* v. *Tennant*, agreeing as that case does with the criterion expressed by Lord Cranworth in *Clarke* v. *Clark*; and that the plaintiffs having an abundance of light left for all ordinary purposes of inhabitancy or business, are not entitled to relief on the ground that their extraordinary use has been interfered with. Unless, indeed, there is some such limitation of the right to light for ancient windows, it is difficult, as Lord Hardwicke observed in *Fishmongers Co.* v. *East India Co.*, to see how the ordinary extensions and improvements of towns could be carried on. If every house which has existed for twenty years is entitled to have all or substantially all the same light come to its windows as during the twenty years, no new houses could be built opposite to old ones unless at a distance which would impose on servient tenements an unreasonable burden, and might involve grave public inconvenience. Nor if that were the law could there well be any presumption that so long as forty-five degrees or some approximate angle is left there is no actionable wrong.

It is not necessary in the present case to consider the question raised in *Lanfranchi* v. *Mackenzie* whether a right to an extraordinary quantity of light for extraordinary purposes can be acquired by prescription.

Judgment for the defendant.

Solicitors for plaintiffs, *Law & Worssam*, for *R. H. Buckby*, Leicester.

Solicitor for the defendant, *J. A. Collins*, for *J. & S. Harris*, Leicester.

Privy Council.

(*From the Supreme Court of Hong Kong.*)

Dec. 8.

HARDOON v. BELILIOS. (*a.*)

Trustee—Indemnity—Shares—Creation of relation of trustee and cestui que trust *—Proof—Personal liability.*

All that is necessary to establish the relation of trustee and cestui que trust *is to prove that the legal title is in one person and the equitable in another.*

A person sui juris *by accepting the beneficial ownership in shares, the legal ownership whereof is vested in another as trustee, renders himself personally liable in the absence of any contract to the contrary, to indemnify the trustee against calls.*

Should the beneficiaries be tenants for life, infants, or if there are special trusts limiting the right to indemnity, the trustee's right does not extend beyond the trust estate —i.e., beyond the respective interests of his cestuis que trustent.

An assignee, therefore, of the beneficial ownership in shares, with full knowledge that they were registered in another's name as trustee for their original purchasers and their assigns, must make good to the trustee any liability he has to meet as legal owner thereof.

Appeal from the Supreme Court of Hong Kong. The facts appear in their lordships' judgment.

Latham, Q.C., and *Whinney*, for the appellant.

Joseph Walton, Q.C., and *R. J. Parker*, for the respondent.

The judgment of their lordships (Lords HOBHOUSE, ROBERTSON, and LINDLEY, Sir FRANCIS JEUNE, and Sir FORD NORTH) was delivered by

Lord LINDLEY.—The question raised by this appeal is whether the plaintiff, who is the registered holder of some shares in a banking company which is being wound up, is entitled to be indemnified by the defendant, who is the beneficial owner of such shares, against calls made upon them in the winding up of the company. The courts of Hong Kong have decided against the plaintiff upon the evidence adduced by him; and have entered judgment of nonsuit. The defendant adduced no evidence; it did not become necessary for him to do so. The Chief Justice who first heard the case decided that the defendant was the sole beneficial owner of the shares, but that the plaintiff had failed to prove any contract by the defendant to indemnify him either express or implied. On appeal the Chief Justice and Wise, J., considered that although the defendant had become the sole beneficial owner of the shares, the relation of trustee and *cestui que trust* had not been created between the plaintiff and the defendant and that the defendant had not become liable to indemnify the plaintiff. Against these decisions the plaintiff has appealed to this board.

The facts of the case so far as they are material are shortly as follows:

The bank in question was formed and registered with limited liability under the Companies Act, 1862. Its capital was divided into shares which were not fully paid up when it went into liquidation, which it did in December, 1894. Calls have been made on the contributories, of whom the plaintiff is one. He is a contributory in respect of fifty £10 shares. He has been sued by the liquidator for the calls made on him in respect of those shares and judgment has been given against him for £402 12s. 11d. which he seeks to recover from the defendant.

The fifty shares in question were placed in the plaintiff's name in April, 1891, by his then employers, Benjamin & Kelly, who were share-brokers. The plaintiff never had any beneficial interest in them; but he was registered as their holder on the 3rd of April, 1891. A provisional certificate of his ownership was made out and he signed a blank transfer of them, and those two documents were held by Benjamin & Kelly, who paid the application and allotment money and first call. This certificate and transfer afterwards came into the hands of one Coxon, who acted on behalf of a syndicate formed to speculate in shares in another company. The defendant financed this syndicate and the provisional certificate and blank transfer of the

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

fifty shares in question were with other securities pledged by Coxon with the defendant as security for his advances. In October, 1891, the plaintiff's provisional certificate was exchanged for an ordinary certificate, which the defendant has ever since held. In March, 1892, dividends were paid on those shares and the defendant, as holder of these fifty shares, demanded these dividends from the plaintiff and received them from him. The operations of the syndicate resulted in considerable loss. Their accounts with the defendant were closed, and in October, 1892, the defendant became the absolute owner of the shares. This, at least, is the conclusion arrived at by both courts in Hong Kong from the entries in the defendant's books, and there are no grounds on which this board can come to any different conclusion.

In November, 1893, a call of £1 per share was made payable by four instalments of 5s. each. The first three of these instalments, payable in November, 1893, February and April, 1894, were, at the plaintiff's request, paid by the defendant to the plaintiff, and by him to the bank. The defendant said he was not liable to pay them; and in his books he debited the plaintiff with those payments, but there is no evidence that the plaintiff was informed of this. The fact that the defendant did not at this time debit Coxon with these calls seems to their lordships very strong evidence that at this time Coxon's interest in these shares was at an end, and they belonged absolutely to the defendant.

On the 10th of April, 1894, the plaintiff wrote to the defendant asking that the shares might be transferred out of the plaintiff's name, but the defendant declined to get this done, and the plaintiff said no more about it until June, 1894, when the fourth instalment of 5s. in respect of the call of £1 became due. The plaintiff then asked the defendant to pay this instalment, and he did so, but debited the plaintiff with the amount as before. Shortly afterwards the plaintiff's solicitors wrote to the defendant and asked him to have the shares transferred out of the plaintiff's name. But the defendant declined, saying that the shares were lodged with him by Coxon, who was absent from the colony.

Further correspondence took place after calls had been made by the liquidator on the plaintiff, as already stated. but the defendant refused to indemnify the plaintiff, and this action was commenced.

It appears from the evidence as it stands that the defendant became in October, 1892, the sole beneficial owner of these shares, the legal title to which was vested in the plaintiff. Assuming this to be established, their lordships are at a loss to understand what more was required to create the relation of trustee and *cestui que trust* between the plaintiff and the defendant. The facts that they never stood in the relation of vendor and purchaser, that there was no contract between them, that the defendant never requested the plaintiff to become his trustee, are quite immaterial. All that is necessary to establish the relation of trustee and *cestui que trust* is to prove that the legal title was in the plaintiff and the equitable title in the defendant. This might be proved in many ways. The mode of proof is quite immaterial. Being proved, no matter how, the relation of trustee and *cestui que trust* was thereby established.

No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer. But the moment the defendant accepted the beneficial ownership of these shares he became the plaintiff's *cestui que trust*, and the plaintiff had no option in the matter.

The next step is to consider on what principle an absolute beneficial owner of trust property can throw upon his trustee the burdens incidental to its ownership. The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burdens unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out of any part of it is clear and indisputable; although if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser* or *Robinson* v. *Murdoch*, 30 W. R. 162, 6 App. Cas. 855, which was referred to in argument. But where the only *cestui que trust* is a person *sui juris* the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves

In *Balsh* v. *Hyham*, 2 P. Wms. 453, the trustee sought indemnity in equity not against a liability incidental to the ownership of the trust property but against a liability incurred by him by borrowing money at the request and for the benefit of his *cestui que trust*. The court decided that the plaintiff was entitled in equity to the relief which he sought on the broad ground "that a *cestuis que trust* ought to save his trustee harmless as to all damages relating to the trust." This language (although open to criticism if applied to *cestuis que trustent* who are not *sui juris* and also sole beneficial owners) shows plainly enough that it was taken for granted as well settled that, speaking generally, absolute beneficial owners of property must in equity bear the burdens incidental to its ownership, and not throw such burdens on their trustees.

The short report of *Balsh* v. *Hyham* as given in 2 Eq. Cas. Abr. 741, fol. 8, shows that this general rule was well recognized, and that the decision was only an illustration of its application to the facts then before the court.

It is impossible to read the judgment of Wigram, V.C., in *Phené* v. *Gillan*, 5 Hare 1, without coming to the conclusion that he also regarded the general rule as well established.

The principle acted upon in *Balsh* v. *Hyham* was reconsidered and most strikingly illustrated in the well-known case of *In re German Mining Co., Ex parte Chippendale*, 2 W. R. 543, 4 De G. M. & G. 19, where the shareholders of a mining company were held liable personally to indemnify the directors against payments made by them in discharge of debts contracted by them, but which payments created no legal obligation on the company enforceable at law, and could not be recovered by the directors from the company by any action at common law. The shareholders in vain contended in that case that the directors had only a right to indemnity out of the assets of the company: see p. 54.

Where, as in *Balsh* v. *Hyham*, a trustee seeks indemnity in respect of transactions in which he need not have engaged, and which were not within the scope of his trust, he must prove that his *cestui que trust* either authorized or ratified such transactions. But if he has incurred liability within the scope of his trust, and for the benefit of his *cestui que trust*,

Ex parte Chippendale shows that nothing more is required.

When a trustee seeks indemnity from his *cestui que trust* against liabilities arising from the mere fact of ownership there is neither principle nor authority for saying that the trustee need prove any request from his *cestui que trust* to incur such liability. In the case supposed the trust involves such liabilities and the trustee whilst he remains such, cannot get rid of them. He is subject to them as legal owner; but in equity they fall on the equitable owner unless there are good reasons why they should not.

As regards shares this right of a trustee to be indemnified by his *cestui que trust* against calls has been repeatedly recognized and enforced on the principles applicable to the equitable ownership of property, and without reference to the principles applicable to contracts or specific performance or any other legal or equitable doctrine. Nothing can be plainer or sounder than the language of James, V.C., in *Castellam* v. *Hobson*, 18 W. R. 731, L. R. 10 Eq. 47; and of Chitty, J., in *Loring* v. *Davis*, 34 W. R. 701, 32 Ch D. 625 *James* v. *May*, L. R. 6 H. L. 328, proceeded on the same principle. Other cases to the same effect might be cited, but it is unnecessary to refer to them. No case has been found, nor as their lordships believe can be found, which is opposed to these authorities

The principle was recognized by Fry, J., in *Hughes Hallett* v. *The Indian Mammoth Gold Mines Co.*, 31 W. R. 285, 22 Ch. D. 561, although he there held that the application for indemnity was premature.

It is true that the facts of this case are not in all respects like those in the cases above alluded to. But although the facts are different the result of them is the same; *i.e.*, the facts were such that the relation of trustee and *cestui que trust* was created. In this case the defendant did not create the trust on which the plaintiff originally held the shares. The defendant had nothing to do with procuring their registration in the plaintiff's name as trustee for Benjamin & Kelly and their assigns. This feature of the case was strongly relied upon by the defendant's counsel as distinguishing it from those above-mentioned, and reliance was placed on what Lord Blackburn said in *Fraser* v. *Murdoch* about makers of trusts (see 6 App. Cas., at p. 872) and trusts to carry on business with particular funds (see p. 875). But their lordships can find nothing in Lord Blackburn's judgment which is inconsistent with the principles which in their lordships' opinion govern this case. The fact that the defendant did not create the trust on which the plaintiff held the shares when they were first placed in his name affords the defendant no defence to this action. Although the defendant did not create the trust he accepted a transfer of the beneficial ownership in the shares first as mortgagee and afterwards as sole beneficial owner with full knowledge of the fact that they were registered in the plaintiff's name as trustee for their original purchasers and their assigns whoever they might be. By this acceptance the defendant became the plaintiff's *cestui que trust*; and the plaintiff could not prevent it or effectually dispute his trusteeship for the defendant. By this acceptance the defendant created the trust for himself. Having done so the defendant, as the beneficial owner of the shares, demanded from the plaintiff and obtained dividends declared in respect of them. The defendant also paid calls made upon them although he attempted to protect himself from any admission of liability by entering these payments in his books as made on behalf of the plaintiff. Lastly, when asked by the plaintiff to procure a transfer of the shares out of the plaintiff's name the defendant refused to do so and thereby compelled the plaintiff to continue to hold them as his trustee. It is idle after this to rely on the fact that the defendant did not create the trust in the first instance; and idle to talk of renunciation or disclaimer of these shares by the defendant. He cannot now get rid of the trust for himself which he created by becoming beneficial owner of the shares, and which trust he has recognized since as subsisting.

It is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the plaintiff on trust for tenants for life or for infants or upon special trusts limiting the right to indemnity. In those cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership; and the trustee accepts the trust knowing that under such circumstances and in the absence of special contract, his right to indemnity cannot extend beyond the trust estate—*i.e.*, beyond the respective interests of his *cestuis que trustent*. In this case their lordships have only to deal with a person *sui juris* beneficially entitled to shares which he cannot disclaim. The obligation of such a person to indemnify his trustee against calls upon them appears to their lordships indisputable in a court of equity, unless, of course, there is some contract or other circumstance which excludes such obligation. Here there is none. Whether the plaintiff in this case could sue Benjamin & Kelly on any promise by them to indemnify him need not be discussed. Such a right, if it exists, in no way affects the obligation of the defendant as the plaintiff's *cestui que trust*. But it is obvious that any payment to the plaintiff by Benjamin & Kelly or by the defendant in respect of the calls would reduce the amount which the plaintiff could recover from the defendant or from them as the case might be.

For these reasons their lordships will advise her Majesty to allow the appeal and to reverse the judgments appealed from, with costs; and the defendant will pay the costs of this appeal.

Owing to the judgment appealed from being a judgment of non-suit only, their lordships are unable to advise her Majesty to order judgment to be entered for the plaintiff with costs. The defendant is entitled to a new trial at the risk of costs. But how in the face of his own books and conduct he can reasonably hope for ultimate success their lordships are at a loss to conceive. If, however, he insists on his strict rights he is entitled to have the action remitted to Hong Kong for retrial; and their lordships will humbly so advise her Majesty.

Solicitors for appellant, *Harwood & Stephenson.*

Solicitors for respondent, *Sharpe, Parker, Pritchards, Barham, & Lawford.*

Court of Appeal.

From Chan. Div. (Rigby and Stirling, L.JJ.) — JAN. 15.

In re KERLY, SON, & VERDEN. (*a.*)

Practice—Writ—Solicitor—Undertaking to enter appearance—Duration of undertaking—R. S. C. ord. 8, *r.* 1; *ord.* 9, *r.* 1.

The solicitors of a defendant, with the defendant's authority, upon the issue of a writ of summons gave the

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

plaintiff a written undertaking in these terms, "We accept service" (of the writ) "for the defendant and will enter an appearance in due course."

Held, that such an undertaking continued binding on the defendant and his solicitors even after the lapse of more than twelve months from the date of issue of the writ, and could be enforced by attachment of the defendant's solicitors.

Judgment of Farwell, J. (ante, *p.* 199), *affirmed.*

This was an appeal from an order made by Farwell, J., on a motion for a writ of attachment against the above-named firm of solicitors by reason of their failure to enter an appearance for the defendants in an action of *Anderson* v. *Tarbutt* in pursuance of their written undertaking to do so. The motion was purely formal (there being no suggestion of any improper conduct on the part of the solicitors), the object of it being to have the question of the effect of the undertaking determined by the court.

The writ in the above-mentioned action was issued on the 23rd of February, 1899, and by it the plaintiff as executrix of one Anderson, deceased, claimed (*inter alia*) an account of profits made by the defendants on the resale by them of certain property purchased or agreed to be purchased by them and resold to a company. The writ was indorsed with the following memorandum: "We accept service for the defendants Tarbutt and Quentin, and will enter appearance in due course," and such memorandum was signed Kerly, Son, & Verden. Various negotiations for a settlement subsequently took place, and owing to some of the parties interested being resident abroad the time for entering appearance was by consent extended to the 30th of April, 1899. Owing to various causes the matter was allowed to drop, and nothing further was done in the action until October, 1900, when the negotiations for a settlement were put an end to by the refusal of the plaintiff to accept an offer which had been made by the defendants on the 24th of February, 1899. The plaintiffs' solicitors then called upon Messrs. Kerly, Son, & Verden to enter an appearance for the defendants pursuant to their undertaking. Correspondence followed, the result of which was that the defendants' solicitors contended that owing to the time that had elapsed the action had expired, and consequently their undertaking had ceased to be binding upon them. They further stated that they had applied to their clients for instructions as to entering appearance, and the clients, in view of the long delay on the part of the plaintiff, directed them not to enter an appearance. The clients, however, requested their solicitors to do whatever the court thought fit to direct under the circumstances. It appeared that if the writ were to be treated as having lapsed, in all probability a new writ would be met by a plea of the Statute of Limitations, which did not apply to the cause of action under the original writ. The real question was, what period of time was sufficient to put an end to an undertaking to enter appearance.

Farwell, J. (*ante*, p. 199), held that ord. 8, r. 1, meant that the writ was in force for the purpose of service for twelve months, not that at the end of that period it had lost its efficacy for all purposes, and that the undertaking was a contract binding for six years and must be complied with.

From this decision the solicitors appealed.

Jenkins, Q.C., and *D. M. Kerly*, for the appellants, contended that, having regard to ord. 8, r. 1, there was now no writ in existence to which they could enter an appearance.

Upjohn, Q.C., and *F. Gore-Browne*, for the respondents.

RIGBY, L.J., said: The question in this case is whether the court has jurisdiction to proceed against solicitors on their undertaking to enter appearance. It is agreed on all hands that there has been no unfair or improper conduct on the part of the solicitors, and the client very fairly instructed his solicitors to do whatever the court thought fit to direct under the circumstances. In February, 1899, the writ in the action was brought to the defendants solicitors and they indorsed on it the following memorandum: "We accept service for the defendants and will enter appearance in due course." That was done with the authority of the client, and we are not here concerned with any question as to usurped authority or want of authority. In my opinion the effect of the undertaking by the defendants' solicitors was that all obligation as to formal service was waived. The indorsement in fact was equivalent to formal service. The undertaking was unconditional. They might have said, "We will accept service and enter an appearance." That was not the case here. They actually accepted service. At the end of the two months, the extended time for entering appearance, they ought therefore to have entered appearance. It was their place to do so. Ord. 8, r. 1, has no application to the present case. Neither the solicitors nor the client has any reason to complain, for the delay was the delay of the defendants. The solicitors are subject to the jurisdiction of the court and as officers of the court ought to carry out their undertaking to enter an appearance. The order therefore will be that the solicitors do forthwith enter an appearance. If there is any difficulty in doing so the matter may be again brought before the court. As this is an application in the matter of the solicitors, the costs should be paid by the solicitors.

STIRLING, L.J., agreed, and said he desired not to decide anything which did not arise from the particular facts of this case. Having stated the facts, he said the question was whether appearance ought now to be entered—whether ord. 8, r. 1. was spent, so to speak? His lordship then read ord. 8, r. 1, and also ord. 9, r. 1, and said that what had taken place here was not strictly in accordance with either rule. The indorsement on the writ meant "You may treat me as served and appearance shall be entered in due course." It was in fact a dispensation of formal notice. In his opinion, after acceptance of service a writ ought not to be renewed. That was a circumstance of great weight in deciding the present case, and looking at all the circumstances his lordship was of opinion that the delay was not so great as to prevent appearance being now entered, which should accordingly be done.

Appeal dismissed.

Solicitors, *Kerly, Son, & Verden; Loughborough, Gedge, Nisbet, & Drew.*

From Chan. Div. (Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) — Oct. 30; Nov. 2; Dec. 17.

In re BORAX CO.

FOSTER *v.* BORAX CO. (*a.*)

Company—Debentures—Floating security—Sale of assets to another company—Dissentient debenture-holders— Ultra vires.

Where a company sells its assets to another company, dissentient debenture-holders, having a floating security,

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

are not entitled to insist on payment unless the sale is ultra vires, *or the undertaking has ceased to be a going concern, or their debentures give them an express right to veto the transaction.*

This was an appeal from a decision of Farwell, J.

The Borax Co. was incorporated in 1887 for the purpose (*inter alia*) "to sell all or any part of the company's business or property, and to subscribe for, take, hold, distribute, allot, sell, or deal with, any debentures, shares, stocks, or securities of any other company or other association or undertaking."

In May, 1898, the company went into voluntary liquidation, and in July following the court sanctioned a scheme of arrangement which was declared to be binding upon all debenture-holders, and stayed all other and further proceedings in the voluntary winding up.

Under this scheme the plaintiff, who had previously been the holder of 114 debentures of £100 each, was to receive 228 new debentures of £50, all of which contained a charge by way of floating security over the whole property, undertaking, and assets for the time being, whether present or future, of the company.

On the 29th of November, 1898, the company entered into an agreement with a certain De Friese for the sale to the latter, free from incumbrance, of the whole of its property and assets, with the exception of certain securities to the value of about £23,000 for the consideration of £320,000, with a view to the whole undertaking being taken over and worked in the future by a proposed new company to be called Borax Consolidated. The purchase-money of £320,000 was to be paid as to £100,000 either in cash or in the issue of 4½ per cent. debenture stock by Borax Consolidated to the Borax Co., as to £150,000 either in cash or by the allotment of fully paid-up preference shares in Borax Consolidated, and as to the remaining £70,000 by the allotment of fully paid-up ordinary shares in Borax Consolidated.

By the same agreement the Borax Co. bound themselves for the future not to carry on their former business as manufacturers of or dealers in borax, &c., otherwise than in conjunction with and for the benefit of the new company.

On the 10th of January, 1899, De Friese entered into an agreement with the trustee of the proposed new company for the sale to the new company of the whole undertaking less the said securities of the value of £23,000.

On the 9th of February, 1899, the plaintiff issued his writ in the present action claiming (*inter alia*) that the Borax Co. might be restrained from carrying out the proposed sale contained in the agreements of the 29th of November, 1898, and the 10th of January, 1899, without first making proper provision for the payment of those debenture-holders who dissented from the proposed sale and in the alternative for foreclosure or sale.

On the 21st of March, 1899, North, J., granted an interlocutory injunction. On appeal, however, the Court of Appeal without expressing any opinion on the merits of the case dissolved the injunction, on the defendants paying into court the sum of £16,800, which was sufficient in any event to satisfy the claims of all the dissentient debenture-holders; and the agreements for sale as aforesaid were accordingly carried into effect.

At the subsequent trial of the action the plaintiff claimed to be entitled to have his debentures paid off or to foreclose, and contended that the injunction had been dissolved on the terms that he should get that to which he was entitled.

Farwell, J., was of opinion that the Court of Appeal intended that the sale should proceed and that the money paid into court was meant to be a security for the dissentient debenture-holders in substitution for the assets sold by the Borax Co. His lordship therefore made a declaration that the dissenting debenture-holders had a charge upon the £16,800 and such other assets of the Borax Co. as had not been included in the sale to the Borax Consolidated.

The Borax Co. now appealed.

Swinfen Eady, Q.C., and *Abraham*, for the company, argued that the sale to Borax Consolidated, even though some of the debenture-holders dissented, was a perfectly legitimate proceeding, having regard to the memorandum of association and to the decision in *Wall* v. *London and Northern Assets Corporation*, 47 W. R. 219, [1898] 2 Ch. 469.

Hughes, Q.C., and *A. C. Clauson*, for the plaintiff, contended that the defendant company were not justified in altering the nature of the plaintiff's security, and referred to *Wallace* v. *Evershed*, [1899] 1 Ch. 891, 47 W. R. Dig. 133; *In re German Date Coffee Co.*, 30 W. R. 717, 20 Ch. D. 169; *In re Vivian & Co.*, 48 W. R. 636, [1900] 2 Ch. 654.

Cur. adv. vult.

Dec. 17.—Lord ALVERSTONE, L.C.J., after stating the facts, said: We have now to consider whether the plaintiff and the other dissenting debenture-holders are entitled to enforce payment of the amount of their debentures in priority to the assenting debenture-holders. [His lordship then referred to the memorandum of association, and continued as follows:] Farwell, J., has not decided that the company had so ceased to carry on business that it could be wound up, nor was this contended before us in the argument on behalf of the respondents. I come to the conclusion upon the facts that the company will, notwithstanding the arrangement made with De Friese, still be carrying on some part of the undertaking as contemplated by the memorandum of association and could not be wound up. I also come to the conclusion, which is perhaps another way of stating the same view, that the company in the agreements made to which exception is taken by the plaintiffs has not acted *ultra vires* of the memorandum of association. But it is contended that although this may be so, the effect of the agreements entered into by the company is such that the transactions cannot be carried out without the consent of all the debenture-holders and that therefore the non-assenting debenture-holders are entitled to claim payment in full. It seems to me that the right of the debenture-holders who have only a floating charge on the undertaking and its assets is clearly settled by the judgment of the House of Lords in *Government Stock, &c., Investment Co* v. *Manila Railway*, 45 W. R. 353, [1897] A. C. 81, and I will only quote the words of Lord Macnaghten: "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes." In my opinion, in order to enable the debenture-holder to insist on payment of his debentures in such a case as this, he must show either that the act complained of is *ultra vires*, or that, to use the language of Lord Macnaghten, "the undertaking has ceased to be a going concern" or that the terms of the debenture which he holds give him the express right to veto or negative the operations which the company are proposing to carry out within their

powers. In my opinion the facts in this case do not support any of the above positions. There is nothing in the debenture to prevent the company from carrying out this particular operation if it is, as I hold it to be, within the memorandum of association, and in my opinion Farwell, J., ought to have declined to give the plaintiffs any special rights in respect of the £16,800 brought into court and ought to have treated them as having only the same rights as the debenture-holders who had assented. For these reasons I think the appeal should be allowed, with costs here and below.

RIGBY and VAUGHAN WILLIAMS, L.JJ., agreed.

Appeal allowed.

Solicitors, *Clements, Williams, & Co.; Linklater & Co.*

High Court of Justice.

Chan. Div. Kekewich, J. } Dec. 6, 18.

HALBOT v. LENS. (a.)

Principal and agent—Warranty of authority—Misrepresentation of fact—Liability of supposed agent.

An agreement was signed by the plaintiff and L. L. signed "for self and wife and Dr. C." He had not in fact authority from his wife or Dr. C. He believed and represented that he had his wife's authority. He stated, and the plaintiff knew, that he had not Dr. C.'s authority.

In an action by the plaintiff against L. to be indemnified by him for the non-concurrence of his wife and Dr. C.,

Held, that L. had warranted his authority to sign for his wife, but not for Dr. C., and that he was, therefore, liable in damages to the plaintiff in respect of the former, but not of the latter, signature.

Smout v. Ilbery, 10 *M. & W.* 1, *taken to be overruled by* Collen v. Wright, 6 *W. R.* 123, 8 *Ell. & Bl.* 647.

This was an action brought by E. L. Halbot as plaintiff against B. C. Lens and his wife Mrs. Lens as defendants. The plaintiff and the defendant B. C. Lens, who carried on a business in partnership at Bradford, in August, 1899, entered into an arrangement with their creditors. At this time the defendant Mrs. Lens and Dr. Clarke were part guarantors of the firm's banking account.

On the 1st of September, 1899, a memorandum of agreement was executed by E. L. Halbot and B. C. Lens, the latter signing "for self and wife and Dr. Clarke." The agreement provided that Halbot should take over the current business of the firm, including stock, book debts, goodwill, and trade-marks, paying B. C. Lens for the stock as therein arranged and undertaking to meet claims of customers for breach of contract; and that B. C. Lens should take the firm's remaining assets, not compete in the business for a certain time, pay in full preferential and secured claims and an agreed composition to the ordinary creditors including costs. Clause 3 of the agreement was as follows: "All claims (if any) made and existing by Dr. Clarke or Mrs. Lens against Halbot to be released." Lens had no authority to sign the agreement on behalf of either Dr. Clarke or Mrs. Lens, and they both repudiated it. The plaintiff, by his statement of claim, asked for a declaration (*inter alia*) that B. C. Lens was bound under the agreement to procure a release by Dr. Clarke and Mrs. Lens of all claims then made and existing by them against the plaintiff, and to indemnify the plaintiff therefrom, and for damages. It appeared from the evidence that at the time of signing the memorandum B. C. Lens represented to the plaintiff, as he believed to be the fact, that he had authority to sign on behalf of his wife, but that he plainly stated he had no authority to sign on behalf of Dr. Clarke, and that the plaintiff was then aware Dr. Clarke had already refused to agree to the terms of the memorandum.

Warrington, Q.C., and *Beddall*, for the plaintiff.—There is an implied contract by Lens to procure the concurrence of his wife and Dr. Clarke; and if he does not procure their concurrence he is liable in damages: *Collen* v. *Wright*. 5 W. R. 265, 7 Ell. & Bl. 301, 6 W. R. 123. 8 Ell. & Bl. 647; *In re National Coffee Palace Co., Ex parte Panmure*, 32 W. R. 236, 24 Ch. Div. 367.

Renshaw, Q.C., and *Methold*, for the defendant B. C. Lens.—As regards Lens' signature for Dr. Clarke, there was no misrepresentation of fact: *Beattie* v. *Lord Ebury*, 20 W. R. 994, 22 W. R. 897, L. R. 7 Ch. App. 777, L. R. 7 H. L. 102. As regards his signature for his wife, there was no intentional misrepresentation: *Smout* v. *Ilbery*, 10 M. & W. 1. He is not therefore liable as having warranted his authority in either case.

Cur. adv. vult.

Dec. 18.—KEKEWICH, J.—Before discussing the question which was mainly argued, and which is one of considerable importance, I must deal with the point argued on behalf of the plaintiff turning on the construction of clause 3 of the memorandum of the 1st of September, 1889. That memorandum was intended to operate as an agreement, and it is properly pleaded as an agreement in the statement of claim; but it is not beside the question to observe that it is not expressed to be made between parties, and that it is intituled "Memorandum as to understanding arrived at the 1st of September, 1899," from which it might be inferred that the document was intended to contain the terms on which an agreement was to be made rather than the agreement itself. The argument on behalf of the plaintiff with respect to the construction of clause 3 was that, inasmuch as Mr. Halbot was to be released, therefore this clause expressed an agreement by Mr Lens that he would procure a release for the benefit of Mr. Halbot. I do not think that a fair construction of that clause standing alone. It is not expressed as an agreement that any one person would procure a release, but rather as a condition of the entire agreement that there should be some release, and by referring to the other clauses of the agreement it is seen that when it was intended that anything should be done by either Mr. Halbot or Mr. Lens it was so stated in plain language.

But now we come to the question whether the defendant Lens is liable in damages to the plaintiff for not having procured the concurrence of Dr. Clarke and Mrs. Lens on the ground that he purported to sign the memorandum on their behalf as well as on his own. It is agreed that the law on this subject is adequately expounded in the judgments in *Collen* v. *Wright*. Study of the judgments delivered in the Queen's Bench Division and in the Exchequer Chamber shows that there was no doubt in the mind of any of the judges what was the question falling for decision, and indeed this is as clearly stated in the dissentient judgment of Cockburn, L.C.J., as it is in the judgment of the majority of the Court of Exchequer Chamber delivered by Willes, J. I could cite many passages by way of illustration

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

but will take one only from the judgment of Cockburn, L.C.J. He says: "The proposition we are called upon to affirm is that by the law of England a party making a contract as agent in the name of a principal impliedly contracts with the contracting party that he has authority from the alleged principal to make the contract, and that if it turns out that he has not this authority he is liable in an action on such implied contract." That proposition was in effect affirmed by the Court of Queen's Bench and by the majority of the Court of Exchequer Chamber. The decision does not proceed on the footing of there having been any wrong or omission to do right on the part of the agent in order to make him personally liable on a contract made in the name of his principal; and the judgment in *Smout* v. *Ilbery*, which was delivered fifteen years before *Collen* v. *Wright*, must be, I think, taken to be overruled by the latter case. The conclusion, therefore, is that, in order to enable a plaintiff to maintain an action on such a contract, he must must prove a misrepresentation of fact—that is to say, a representation by the defendant that he was authorized to sign on behalf of an alleged principal when in fact he was not so authorized, but he need not prove that this misrepresentation was due to an omission or wrong of the party signing. The decision in *Collen* v. *Wright* is briefly summarized on these lines by Mellish, L.J., in *Beattie* v. *Lord Ebury*, to which I must again presently refer. If, therefore, the case against the defendant Lens simply is that, having no authority to sign on behalf of his wife and Dr. Clarke, he nevertheless signed, as in fact he did, as their agent, he must be regarded as having entered into a contract that he had authority so to sign, that is, to bind them, and if there were no such authority he must be held to have made a misrepresentation of fact which renders him liable to an action on the implied contract. The defendant Mrs. Lens never authorized her husband to sign the memorandum of agreement on her behalf, or to agree to its terms. He thought that he had such authority or that she would ratify his bargain on her behalf, and the plaintiff apparently took this for granted. The proposition affirmed by *Collen* v. *Wright* is directly applicable, and the plaintiff is entitled to judgment on that footing. There was some discussion about the measure of damages, but the principle is well settled, and I do not anticipate any difficulty in applying it to the case in dispute. Therefore I say no more about that now.

The case against the defendant Lens on the alleged misrepresentation that he had no authority to sign for Dr. Clarke stands on a different footing. The result of the evidence is, I think, clearly to establish that both the plaintiff and the defendant Lens equally knew not merely that the defendant Lens had no authority to bind Dr. Clarke, but that Dr. Clarke had positively declined to assent to the terms of the agreement so far as they affected him. Is it possible under these circumstances to say that the defendant Lens made a misrepresentation of fact? There is a passage in the judgment of Mellish, L.J., in *Beattie* v. *Lord Ebury* which to my mind throws much light on this question. He says: "Supposing, when an agent comes and professes to make a contract on behalf of his principal, instead of trusting his representation that he has power to bind his principal the person dealing with the agent were to ask to see his authority, and a power of attorney executed by the principal were shown to him, and he took the opinion of his lawyer as to whether the power of attorney was sufficient to bind the principal, and was advised that it was sufficient to bind the principal, and then after that a contract was made and it turned out when the point was raised in a court of law that the power of attorney was insufficient—under such circumstances I am clearly of opinion that there would be no warranty on the part of the agent that the power of attorney was good in point of law." The case put by Mellish, L.J., is not on all fours with that I have to deal with here, but it strongly accentuates the position that in order to maintain such an action there must be misrepresentation of fact trusted by the person to whom it is made, and I cannot myself see how a man can be properly said to have made such a misrepresentation when in truth and in substance he has said, "Although I will, if you wish it, sign this on behalf of the alleged principal, I tell you plainly that I have no authority to do so, and have every reason to believe that such authority will not be forthcoming." A man, of course, might say "I have no authority and probably cannot obtain such authority, but yet I will contract to obtain it and run the risk of damages." Such a contract is conceivable, and would be good in law, but ought not, I think, to be inferred except from facts looking directly to that conclusion, and I do not find those facts here. I think it far more likely that it was agreed between the parties that the defendant Lens should add his signature on behalf of Dr. Clarke for what it was worth, each party recognizing that in all probability it was worth nothing. In my judgment, therefore, the plaintiff has failed to establish misrepresentation of fact against the defendant Lens as regards his signature on behalf of Dr. Clarke, and the action is not maintainable to that extent. The result is that the plaintiff has succeeded in part and failed in part. I do not see any way to distribute the costs otherwise than on the principle of equality, and the plaintiff will therefore have such judgment as he is entitled to without costs.

Solicitors, *Clarke & Blundell*, for *Gordon, Hunter, & MacMaster*, Bradford; *Massey & Fellowes*, for *Vint, Parkinson, Hill, & Killick*, Bradford.

Chan. Div. } Farwell, J. } Jan. 17.

In re PARKER.

STEPHENSON *v.* PARKER. (*a.*)

Will—Residue—Gift over of residue as a whole—Sum set apart—"Survivor"—Devolution on next-of-kin.

A sum directed to be set apart out of residue will, where the testator has shown an intention that the residue should go over as a whole, and on the failure of the trusts affecting it, fall back into and go with the remainder of the residue, and will not devolve upon the next-of-kin of the testator as upon an intestacy.

Skrymsher *v.* Northcote, 1 *Swanst.* 566, 1 *Wils. Ch.* 248, *discussed.*

This was an adjourned summons.

The testator in a codicil dated the 29th of January, 1881, to his will dated the 18th of September, 1879, after reciting the provision as to one equal third part of his residuary estate for the benefit of the children of his late son Arnold Parker, continued: "Now I do hereby revoke the bequest of such remaining equal one-third part of my said residuary estate . . . and in lieu thereof I direct that the trustees or trustee of my said will shall stand and be possessed of and interested in the said one-third part of my said residuary estate upon the trusts following—that is to

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

say, as to the sum of £4,500 part thereof, the sum of £2,250 to be held in trust for each of my two grandchildren Arnold S. Parker and Norman James Parker (sons of my said son Arnold Parker) who shall attain the age of twenty-one years, and as to the remaining part of the said one-third part of my residuary estate in trust for such one or more of the four children of my said late son Arnold" (the four named in the will including the two above-mentioned) "who being sons or a son shall attain the age of twenty-one years or being a daughter shall attain that age or marry under that age, and in case there shall not be any such child of my said son Arnold Parker I direct that the said one-third share of my said residuary estate or any accruing share shall go and be held in trust for" the testator's married daughter and her husband and children "and in default to my next-of-kin according to the Statute of Distributions."

The testator died on the 9th of December, 1881, and his will and codicil were proved on the 17th of May, 1882.

His grandson Arnold S. Parker attained the age of twenty-one years on the 18th of April, 1898, and his grandson Norman J. Parker died under the age of twenty-one years on the 22nd of February, 1900.

This summons was taken out by the present trustees of the will to determine whether there was an intestacy as to the £2,250 in trust for Norman J. Parker or whether that sum was to be held in trust for the three children of Arnold Parker, who had attained the age of twenty-one years.

P. M. Walters, for the plaintiffs.

R. N. Arkle, for one of the next-of-kin.—The gift is of a share of residue set apart, which cannot fall into residue; the case is governed by *Skrymsher* v. *Northcote*, 1 Swanst. 566, 1 Wils. Ch. 248; *Green* v. *Pertwee*, 5 Hare 249; and *Lloyd* v. *Lloyd*, 4 Beav. 231.

T. T. Methold, for a brother and sister of Norman James Parker.—The testator intended the property to go over as a whole, as is suggested by the gift over in the event of all dying. The word "survivor" means "other." *Skrymsher* v. *Northcote* has been dissented from: see *In re Judkin's Trusts*, 32 W. R. 407, 25 Ch. D. 743; also see *Champney* v. *Davy*, 27 W. R. 390, 11 Ch. D. 949. [FARWELL, J., referred to *In re Palmer*, *Palmer* v. *Answorth*, 42 W. R. 151, [1893] 3 Ch. 369.]

R. N. Arkle, in reply.—There was a gift over in *Skrymsher* v. *Northcote*.

FARWELL, J.—The question calling for my determination is whether the £2,250 given to Norman James Parker is disposed of under the gift of "the remaining part of the said one-third part of my said residuary estate," or whether the gift devolves as upon an intestacy. For the next-of-kin of the testator reliance is placed on *Skrymsher* v. *Northcote*, which undoubtedly bears a strong resemblance to the present case in that the will in that case also contained a gift over. I do not think it is necessary for me to say whether *Skrymsher* v. *Northcote* can stand, having regard to *In re Palmer*, *Palmer* v. *Ainsworth*, because in my opinion I am bound to apply the rule of construction established by decisions in the Court of Appeal in reference to the analogous case of a gift over to survivors. Although the rule might have been applied in *Skrymsher* v. *Northcote* it must be remembered that the particular point—namely, the weight to be given to the terms of a gift over, is of comparatively modern origin. Here I have got the words "as to the remaining part of the said one-third of my residuary estate" which are ambiguous in this sense, that they may mean "remaining after deducting the £4,500" or they may mean true residue, that is "remaining after deducting so much of the £4,500 as is required to satisfy the legacies to Arnold and Norman." I will assume that *Skrymsher* v. *Northcote* was well decided. But I have a gift over which shows that the testator believed that the gift of the residue would not fail unless all the children died in the events which have happened. Now, a gift over in a case of the death of the survivor has been held to show that the fund is to go over as a whole and only if there is a failure of the issue, or of the tenants for life. The cases have held that although the word "survivor" has its true meaning of "survivor" where there is no gift over, yet a gift over gives a different signification. Applying that doctrine I must hold that the remaining part of the clause, coupled with the gift over, does show that the testator was dealing with it as a whole, and that there is accordingly no failure of objects. It is not unimportant to note that the ultimate gift is to next-to-kin. The declaration will be that three children of Arnold, the son, and not the next-of-kin of the testator, are the parties interested.

Solicitors. *Guscotte, Wadham, & Bradbury*, for *Wightman & Parker*, Sheffield; *Geare & Pease*, for *Wake & Sons*, Sheffield.

Chan. Div. } Wright, J. } Nov. 7, 10.

In re UNITED SERVICE ASSOCIATION.
Ex parte YOUNG. (*a.*)

Company—Winding up—Contributory—Action begun by company—Discontinuance by liquidator—Originating summons—Same cause of action—Costs of action—Stay of proceedings—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 101.

Where a company commenced an action against a shareholder for calls, but afterwards went into voluntary liquidation, and the liquidator discontinued the action, and then took out a summons against the shareholder for a balance order, the shareholder is not entitled to a stay of proceedings on the summons till his taxed costs of the discontinued action have been paid, but is entitled to set off these costs against any sum which the liquidator may recover against him under the summons.

Adjourned summons to stay proceedings in an originating summons taken out by the liquidator for an order on the applicant to pay certain moneys alleged to be due.

The company, while a going concern, commenced an action against John Young, the applicant, to recover £375 alleged to be due from him as holder of 500 shares in the company.

On the 14th of September, 1899, they issued a summons under order 14 of Rules of the Supreme Court for leave to sign final judgment.

Young obtained leave to defend on the 27th of September, and also an order for discovery of document on giving security for costs, and the action was set down on the short cause list.

Young gave security, but failed to get discovery, and in consequence obtained an order that the action should not be set down and heard till after discovery had been given.

Before this was given, on the 14th of May, 1900, the company passed an extraordinary resolution to voluntarily wind up, and appointed the secretary of the company the liquidator.

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

The liquidator applied to Young for payment of the £375, and on his refusing to pay, in June, after notice, put him on the list of contributories.

On the 31st of July, 1900, the liquidator gave notice of discontinuance of the action, and issued an originating summons in the winding up under sections 101 and 138 of the Companies Act, 1862, for an order on Young to pay the money with interest and costs.

On the discontinuance of the action Young's costs were taxed and allowed at £13 1s. 2d. The liquidator, however, refused to pay them.

Young now applied by summons in the winding up, asking (1) that all further proceedings under the originating summons might be stayed till payment of his taxed costs in the action; (2) for security for costs in the originating summons, and in the meantime a stay of all proceedings; (3) that if the costs were paid and the security given the liquidator should make an affidavit of documents and allow an inspection of documents.

Young's alleged liability was the only asset of the company.

Giveen, for the applicant.—There should be a stay of proceedings until payment of the taxed costs, for the liquidator is much in the same position as a trustee in bankruptcy who revives an action commenced by the bankrupt, and the court has ordered all proceedings to be stayed in such a case where the bankrupt had been ordered to pay costs in a suit which, after the bankruptcy, had been revived by his assignee until such costs were paid: *Cook* v. *Hathway*, 17 W. R. 1057, L. R. 8 Eq. 612; *Horlock* v. *Priestley*, 8 Sim. 621. Where an action has already been brought the court in both England and Ireland will stay proceedings in another action between the same parties over substantially the same matter until the costs of the first action have been paid: *McCabe* v. *Bank of Ireland*, 38 W. R. 257, 14 App. Cas. 413-416. Rules of Supreme Court, 1883, ord. 26, r. 4, expressly applies the same rule to cases where the actions have been discontinued. This is not a case where the court would order the liquidator to pay costs personally; he is only the agent of the company, and therefore represents the company itself, which, being insolvent, ought to give security for costs: *In re W. Powell & Sons*, 44 W. R. 618, [1896] 1 Ch. 681.

Martelli, for liquidator.—The present case is outside the rule as to the costs of abandoned proceedings. The liquidator represents not only the company, but also its creditors who have intervened in the winding up. He is right in discontinuing the action, as other defences could be raised there which are not available to a contributory. The liquidator is now only using the machinery provided by section 101 of the Companies Act, 1862, to compel payment. The applicant is only a creditor of the company as to the costs of the former action, and must prove for them in the winding up. [On this point he was stopped by the court, and was not called on as to giving security for costs.] The liquidator is willing to produce all documents.

Giveen, in reply.—The applicant is a successful litigant, and ought to be paid his costs in full, and not put in competition with creditors who became so before the winding up: *In re London Metallurgical Co.*, 43 W. R. 476, [1895] 1 Ch. 758, at p. 763.

WRIGHT, J.—I have already dealt with the application that the liquidator may be ordered to give security for costs, and have refused to order him to do so. As regards the application that he may be ordered to give discovery, I understand that he undertakes to produce and give the applicant inspection of all documents relating to matters in question in the summons. The application that the liquidator's proceedings by originating summons may be stayed must be refused, for I do not think the case comes within the principle of the authorities cited on behalf of the applicant. There is nothing vexatious in the ordinary statutory proceedings which the liquidator is now taking; he is not bound to go on with the action commenced by the company, and he seems only to have done his duty when he discontinued that action. There is no analogy between this case and that of oppressive litigation or proceedings being continued by a person who succeeds to a plaintiff's interest as his representative. I must take it that the action was properly brought, but that it was rightly discontinued, and I cannot say that the liquidator's proceedings by way of originating summons ought to be stayed unless he pays the cost of an action which he did not begin himself. The effect of that would be to give the present applicant the full costs of his action instead of leaving him to prove for the amount in the liquidation. The case may, no doubt, be one of hardship, but it is a hardship which is caused by the liquidation and not by any fault of the liquidator. The £13 costs in the action ought to be allowed to the applicant out of any moneys which the liquidator may recover against him. The costs of the present application will be liquidator's costs in the originating summons. Leave to appeal refused.

Solicitors, *Harwood & Stephenson; Poole & Robinson.*

Q. B. Div.
(Bruce and Phillimore, JJ.) Jan. 16.

MOSES *v.* MARSLAND. (*a.*)

Metropolis—Building—Hospital—Building used for a public purpose—Home for defective children—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5 (27).

In order to provide effectually for the education of children of defective intellect within their district, the Metropolitan Asylums Board established homes close to board schools specially equipped and adapted for the education of children of that class, in which it was intended the children should live while attending such schools.

Held, that a building acquired by the board for this purpose, not having a cubical capacity of more than 250,000 *feet, or sleeping accommodation for more than* 100 *persons, was not a "public building" within the London Building Act*, 1894, *not being a "hospital" or a building "used or constructed, or adapted to be used, for any other public purpose" within section* 5 (27).

Case stated by a metropolitan magistrate.

A complaint was preferred by the respondent against the appellant charging that he did not comply with a notice served on him by the respondent, a district surveyor, under the London Building Act, 1894, requiring him to do certain things under the provisions of that Act whilst carrying out certain alterations for the Metropolitan Asylums Board at a building, No. 16, Elm-grove, Peckham.

By an order of the Local Government Board dated the 2nd of April, 1897, the care of children who by reason of defect of intellect or physical infirmity cannot properly be trained in association with children in ordinary schools was placed in the hands of the Metropolitan Asylums Board.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

That Board for the purpose of carrying out that order prepared a scheme for purchasing various dwelling-houses in different parts of London adjacent to schools specially provided and staffed by the London School Board, for the education of children of this class.

Under this scheme the children were to live, sleep, and board in such houses under the care of a responsible matron in numbers generally not exceeding fourteen in any one house, and to attend such special Board schools each day for the purpose of their education. The houses were intended to be permanent homes for the children. No. 16, Elm-grove had been an ordinary detached dwelling-house of two floors, with one room and a basement below, and had been purchased by the board under the scheme; and they had instructed the appellant under the supervision of the board's architect to alter or convert the dwelling-house to make it suitable for the accommodation of twelve to fourteen children and a matron, cook, and housemaid (the latter in the exclusive service of the board). The total cubical capacity of the dwelling-house was under 50,000 cubic feet, with sleeping accommodation as above.

The only question argued before the magistrate was whether the building in the above circumstances was a "public building" within the London Building Act, 1894, ss. 5 (27), 68, and 79.

The magistrate held that the building was, in the hands of the Metropolitan Asylums Board, "used, or constructed, or adapted to be used for a public purpose," and was therefore a "public building" within the definition of public building in section 5 (27) of the above Act, and made an order upon the appellant that he should comply with the requirements of the respondent's notice.

Section 5 (27) of the London Building Act, 1894, provides that in that Act "the expression 'public building' means a building used, or constructed, or adapted to be used as a church, chapel, or other place of public worship, or as a school, college, or place of instruction (not being merely a dwelling-house so used), or as a hospital, workhouse, public theatre, public hall, public concert-room, public ballroom, public lecture-room, public library, or public exhibition-room, or as a public place of assembly, or used, or constructed, or adapted to be used for any other public purpose, also a building used, or constructed, or adapted to be used as an hotel, lodging-house, home, refuge, or shelter, where such building contains more than 250,000 cubic feet, or has sleeping accommodation for more than 100 persons."

Macmorran, Q.C. (*Herbert Smith* with him), for the appellant.—The building is not a "public building" within the London Building Act, 1894. The learned magistrate seems to have thought that a building was a building used for a public purpose within section 5 (27) if it was provided out of public funds. The real test is whether the building is intended to be used for a purpose similar to those of the buildings enumerated in the section. The section does not include a mere dwelling-house, such as the building in question, even though it existed under the auspices of a public body: See *Joselyne* v. *Meeson*, 53 L. T. Rep. 319, 34 W. R. Dig. 120.

R. C. Glen, for the respondent.—The building is a public building, being a public hospital within section 5 (27). It is a hospital because it is a place intended for children suffering from physical infirmity. At any rate it is a place *ejusdem generis* with hospital and therefore within the general words building "used, &c., for any other public purpose."

BRUCE, J.—In my opinion the building in question is not a "public building" within the London Building Act, 1894, as defined in section 5 (27). It is said on behalf of the respondent that it is covered by the words "public hospital." No doubt the word hospital originally had a very wide significance. One of the meanings given in Murray's Dictionary is "any place of lodging," and there is cited as an illustration the following passage from Spenser's Faërie Queene (11 IX. 10): "They spide a goodly castle . . . which choosing for that evening's hospitale they thither marcht."

But I think the word is used in this statute in its modern meaning, connoting a place for the treatment of the sick, and I do not think that, using the word in that sense, this building can be treated as a hospital. Nor is it a building "used or constructed or adapted to be used for any other public purpose." The substance of the decision in *Joselyne* v. *Meeson* was that the buildings referred to under that phrase were not buildings in which the public had an interest, but buildings to which they could gain admission.

But apart from that, "other public purpose" must be some purpose *ejusdem generis* with the purposes for which the enumerated buildings were used, and such a purpose would not, in my opinion, include the purpose for which the house in question was intended to be used. It is obvious that it cannot be a "home" within the meaning of the Act because it has not a cubical capacity of 250,000 feet or sleeping accommodation for 100 persons. In my opinion, therefore, the appeal ought to be allowed and the order of the magistrate annulled.

PHILLIMORE, J.—I am of the same opinion. I conceive that a building cannot be both a hospital and a home. The word hospital is clearly not used in the old sense as a place of lodging, nor even in the old legal sense as an asylum for the destitute and infirm, but it is used in the modern sense as a place for the treatment of physical ailments. The Local Government Board and the Metropolitan Asylums Board appear to have anticipated the provisions of the Elementary Education (Defective and Epileptic Children) Act, 1899, and have provided for the reception of children incapable of being taught in association with ordinary children, houses or homes as adjuncts to certain schools which are provided with special teachers and appliances for the instruction of children of that class. It is to be observed that the children sent to and kept at those houses are not kept there in order that they may be treated for their infirmities but merely for the purposes of education. That seems to me to make it clear that the house in question is not, in the sense in which the term is used in the Act, a hospital. I think it is also clear that the house does not come within the general words "building" "used, &c., for any other public purpose."

Those are not perhaps the best words that could have been used; but they were words which had appeared in one of the earlier Acts which the London Building Act, 1894, superseded, and as they had received judicial interpretation they were retained. The court held in *Joselyne* v. *Meeson* that the words did not mean a building in which the public had an interest, but one used for a purpose which involved the admission of the public, such as, for instance, a public lecture-hall to which members of the public were admitted on payment of entrance money.

This house, then, is not a hospital, nor is it within the general words, and as it is not a "home" of the size to which this section refers it is not a "public building" within the Act.

Appeal allowed.

Solicitors for the appellant, *Williams & James.*

Solicitors for the respondent, *Walter C. Williams.*

Q. B. Div. (Div. Court). (Lord Alverstone, L.C.J., and Kennedy, J.). Nov. 6, 21.

In re FOUR SOLICITORS.

Ex parte INCORPORATED LAW SOCIETY. (*a.*)

Solicitor—Professional misconduct—Conflicting interests—Undisclosed agreement to share profits—Solicitors Act, 1888 (51 & 52 *Vict. c.* 65).

Where solicitors represent conflicting interests in litigious proceedings of any kind, any arrangement or understanding or practice whereby a share of profit, whether called "agency" or by any other name, is paid by one of the solicitors to another, is wrong in principle and fraught with risk to the welfare of clients and to the administration of justice, and constitutes professional misconduct.

This was a motion upon the report of the Statutory Committee of the Incorporated Law Society.

An application had been made by the T. E. Stephens that John Hawthorne Lydall, John French Lydall, and Herbert Wykeham Lydall, all of 37, John-street, Bedford-row, London, solicitors, might be required to answer the allegations contained in the affidavit which accompanied the application, and that their names might be struck off the roll of solicitors of the Supreme Court, or that they might be suspended from practice as solicitors, or that such other order might be made as the court should think right, on the ground that the matters of fact stated in the affidavit constituted professional misconduct on the part of the said J. H Lydall, J. F. Lydall, and H. W. Lydall in their capacity of solicitors of the Supreme Court of Judicature in England.

A similar application was made in the case of the respondent Mark Jameson Letcher.

The statutory committee in their report stated that "The applicant is a barrister-at-law. He was formerly a solicitor practising at Liverpool, but retired from practice in June, 1884, when he was struck off the roll at his own request preparatory to his applying to be called to the bar. During the years 1880-85 he was a partner in the firm of Frisby, Dyke, & Co., who were carrying on a large business as drapers and silk mercers at Liverpool and elsewhere. The respondent J. H. Lydall was admitted in Trinity Term, 1859, J. F. Lydall, one of his sons, in July, 1890, and H. W. Lydall, another son, in July, 1893. The respondent J. H. Lydall practised by himself until May, 1894, when he took the other two respondents into partnership with him, and they have since that date practised in partnership under the style of Lydall & Sons. The respondent M. J. Letcher is a solicitor practising at 68, Lincoln's-inn-fields, London. He was admitted in Easter Term, 1872."

The applicant practised as a solicitor in Liverpool, and when he was about to retire from business he entered, on the 23rd of June, 1880, into the following agreement with the respondent John Hawthorne Lydall: "My dear Stephens,—I hereby agree, in consideration of your introducing business, to allow you one-half of the net profits of all business introduced by you to me, or that I may obtain through any introduction of yours as from the 14th of May last, and I undertake and agree to pay such share of the profits to you or your executors or administrators immediately after receipt of the costs or any portion thereof in the respective matters.—Yours very truly, JNO. H. LYDALL.—Those current at the present time are John Dyke, deceased, and Snoder's matters."

In 1897 the applicant brought an action against the said respondent for an account. On the hearing the respondent gave evidence and this evidence was read before the statutory committee on the hearing of the applications, as also was the judgment of Kekewich, J, before whom the action was tried in 1899. In the course of his judgment the learned judge made the following remarks: "The object of this summons is to determine whether four specified items of business fall within the agreement of the 23rd of June, 1880, so as to make the costs of those items divisible between the parties pursuant to the agreement or not. Mr. Warrington has not pressed his view with regard to item No. 2, therefore my judgment on that is not required. But after what we have heard it is quite impossible for me to pass it over, because it affects the profession seriously. Mr. Lydall had command of the administration action, actual or intended of Mr. Dyke's estate. It was necessary, so he was advised, no doubt rightly, that an administration action should be commenced. So urgent was it that he issued a writ without instructions, though of course he was willing to tear that up. He thought, and probably he was right, to make the infants plaintiffs, but the administration suit with the infants either as plaintiffs or defendants was essential, and it was in his hands. It was to be a friendly action, entirely in his hands. Instead of acting for both parties or telling the defendants they must go to an independent solicitor, he performed what would be a farce if it was not something very much worse. He retained a Mr. Letcher, who seems to have done the same work before, but not to my mind at all creditable to him (I will not say more, as he is not here), to appear for the defendants upon the terms that he (Mr. Letcher) was to divide his costs with Lydall, the plaintiff's solicitor. A most discreditable thing, to my mind. The painful part of it is this, there is not one day in the sittings in which there have not come before me several cases in which the infants are plaintiffs or defendants and their father or mother or other members of the family in the opposite position, and I have very disagreeable and sometimes difficult questions to decide, mainly questions of discretion between the parties, and I rely, as it has always been my custom to rely, and I hope it always will be, on those who come before me to give me the very best assistance on behalf of the parties they represent. If I thought that one party was only coming here to say and do what he is told by the other, of course my confidence would be entirely destroyed, and the advantage to the infants particularly would be entirely gone. Mr. Lydall says he believes it to be the universal practice in the profession under similar circumstances. I do not mean to say I may not have heard of such a case before, but I hope I shall not again. I do not believe Mr. Lydall's statement. I should be unworthy of my position and the honourable view I take of the members of the profession if I believed that to be true. I believe it to be utterly untrue. It is a very serious charge against solicitors if it is true. It really comes to this—Mr. Lydall puts it in this way—that he procures Mr. Letcher to appear for the defendants, and divides Mr. Letcher's costs with him. The real substance of such an arrangement as that is that they are Mr. Lydall's clients, and he commands the administration from first to last, and he pays someone else to do his bidding. That is what it must come to if what is said to be the universal practice has any holding on the profession. I am thankful to think it has not. But I have thought it right to make these observations on this disclosure, and I hope the solicitors as a body will look into it and see that if it does prevail, it will be allowed to prevail no longer."

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

Several other charges were made against the respondents, but these were withdrawn during the inquiry.

The committee found that the respondent J. H. Lydall, for many years past, and, since 1894, the respondents J. F. Lydall and H W. Lydall also, introduced the respondent Mark Jameson Letcher and other solicitors to act for parties in administration actions whose interests conflicted with those of the parties for whom these respondents (the Lydalls) were acting, and that in all such cases the respondents received from the solicitors introduced by them agency on or a share of their profit costs without disclosing it, and the committee found that in doing this the respondents were guilty of professional misconduct within the meaning of the Solicitors Act, 1888.

A. H. Trevor, for the Incorporated Law Society.

Rawlinson, Q.C., and *Romer*, for the applicant.

Sir E. Clarke, Q.C., *Pickford, Q.C.*, and *MacSwinney* for the respondents Messrs. Lydall.

C. E. Jones, for the respondent M. J. Letcher.

R. E. Moore held a watching brief on behalf of an interested party.

The cases of *In re Lilley*, [1892] 1 Q. B. 759; *In re Four Solicitors*, 35 SOLICITORS' JOURNAL, 648; and *In re Coaks*, 40 SOLICITORS' JOURNAL, 717, were referred to.

Nov. 21.—KENNEDY, J., read the following judgment of the court: In this case the Statutory Committee of the Incorporated Law Society, charged with the investigation of certain matters of complaint made by Mr. T. E. Stephens against four solicitors practising in London—viz., three of the name of Lydall and one of the name of Letcher—have, after due inquiry, reported that they find all four guilty of professional misconduct within the meaning of the Solicitors Act of 1888. The matter has now been brought before this court by the committee in the usual way, and it becomes our duty to pronounce judgment upon it, after considering the report of the committee and the arguments in regard to the persons affected by it which have been addressed to us by their counsel. The correctness of the full and careful statement of facts upon which the committee base their finding is not impugned by any of the respondents in any material point, and we accept that statement. It is unnecessary to dwell upon the details of the transactions which it sets forth. They are summarized clearly and quite sufficiently for the purpose of our judgment to-day in its concluding paragraph. The committee there find that the respondent J. H. Lydall for many years past, and, since 1894, the respondents J. F. Lydall and H. W. Lydall also, introduced the respondent M. J. Letcher and other solicitors to act for parties in administration actions whose interest conflicted with those of the parties for whom the Lydalls were acting, and that in all such cases the respondents received, from the solicitors introduced by them, agency on, or a share of, their profit costs without disclosing the fact. In our judgment, where solicitors represent conflicting interests in litigious proceedings, of any kind, any arrangement or understanding or practice whereby a share of profit, whether called "agency" or by any other name, is paid by one of the solicitors to another is wrong in principle and fraught with risks to the welfare of clients and to the administration of justice. It must, not infrequently, involve a temptation to him who receives a share of his opponent's profit to neglect, if not to sacrifice, the true interests of his client, where the opponent is taking steps which make costs for the common gain, according to such a practice, of both solicitors. It cannot be right that those who are paid to guard conflicting interests should enter into such pecuniary relations with each other as make it profitable to the legal representative of one of the interests to acquiesce, if not to assist, in needless and wasteful proceedings on the part of the respresentative of another interest. The temptation may be resisted, or the court may effectually intervene, and no harm may result; but the agreement or practice which creates such a temptation ought not to find a place in the work of a great and honourable profession. But whilst in our judgment the relation which such an agreement or practice produces between solicitors entrusted with conflicting interests is altogether and in itself objectionable and indefensible, the matter appears to us to assume a much more serious aspect, both practically and morally, if the agreement or practice is not disclosed; and this the committee find to be the case here. The court and its officers are misled, and the corrective force of its supervision is impaired. The court is kept in ignorance of the fact that proceedings, which it rightly requires and assumes to be directed by independent and disinterested advice, may be dictated by a league of persons who oppose only in name and appearance and not in fact. One of our colleagues in the Chancery Division, in his judgment in *Stephens* v. *Lydall*, which is quoted in the report, has in strong terms reprobated such a practice, and called attention to evils which may result from it, especially where the interests of infants are involved in the litigation; and in the present case the committee of the Incorporated Law Society, after a careful examination of the facts, have found that the respondents in carrying on this practice of undisclosed profit-sharing with solicitors who represented conflicting interests have been guilty of professional misconduct. It is now our duty, and it is a painful duty, to say that we emphatically endorse the grave censure which that finding involves. Having come to this conclusion, we have anxiously considered how, in the exercise of our disciplinary powers, we ought to deal with these respondents. We have decided to take a course which may perhaps seem to some to err on the side of clemency. In any case, before stating the considerations of mitigation which have helped to guide us, we feel it to be our duty to point out (although we earnestly hope that the warning is not needed) that if professional misconduct, such as that of which these respondents have been found guilty, is proved to have taken place after this public condemnation of it by this court one of the principal matters of mitigation will not then exist. This is, so far as we are aware, the first occasion on which the court has had to consider this particular kind of professional misconduct. We are glad to find that the committee are able to say not only that they had no proof adduced before them of the practice of which the respondents have been guilty, being, as the respondents asserted, a common practice, but that, in the belief of the committee that assertion is untrue, and no attempt was made before us to support such a contention. At the same time we have reason to fear that there has existed in the ranks of the profession, although, as we hope, within a very limited range, a certain laxity of habit in such matters, and a readiness to do work upon a profit-sharing basis where the nature of the relative duties of the parties to the transaction make it inherently vicious and improper. There are indeed, indications of that to which we refer in the evidence which is included in the report of the committee. Whilst this fact is, of course, no excuse for the respondents, and whilst from the standpoint of public interest it enhances the importance of a clear

and strong condemnation in this court, it is, nevertheless, in our judgment just, in dealing with these cases which are the first, to admit it as an element of mitigation. It is not, however, the only element. We are bound in our view to give weight to the consideration that, while the practice complained of on the part of the two elder respondents had extended to several actions and over many years, neither in their case nor in the case of the two younger respondents has it been proved that a pecuniary mischief has resulted to a client. There is in the case at least of some of the actions, evidence to the contrary. It would no doubt be very difficult, if not impossible, now to ascertain accurately in such record and papers as may still exist or otherwise, the propriety or impropriety of proceedings taken in administration suits long since concluded, and paragraph 19 of the report certainly inspires some misgivings. Still, the jurisdiction which we are exercising is punitive and almost penal, and in proceedings of such a nature the accused are, in our judgment, entitled in a high degree to insist upon strictness of proof. And it is fair to say, further, that the committee in regard to one of the administration actions expressly find that the proceedings had been carried on quite properly, and in regard to two other actions report in effect an equally favourable conclusion. Lastly, in regard to the two younger respondents, Mr. J. F. Lydall and Mr. H. W. Lydall, we hold it to be right to consider, in mitigation of the professional misconduct of which they have been found guilty, that they are young men in their father's office, who naturally would be influenced by their father's example in the conduct of business, not only owing to their close relationship to him, but owing also to the fact that at the time when the elder son was admitted to the profession the father had been practising as a solicitor for more than thirty years. In these circumstances we think that the justice of the case will be met if we make in the case of each of the two elder respondents, John Hawthorne Lydall and Mark Jameson Letcher, an order of suspension for three months, and in the case of the two younger respondents, John French Lydall and Herbert Wykeham Lydall, an order that they as well as the two first-named respondents do pay the costs of the Law Society. We make no order as to the costs of Mr. T. E. Stephens. He made a number of most grave charges against the respondents, which were abandoned in the course of the inquiry; and, further, in the 14 (H) paragraph of the report, it appears that he was from time to time informed by Mr. J. H. Lydall that he was receiving as agency a share of the profit costs of Mr. Letcher and of Mr. Lidiard, and that half of such share was from time to time remitted to him in letters stating the sums remitted to be a proportion of the profit of Mr. Letcher's and Mr. Lidiard's costs respectively.

Judgment accordingly. Leave to appeal given and order to be suspended pending appeal.

Solicitors, *S. P. B. Bucknill; Lewis & Lewis; Lydall & Sons; M. J. Letcher.*

Q. B. Div.
(Commercial Court.)
(Mathew, J.)

Nov. 14, 19.

MONTGOMERIE *v.* INDEMNITY MUTUAL MARINE INSURANCE CO. (LIMITED). (*a.*)

Insurance—Marine—General average—Ship and cargo belonging to same owner—Sacrifice of mast—Liability of underwriters on cargo.

In the case of an action on a policy of marine insurance on the cargo of a ship to recover a general average loss incurred by the cutting away of the mainmast under circumstances constituting a general average sacrifice, the fact that the vessel and the cargo both belonged to the plaintiffs is no defence to the action.

The Brigella, [1898] *P.* 189, 41 *W. R. Dig.* 92, *dissented from.*

Commercial case.

In this case the plaintiffs claimed for a general average loss under a policy of marine insurance on cargo, made by the defendants; alternatively, they claimed for the defendants' proportion of ruing and labouring expenses to avert a total loss of the insured cargo.

The policy was on a cargo of nitrate of soda in the ship *Airlie* at and from any ports on the west coast of South America to a port of discharge in the United Kingdom or on the continent of Europe, or in the United States. The ordinary sea perils were insured against, and the policy contained the ordinary sue and labour clause.

The facts, shortly, were that while in the latitude of the River Plate *The Airlie* encountered stormy weather, and the master, fearing that the main mast would break and fall on the deck and cause the loss of the vessel, had the rigging cut away, and the mast fell over the side.

The plaintiffs were the owners of both the ship and the cargo, and they claimed a general average sacrifice.

The defendants pleaded that there had been no general average sacrifice; that the plaintiffs had no claim under the policy, because as owners of the cargo they had not paid, and were not liable to pay, contributions to general average as they were the owners of the vessel as well as of the cargo, and that the sue and labour clause did not apply.

Carver, Q.C., and *J. A. Hamilton*, for the plaintiffs.—The cutting away of the mainmast was in the circumstances a general average sacrifice rendered necessary by perils of the sea. General average is a sacrifice for the common good, and the loss must be borne by the whole adventure, and therefore the underwriters must bear their proportion of the loss falling on the interest which they have insured. It is no defence to say that because the ship and the cargo both belong to the same owner, there being therefore no contribution between the owner of the cargo and the owner of the ship, the underwriters on the cargo are not liable to contribute: *Birkley* v. *Presgrove*, 1 East 220; Arnold on Marine Insurance (2nd. ed.), p. 895; Emerigon, c. 12, s. 19. *The Brigella*, [1893] P. 189, 41 W. R. Dig. 92, which is the case on which the defendants rely, is a wrong decision.

Counsel also relied on the opinion of Blackburn, J., in *Oppenheim* v. *Fry*, 11 W. R. 725, 3 B. & S. 873, at p. 884, and the American decisions, *Potter* v. *Ocean Insurance Co.*, 3 Sumner 27, and *Greely* v. *Tremont Insurance Co.*, 9 Cushing 415.

Joseph Walton, Q.C., and *Loehnis*, for the defendants.—There was no general average sacrifice, because at the time the master ordered the mast to be cut away he thought it had already become a wreck: *Shepherd* v. *Kottgen*, 26 W. R. 120, 2 C. P. D. 578, 585. Further, there cannot be a claim for a general average loss on ship against underwriters on cargo in the case where both ship and cargo are owned by the same person. The decision of Barnes, J., in *The Brigella* is good law. Where all the interests are owned by one person, but are insured by different underwriters,

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

expenses incurred in averting a loss may be recovered under the different policies in proportion to the amounts insured. A general average loss cannot be recovered under the sue and labour clause: *per* Lord Blackburn in *Aitchison* v. *Lohre*, 28 W. R. 1, 4 App. Cas. 755, at p 764.

See also Parsons on Insurance (1868 ed.), vol. 2, p. 208; *Dickenson* v. *Jardine*, 16 W. R. 1169, L. R. 3 C. P. 639; *Kidston* v. *Empire Marine Insurance Co.*, 15 W. R. 63, 769, L. R. 1 C P. 535, L. R. 2 C. P. 357; *Xenos* v. *Fox*, 17 W. R. 893, L. R. 4 C. P. 665.

Carver, Q.C., in reply, referred to Benecke on Marine Insurance, p. 473.

Cur. adv. vult.

Nov. 19.—MATHEW, J., read the following reserved judgment: This was an action on a policy on the cargo of the ship *Airlie* to recover a general average loss incurred by the cutting away of a mast. The ship sailed on the 29th of March, 1900, with a cargo of nitrate from Tocopilla, a port on the west coast of South America, for Shields. On the 17th of May, while in the latitude of the River Plate, the vessel encountered very bad weather with a heavy cross sea, and began to roll and lurch violently. About 9 a m. it was noticed that the mainmast, which was an iron mast and hollow, had settled down. The rigging, which had slackened, was at once tightened by a process called "swittering up," and the mast so secured remained firm in position. The ship continued to roll, and the master, after some time, fearing that the mast would break and fall on the deck and cause the loss of the vessel, thought it best to get rid of it. Accordingly the vessel was brought into position, the windward rigging was cut, and the mast fell over the side, carrying away portions of the other masts and rigging. The wreckage was promptly cut adrift. The vessel was brought home under jury rig, and reached her port of discharge in safety. The first point made by the defendants was that there was no general average sacrifice. The mast, it was said, was already hopelessly lost, and therefore it was not sacrificed for the safety of the crew, ship, and cargo. But I cannot agree with this contention. The mast was not in such a condition that it must have been lost whether the rest of the adventure had been saved or not. It could not be said that the mast had no value, or that it was impossible to be saved. There was a chance of saving it, and that chance was thrown away for the safety of the whole adventure. The master would seem to have exercised his judgment reasonably, and it was not necessary that his view should be borne out by the facts when they came to be afterwards examined. It was found, when the cargo was discharged, that the mast had been in no greater peril than the rest of the adventure. It had broken across about 12in. from the keelson. The upper portion had crushed into the lower in telescope fashion, and rested firmly and securely on the keelson. For the defendants reliance was placed on the case of *Shepherd* v. *Kottgen*, where the mast was cut away, but was held to be already lost. There it appeared that the rigging had been loosened in the storm, and that all that was done was to anticipate by a few minutes an inevitable loss. The mast of *The Airlie* before the rigging was cut was firmly upheld, and could have stood and been saved if the master had not ordered it to be cut away. Upon the question of fact I am of opinion that was a general average sacrifice.

But the underwriters relied upon another defence which raises a question of great importance. It was said that the loss of the mast did not give rise to a general average claim because the ship and the cargo both belonged to the plaintiffs, and, as there could be no contribution in fact, there was no general average loss. The defendants relied on the case of *The Brigella*, which was said to be a judgment in favour of their contention. It was pointed out, however, that the opinion of the learned judge was not necessary to his decision, and I was asked to hear the case argued and give my judgment upon the matter. I feel compelled to do so, though I have great reluctance to express an opinion on the matter which differs from that of Barnes, J. The duty has probably been imposed upon me in order that, if the case should go further, it may be more readily dealt with when the different views which have been held on this subject have been formally stated. It seems to me that a general average act is not affected by the consideration whether there will be a contribution or not. The sacrifice is made for the safety of those on board as well as of the ship and cargo. But there is no contribution from those whose lives have been saved. Further, in such a case, it has never been held, or, so far as I know, argued that as between ship and freight there is no distribution of loss among the respective underwriters because both interests belong to the shipowner. It was not disputed that, in the case of general average expenditure, as, for instance, in the hire of a tug to extricate a ship from a dangerous position, there was a right to demand contribution from underwriters. The explanation offered on behalf of the defendants was that such expenditure was recoverable under the sue, labour, and travel clause. But that clause, it seems to me, stands clear of the insurance against general average sacrifice. Its object is explained by Lord Blackburn in *Aitchison* v. *Lohre*. It was not intended that the clause should afford an additional remedy for what was already sufficiently protected. Again, what is sacrificed in general average ought, in my judgment, to be treated in principle as lost by the perils averted. In the present case the loss of the mast must be regarded as a loss by perils of the seas, a loss not altered in its character by reason of a voluntary act intended to prevent more disastrous consequences Accordingly, it has been held that a loss by general average cannot be added to a loss to the full amount insured so as to cast a further liability on the underwriter: see *Aitchison* v. *Lohre*. One further consequence of the supposed rule would be that in a case of joint ownership a jettison of cargo would leave the underwriter on cargo liable for the whole amount, without any right of contribution; and the concealment of the fact that the owner of goods was also the owner of the ship might be treated as an objection to the insurance on the ground of concealment of material fact. Here the policy of insurance is a policy against general average due to perils of the seas and other losses of the same character; and, if there were any question as to whether this loss was covered as general average, it is certainly a loss of the same character. Although the point has not been dealt with in any other case than that of *The Brigella*, there is considerable authority for saying that the liability of the underwriter is not affected where insured interests are joint: *Oppenheim* v. *Fry*, per Blackburn, J.; the two American cases, *Potter* v. *Ocean Insurance Co.* and *Greely* v. *Tremont Insurance Co.*; and Phillips on Marine Insurance, ss. 1274 and 1412. A man of business desirous of keeping a strict account of his transactions would allocate such a loss as this to his interest in ship and cargo in proportion to their respective values. There seems no reason why his underwriter should not be placed in the same position. It was agreed that the figures should be settled between the parties when the question of principle

was determined. I give judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors, *W. A. Crump & Son; Waltons, Johnson, Bubb, & Whatton.*

Q. B. Div.
(Lord Alverstone, L.C.J., and Kennedy, J.) — Nov. 13.

PHILLIPS AND OTHERS *v.* ALHAMBRA PALACE CO. (HULL). (*a.*)

Contract—Personal contract—Agreement with a partnership—Death of one member of partnership—Liability of surviving partners—"Unforeseen calamity"—Sale under power in mortgage.

The plaintiffs, music-hall artists, entered into a contract with the A. Co., which was then a partnership of three persons, to perform on two separate occasions at their hall. The plaintiffs had no knowledge of the fact that the A. Co. was a partnership consisting of three persons. The contract contained a clause that, in the event of any "unforeseen calamity" by which the business might be stopped, all engagements were to terminate. Before the time fixed for the first performance one of the partners in the firm died, but the plaintiffs performed in accordance with their contract, and were paid by the defendants for their services. After the first performance, and before the time fixed for the second performance, the hall was sold by a mortgagee under a power of sale in the mortgage, and the second performance was not carried out.

Held, that, the contract being one which had no reference to the personal character and conduct of the partner who had died, the surviving partners were liable for a breach of it, and that the sale of the hall under the power of sale was not an "unforeseen calamity" within the contract, and that the plaintiffs were entitled to recover.

Appeal from his Honour Judge Raikes, sitting at Kingston-upon-Hull County Court.

The plaintiffs, four music-hall artists, sued to recover from the Alhambra Palace Co., Hull, damages for breach of a contract entered into by them with the plaintiffs.

On the 12th of October, 1897, the plaintiffs entered into a contract with the defendants, the Alhambra Palace Co., Hull, to perform at their music-hall for two periods of a fortnight each, commencing on the 8th of August, 1898, and the 23rd of October, 1899, respectively.

The Alhambra Palace Co., Hull, was a partnership firm which consisted of three members.

On the 16th of December, 1897, one of the three members of the company died, and the business was carried on with the object of winding it up. The engagement for the 8th of August, 1898, was carried out by the plaintiffs and they were paid for their services according to the contract.

Before the time fixed for the second performance in October, 1899—namely, on the 8th of July, 1899—the hall in which the Alhambra Palace Co., Hull, carried on their business was sold by the mortgagee under a power of sale in the mortgage, and the business was wound up.

The plaintiffs were thus unable to perform their engagement commencing on the 23rd of October, 1899, and their claim was in respect of that engagement.

The contract between the plaintiffs and the company was signed by T. H. Greasley, manager, and it was signed by him "For the Alhambra Palace Co., Hull." There was no evidence that the plaintiffs had any knowledge as to the persons composing the company with which they were contracting.

The contract stated: "No play, no pay," and "In the event of any unforeseen calamity by which the business may be suspended or stopped, all engagements will terminate immediately."

It was contended for the defendants that the contract, being one for personal service, was *ipso facto* cancelled by the death of one partner in the firm; that the sale of the hall under the power of sale in the mortgage was an "unforeseen calamity" within the meaning of the contract, which terminated the engagement, and that in addition the contract was made on the terms of "No play, no pay."

The county court judge gave judgment for the plaintiffs, and the defendants appealed.

Cautley, for the defendants.—The defendants are not liable upon two grounds. In the first place, the contract in this case was a contract of a personal nature; it was a contract for personal service. When it was entered into with the company, the company consisted of three partners. By the death of one of the partners, the contract, being personal, came to an end, and the surviving partners were not bound to complete it, and they are not liable to the plaintiffs for a breach of it: *Tasker* v. *Shepherd*, 9 W. R. 476, 6 H. & N. 575; *Robson & Sharpe* v. *Drummond*, 2 B. & Ad. 303. In the second place, by the terms of the contract itself the engagement was to come to an end in the event of any "unforeseen calamity" terminating the business. The sale of the hall by the mortgagee under his power of sale was an "unforeseen calamity" within the meaning of the contract, and therefore put an end to the contract.

Trevor White, for the plaintiffs.—The judgment of the learned county court judge was right. The contract was not a contract for any personal service at all; it was not a personal contract in any sense. There was no evidence to show that the plaintiffs ever knew who the three partners were, and they did not enter into the contract because of the personal character of the partner who died. A contract of personal service is a contract with regard to a service to be rendered to a particular person. Here there were no services to be rendered by the plaintiffs to any one of the partners in particular. The service was personal in this sense, that as regards the plaintiffs themselves the services were to be rendered by them; but it was not personal in any other sense. Therefore the death of the one partner did not put an end to the contract, or deprive the plaintiffs of their right of action against the surviving partners: *Scarf* v. *Jardine*, 30 W. R. 893, 7 App. Cas. 345, at p. 349; *Tasker* v. *Shepherd*. The sale of the hall was not an "unforeseen calamity" within the meaning of this contract. The plaintiffs are therefore entitled to recover.

Lord ALVERSTONE, L.C.J.—This case, in my opinion, is not free from difficulty. We have in the first place to consider what principle of law applies, and then to consider the facts of this particular case. In 1897 the plaintiffs entered into a contract with the Alhambra Palace Co. to perform on two occasions. It now appears that there was no evidence that it was known to the plaintiffs that although the defendants were described as the Alhambra Palace Co., as a matter of fact the company was a partnership of three persons. Before August, 1898, one of the partners died, but the plaintiffs, in accordance with their contract, performed, and were paid by the de-

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

fendants. Between this date and October, 1899, the mortgagee sold under his power of sale, and the two surviving partners ceased to carry on any business in the palace. It is now said that either the contract came to an end by the death of one of the partners, and, therefore, that no action can now be maintained for a breach of the contract in October, 1899; or, it is said, that it came to an end by the happening of an "unforeseen calamity" within the meaning of the contract. We do not think that interference by a mortgagee in selling under a power of sale contained in his mortgage can come under the words "unforeseen calamity," and we think that such interference is not an "unforeseen calamity." We have, therefore, to decide the other point—which is one of considerable difficulty—namely, whether the death of one of the partners put an end to the contract. It seems to me that the principle of law applicable in these cases is that you have to see whether the obligation sought to be performed depends on the personal conduct of the deceased person with regard to the other contracting person. I think that the two cases cited on behalf of the appellants bring out clearly that distinction. In *Tasker* v. *Shepherd* the action was brought against the survivor of two partners who had entered into an agreement with the plaintiff to employ him as their agent for the supply of stone for a period of four and a-half years from the date of the agreement. One of the partners died during the period, and the breach alleged by the plaintiff was his non-employment by the defendant (the surviving partner) during the whole period of four and a-half years. The judges drew the inference from the facts that the parties contracted with reference to a certain existing partnership business only, and subject to the condition that all the parties so long lived. I think the fact that the judges considered the special facts of that case, and came to the conclusion that the contract was entered into subject to certain conditions as to the partners living so long, shows that it is necessary to discriminate one case from another—in other words, that the personal element comes in. Then the case of *Robson & Sharpe* v. *Drummond* is another good illustration of the principle. There Lord Tenterden, speaking of the contract in that case, says: "Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and therefore have agreed to pay money in advance. The latter, therefore, having said it was impossible for him to perform the contract, the defendant had a right to object to its being performed by any other person, and to say that he contracted with Sharpe alone and not with any other person. On that ground I think the non-suit was right." There the same principle was applied that the basis of the contract was personal. If, on the other hand, the contract is one which has no relation to the personal action of the partner who has died, then I see no reason why the surviving partners should not be liable, notwithstanding the death of one of the partners. Applying that principle to the facts of this case, I come to the conclusion that when the plaintiffs entered into this contract to perform at the times specified they did not in any way rely on the personal character of the partners who were unknown to them. I, therefore, come to the conclusion that these two defendants by their agreement became liable to employ these persons, and that at that time there was another person who was also liable. That other person died, and in that case I think the contract can be enforced against the two others. I think the case was rightly decided and this appeal ought to be dismissed.

KENNEDY, J., concurred.

Appeal dismissed.

Solicitors for the appellants, *Collyer-Bristow & Co.*, for *J. J. Underwood*, Hull.

Solicitors for the respondents, *Chester, Broome, & Griffithes*, for *J. M. Rutter*, Bolton.

Prob. Div. & Adm. Div. Admiralty. } Nov. 5.

"THE HOLAR." (*a.*)

Ship—Pilotage—Compulsory pilotage—Foreign vessel—Port of Blyth—Trinity House of Newcastle-upon-Tyne—41 Geo. 3. c. lxxxvi., s. 6.

A foreign vessel resorting to, or coming into, or departing from the port of Blyth, is bound by compulsion of law to employ a pilot licensed by the Trinity House of Newcastle-upon-Tyne.

This was an action of damage instituted on behalf of the owners of the paddle steam-tug *George Peabody*, against the Norwegian steamship *Holar*, known at the date of the collision as the steamship *Vadso*, to recover for the damages sustained by the *George Peabody* on the 15th of February, 1896, when *The Holar* outward bound from the port of Blyth with a pilot licensed by the Trinity House of Newcastle on board and in charge of her, came into collision with and damaged *The George Peabody* in Blyth Harbour about 100 yards inside the west pier of the harbour.

The defendants the owners of *The Holar* in their defence denied that the collision had been caused by the negligent navigation of *The Holar*; pleaded that such collision had been caused by the negligent navigation of *The George Peabody* by the plaintiffs or their servants; charged that a good look-out had not been kept on board *The George Peabody* or on *The Volterno*, a vessel *The George Peabody* was attending at the time of the collision, or on *The General Gordon*, another tug then employed by the *The Volterno*; that *The Volterno* and her tugs had entered Blyth Harbour at an improper time, had improperly tried to pass *The Holar* and had improperly neglected to slacken their speed and stop, and that *The George Peabody* had improperly failed to keep on the proper side of the channel, to slip her towing hawser, and to obey articles 7 and 8 of the Blyth Harbour Commissioners Bye-laws and articles 18 and 25 of the Regulations for Preventing Collisions at Sea. After pleading all these defences on the merits, the defence continued as follows: "The defendants further say that, so far as the said collision was caused or contributed to by any negligence of *The Vadso* (*The Holar*), which they deny, as aforesaid, it was so occasioned solely by the fault or neglect of the pilot who, being a duly licensed pilot for the district, was by compulsion of law in charge of *The Vadso* (*The Holar*)."

The defendants did not set up any counterclaim.

Oct. 30.—The action was heard by Barnes, J., assisted by two of the Elder Brethren of the Trinity House of Deptford, Stroud, and the court, after hearing evidence, came to the conclusion that the collision had been solely caused by the negligence of the licensed pilot in charge of *The Holar*, and adjourned the case for further hearing and argument on the question whether *The Holar* and her owners were exempt from liability on the ground that the licensed pilot on board *The Holar* had been employed on board her by compulsion of law.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

Nov. 5.—The hearing of the action was continued and evidence was given on behalf of the defendants to prove that pilotage was compulsory for foreign ships resorting to or entering or leaving the port of Blyth under the charters of the Trinity House of Newcastle-upon-Tyne, and the 41 Geo. 3, c. lxxxvi. s. 6.

A member of the corporation of the Trinity House of Newcastle-upon-Tyne was called as a witness for this purpose and produced "The Record Book" containing copies of the charters granted to the corporation. He stated that Blyth was a creek of the port of Newcastle-upon-Tyne and that pilots to conduct vessels resorting to or entering or leaving the port of Blyth were licensed by the Newcastle Trinity House, and that the pilot acting in charge of *The Holar* at the time of the collision was one of the pilots so licensed.

The plaintiffs called witnesses who gave evidence to the effect that recently foreign vessels had gone into and out of Blyth without employing a pilot, and that no proceedings were known to have been taken against them for their infringement of the provisions of the 6th section of the 41 Geo. 3. c. lxxxvi.

The question of compulsory pilotage was then argued.

Laing, Q.C., and *Balloch*, for the plaintiffs.—The intention is clear from the passing of the Hartlepool Pilotage Confirmation Act, 1864 (26 & 27 Vict. c. 58), the Tyne Pilotage Order Confirmation Act, 1865 (28 & 29 Vict. c. 44), the Tees Pilotage Order Confirmation Act (45 Vict. c. 1), and the Sunderland Pilotage Confirmation Act, 1865 (28 & 29 Vict. c. 59), that the compulsory pilotage jurisdiction of the Trinity House of Newcastle-upon-Tyne should be abolished, and this intention has been carried out by the pilotage bye-laws, made by the Trinity House of Newcastle-upon-Tyne under section 333 of the Merchant Shipping Act, 1854, in 1883, and which bye-laws were confirmed by an Order in Council of the 14th of February, 1883. In effect these bye-laws only provide for sums due for pilotage dues under them being paid in case a pilot is voluntarily employed, and do not make any provision for pilotage being recovered by way of a penalty when a pilot is not taken.

They referred to *The Johann Sverdrup*, 35 W. R. 63, 300, 11 P. D. 49, 12 P. D. 43.

Aspinall, Q.C., and *Stubbs*, for the defendants.—*The Holar* at the time of the collision was in charge of her pilot by compulsion of law under the 6th section of 41 Geo. 3, c lxxxvi., which, though repealed as to a great portion of what was once the Newcastle-upon-Tyne Trinity House Pilotage District by the Acts relied on by counsel for the plaintiffs, is still in force as to the port of Blyth, which was a creek of the port of Newcastle-upon-Tyne at the time of the passing of the Act of George. The 6th section in question provides in terms that the "owners or masters of any foreign vessel resorting to or coming into or departing from the said port of Newcastle or any of the creeks or members belonging thereto, shall and they are hereby obliged and required respectively to receive, take on board, and employ in the piloting and conducting their vessels such pilots to be licensed as aforesaid," *i.e.*, by the Trinity House of Newcastle-upon-Tyne, "and in case of their neglect or refusal to receive or employ such pilots as aforesaid, they shall nevertheless answer and pay to the master pilots the aforesaid pilotage duties as if such pilots had been actually received and employed." This statutory provision is expressly in point in the present case, and it is immaterial whether or not the Trinity House of Newcastle-upon-Tyne have or have not recently chosen to enforce their rights under it, The owners of *The Holar* are consequently not liable for the damage proceeded for.

The cited *The Maria*, 1 W. Rob. 95; *The Vesta*, 50 W. R. 705, 7 P. D. 240.

BARNES, J.—I have already decided that the collision which occurred in the port of Blyth between the plaintiff's steam-tug *George Peabody* and the defendant's steam vessel *Vadso*, now called *The Holar*, was solely occasioned by the fault of the pilot of *The Vadso*, and I have now to determine whether the pilot was in charge of the defendants' vessel by compulsion of law. *The Vadso* was a Norwegian steamship, and by section 6 of a local Act of Parliament (41 Geo. 3, c. lxxxvi.) foreign vessels resorting to or coming into or departing from the port of Newcastle or "any of the creeks or members belonging thereto" are required to emply pilots licensed by the proper authority, and in the event of neglect or refusal, pilotage is recoverable as if a pilot had been employed. It has been proved that the port of Blyth is one of the creeks or members of the port of Newcastle within the meaning of the section in question; and shortly put the contention of the defendants is that by the Act of 1801 (41 Geo. 3, c. lxxxvi.) pilotage was in respect of foreign vessels rendered compulsory over the Tyne and various creeks or members belonging to the port of Newcastle, and that nothing has since taken place so far as the port of Blyth is concerned to repeal or vary this section of the Act. On the other hand the plaintiffs assert that pilotage is no longer compulsory on foreign vessels in the port of Blyth by reason of a change of regulations affecting the port. In other words, they contend that what has since taken place has been sufficient to repeal the sixth section of the Act of 1801 so far as compulsory pilotage is concerned. In support of the contention they rely upon a new code alleged to have been established by bye-laws made in 1883 pursuant to section 333 of the Merchant Shipping Act, 1854, the provisions of which section are repeated in section 582 of the Merchant Shipping Act, 1894. Now there is no doubt that originally the port of Blyth formed part of the port of Newcastle so far as pilotage is concerned, and that from time to time in recent years the Act of 1801 and the jurisdiction of the Trinity House of Newcastle-upon-Tyne have been affected by there being taken out of the Act of 1801 various ports, including Newcastle itself, and by various authorities being constituted for the purpose of dealing with pilotage within the various ports, but it nowhere appears that this has been done with regard to Blyth. There is, however, another section of the Merchant Shipping Act, 1854, which must be considered—namely, section 332 (equivalent to section 581 of the Merchant Shipping Act, 1894), by which power is given to pilotage authorities to make and extend exemptions from compulsory pilotage, whilst the immediate succeeding section—section 333, under which the bye-laws of 1883 were made—does not deal with the question of compulsory pilotage at all, but deals, amongst other things, with the power to alter and reduce the rates of pilotage. I think it is clear, when the bye-laws of 1883 are considered, there is nothing in them which purports to deal with the rights conferred under section 332 of the Act of 1854, although there is, to a certain extent, under section 333 a change in the rates, for under the Act of 1801 there was a difference between the rates on British and foreign ships, but by the bye-laws of 1883 all ships are put upon the same footing. Looking at the matter, therefore, as affecting the port of Blyth, I cannot find anything in the bye-laws of 1883 which in any way modifies the obligation to employ a pilot imposed upon a foreign vessel by the Act of 1801.

Counsel for the plaintiffs, however, contend that this case must be decided upon the same lines as that of *The Johann Sverdrup*, with the result that compulsory pilotage will be found to be abolished in respect of the port of Blyth; but that case relates to the Tyne, and the Tyne has been taken out of the operation of the Act of 1801 by virtue of a provisional order embodied in the Tyne Pilotage Order Confirmation Act, 1865 (28 & 29 Vict. c. 44), which now contains a complete code of regulations respecting the pilotage of the River Tyne. That provisional order was made under the Merchant Shipping Act, 1862, s. 39, by which the Board of Trade was enabled, amongst other things, to transfer pilotage jurisdiction, to constitute new pilotage authorities, and to make exemptions from compulsory pilotage in any district. The Act of 1865 gave effect to a pilotage provisional order in respect of the Tyne. A body of pilotage commissioners was constituted for the Tyne, the pilotage district was defined, the jurisdiction vested in the Trinity House of Newcastle-upon-Tyne was transferred to the commissioners, the pilotage dues were provided for, and by paragraph 16 of the order it was provided that "nothing in this order shall extend to oblige the owner or master of any vessel to employ . . . any pilot . . . if he is not desirous so to do." It was held in *The Johann Sverdrup*, that the pilotage provisional order confirmed by the Act of 1865 contained a complete code of regulations respecting pilotage in the Tyne, and that its provisions superseded those of the Act of 1801, and that therefore under paragraph 16 of the order, which is contained in the schedule to the Confirmation Act of 1865, pilotage was not compulsory for either British or foreign vessels in the Tyne. It seems to me, however, that that case has no application to the matter before me, because it is dealing and is concerned solely with the effect of an Act of Parliament confirming a provisional order. In the present case there is no provisional order, and no Act of Parliament varying the effect of the Act of 1801. There is only a code of bye-laws made by the still existing pilotage authority so far as the port of Blyth is concerned—the Trinity House of Newcastle-upon-Tyne, and these bye-laws are only made by virtue of the 333rd section of the Merchant Shipping Act, 1854. It is, however, urged by counsel for the plaintiffs that there has been an abolition of compulsory pilotage, and reliance is placed upon the latter part of a clause in the bye-laws headed "Rates of Pilotage," which provides that "the pilotage dues shall be paid to the sub-commissioners or to the pilot performing such pilotage within five days after the performance thereof." It is argued that as the pilotage dues are only to be paid to the sub-commissioners "after" the pilot has performed the pilotage duties they cannot possibly be paid when the pilot has not performed those duties, and that that implies that the pilotage dues cannot be compulsorily imposed; but the words I have referred to are only a repetition of what is to be found in the latter part of section 7 of the Act of 1801 and the compulsion imposed by the sixth section cannot be construed to be taken away merely because section 7 speaks of the pilotage dues being paid within five days after the pilotage duties have been performed. Moreover, it appears to me that there is nothing to show that there has been any custom or usage with regard to the matter, because, though evidence has been given that cases have occurred in which foreign ships have not been asked to pay after coming in or going out of port, and though there may have been a misconception on the point, that does not, to my mind, affect the question whatever, pilotage is compulsory in law. The conclusion to which I have come on reading these Acts of Parliament and the bye-laws above referred to is that there is nothing to be found which in any way abolishes the compulsion imposed by the sixth section of the Act of 1801 so far as the port of Blyth is concerned, though there is a reduction of the pilotage rates in accordance with the powers conferred by the Merchant Shipping Acts. For these reasons I must hold that the pilotage in this case was compulsory by law and that the defendants are exonerated from responsibility for the collision.

There will be no order as to costs.

Solicitors for plaintiffs, *Ince, Colt, & Ince.*

Solicitors for defendants, *Stokes & Stokes.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Dec. 6, 7.

REG. v. LOCAL GOVERNMENT BOARD AND THE GUARDIANS OF WILLESDEN. (*a*.)

Poor law—Separation of parish from union—Amount to be paid by union to parish—Principle of apportionment—"Property" of the union—Jurisdiction of the Local Government Board—Poor Law Amendment Act, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 32—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 24 (2) (d), 26 (1).

In 1896 *the Local Government Board made an order under section* 32 *of the Poor Law Amendment Act,* 1834, *for the separation of the parish of Willesden from the union of Hendon, of which theretofore it had been a part. In consequence of such order it became requisite, under the same section, for the board to ascertain the proportionate value to the parish of Willesden of the union of Hendon workhouse or "other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers thereof," and also to "fix the amount to be received or paid, or secured to be paid, by" the parish of Willesden.*

There were two annuities payable by the county council of Middlesex, under the Local Government Act, 1888, *to the old undivided union of Hendon in respect of the salaries of registrars and costs of the officers.*

Held, that these annuities came within the meaning of the words "other property" in section 32 *of the Poor Law Act,* 1834.

In ascertaining the proportionate value to a parish of a union of such annuities, and fixing the amount to be received or paid by such parish, the Legislature contemplated the capitalization and division of the annuities at the time of the separation of the parish from the union.

An apportionment of the annual sums according to the future rateable values of the union and parish respectively is not a fixing of the amount within the section.

This was an appeal by the Hendon Union from the decision of Bigham and Channell, JJ., who, on cause shown by the Local Government Board and the Willesden Board of Guardians, discharged a rule for a *certiorari* to quash an order made by the Local Government Board under section 32 of the Poor Law Amendment Act, 1834, dealing with the apportionment as between the parish of Willesden and the union of Hendon of two annual sums received by the said union from the Middlesex County Council.

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

On the 12th of August, 1896, the parish of Willesden, which up to that date was one of eight parishes constituting the Hendon Union, was separated from such union by an order of the Local Government Board made pursuant to section 32 of the aforesaid Act, as amended by section 66 of the Poor Law Amendment Act, 1844.

On the 13th of August, 1896, the board issued another order whereby it was (*inter alia*) ordered that the laws for the relief of the poor in the parish of Willesden should be administered by a board of guardians elected for that parish.

In consequence of the order of the 12th of August it became necessary for the Local Government Board to ascertain, pursuant to section 32 of the above Act of 1834, the proportionate value to the parish of Willesden of the workhouses of the Hendon Union and of "other property held or enjoyed by such union for the use of the poor or the benefit of the ratepayers therein," and to "fix the amount to be received or paid, or secured to be paid, by" the parish.

The amount paid by the guardians of the poor of the Hendon Union out of local grants towards the remuneration of registrars of births and deaths during the financial year ending the 31st of March, 1889, was the sum of £18, and under and by virtue of section 24 (2) (*d*) of the Local Government Act, 1888, the county council of the county of Middlesex became liable to pay, and did pay, that sum of £18 a year, to the Hendon Union.

On the 11th of September, 1889, the Local Government Board certified that the sum of £2,597 had been expended by the guardians of the Hendon Union, during the financial year ending the 25th of March, 1898, on the salaries, remuneration, and superannuation allowances of the officers of the Hendon Union (other than teachers in poor law schools), and on drugs and medical appliances; and under and by virtue of section 26 (1) of the Local Government Act, 1888, the county council of Middlesex became liable, after the 31st of March, 1889, to pay, and did pay, that sum of £2, 597 annually to the Hendon Union.

The order issued by the board on the 23rd of December, 1898, after reciting (*inter alia*) that it was necessary to provide for the apportionment of these sums of £18 and £2,597 provided:

Article 5: "As and when the sums of £18 and £2 597 are received by the guardians of the poor of the said Hendon Union from the county council of Middlesex, in pursuance of the provisions of section 24 (2) (*d*) and of section 26 (1) of the Local Government Act, 1888, in respect of the financial year ending the 31st of March, 1899, and in respect of each succeeding financial year, such sums shall be apportioned by the guardians of the poor of the Hendon Union between the Hendon Union and the parish of Willesden according to the respective rateable values of the union and parish for the purposes of the poor rate, according to the valuation lists in force on the 25th of March next preceding the financial year in respect of which the payment is made, and the guardians of the poor of the Hendon Union shall forthwith pay to the guardians of the poor of the parish of Willesden the amount so apportioned to that parish."

The Hendon Union then pointed out to the board that if Willesden had not been separated from the union they would have contributed according to the rateable value of the parish to the expenditure on salaries, drugs, extra medical fees, &c., and would have been entitled to receive the proportion of grant on the same basis; but that according to article 5 of the order, Willesden would still be entitled to the payment of the proportion of the grant according to rateable value, when they did not contribute to the expenditure of the union, which would place an unjust burden on the union.

The board having declined to alter the order, Hendon Union then obtained the above rule for a *certiorari* to quash article 5 of the order, upon the grounds that the annual sums dealt with in the order were not "property," within the meaning of section 32 of the Act of 1834, and that, therefore, the board had no jurisdiction; that the division of the sums by the board according to rateable values was not a "fixing" of the amount within that section, and that the board had no jurisdiction to apportion the sums as they had done.

The Divisional Court held that the annuities were "property held or enjoyed by the union for the use of the poor" within the meaning of section 32, and that the apportionment, by the Local Government Board, of such annual sums according to the rateable values of the union and parish respectively was a proper fixing of the amount within the section.

From this decision the Hendon Union now appealed.

The Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), provides:

Section 32: "It shall be lawful for the said commissioners"—now the Local Government Board—"from time to time as they may see fit, by order under their hands and seals, to declare any union . . . to be dissolved, or any parish or parishes, specifying the same, to be separated from or added to any such union; and, as the case may be, such union shall thereupon be dissolved, or such parish or parishes shall thereupon be separated from or added to such union accordingly. . . . Provided always that in every such case the said commissioners shall and they are hereby required to ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers thereof, and also the proportionate amount chargeable on every parish in respect of all the liabilities of such union existing at the time of such dissolution or alteration of the same; and the said commissioners shall thereupon fix the amount to be received, or paid, or secured to be paid, by every parish affected by such alteration," &c.

The Dissolved Boards of Management and Guardians Act, 1870 (33 & 34 Vict. c. 2), provides:

Section 11: "Where any district or union has been or shall be dissolved, or any parish has been or shall be added to or separated from a union . . . and a valuation shall become requisite for the adjustment of the rights and liabilities of the districts, unions, or parishes affected thereby, such valuation shall be procured by the managers, guardians, or overseers of the districts, unions, or parishes, in such manner as the parties interested shall mutually agree upon, or by the poor law board" (now the Local Government Board) "in case of their not agreeing within such time as the board shall fix," &c.

The Local Government Act, 1888 (51 & 52 Vict. c. 41), provides:

Section 24: "Whereas certain grants heretofore made out of the Exchequer in aid of local rates (in this Act referred to as local grants) will, by reason of the duties on the local taxation licences and the probate duty grant being by this Act made payable to local authorities, cease, it is therefore hereby enacted as follows: (2) In substitution for local grants, the council of each county shall from time to time . . . pay out of the county fund and charge to the Exchequer Contribution Account the following sums . . . (*d*) they shall pay to the guardians paying the registrars of births and deaths for any district wholly or partly in the county a sum equal to the amount paid out of

local grants towards the remuneration of the registrars paid by those guardians during the financial year ending on the 31st of March next after the passing of this Act."

Section 26 (1): "After the 31st day of March next after the passing of this Act, every county council other than the London County Council shall grant to the guardians of every poor law union wholly or partly in their county, an annual sum for the costs of the officers of the union and of district schools to which the union contributes; and . . . the said annual sum shall be such sum as the Local Government Board certify to have been expended by the guardians of each poor law union during the financial year ending the 25th of March next before the passing of this Act, on the salaries, remuneration and superannuation allowances of the said officers (other than teachers in poor law schools), and on drugs and medical appliances."

Page, Q.C., and *Bartley Denniss*, for the appellants, the Hendon Union.—These two annual payments of money are not "property" within section 32 of the Poor Law Act, 1834, and are not liable to apportionment by the Local Government Board at all. When that Act was passed such payments as these were not in existence or contemplated. They are not sums that could be raised or charged on the rates such as that Act contemplated and therefore they cannot be "property" within section 32. They are merely annual payments which were brought into existence by the Local Government Act, 1888. It is possible that the right to receive these annual payments may be such "property," but that question was not raised upon the *certiorari*. Even if these payments are "property" within section 32, the Local Government Board has only power to fix once for all the amount payable, but here they have not made a final settlement. They have ordered a continuing payment and they have made an apportionment according to the rateable values of the parish and union respectively—thus leaving it a fluctuating sum. This they had no jurisdiction to do. The rateable value of the parish of Willesden is increasing faster than that in the union of Hendon, and the consequence, if this order stands, will be that the parish of Willesden's share in these annual payments will grow larger year by year. The order should be quashed.

Sir Robert Finlay, A.G. (*Sutton* with him), for the Local Government Board.—There is no ground for quashing this ord r These two annual payments of £18 and £2,597 are such "property of the union held and enjoyed by the union for the use of the poor" as is liable to be apportioned between the parish of Willesden and the union of Hendon on their separation. Further, the Local Government Board had here a statutory duty to perform, and in doing so they adopted the most practicable method. There is no statute which lays down in terms any rule as to how they are to fix the apportionment. They adopted a reasonable course and one within their legal powers. They have exercised their discretion, and that should not be overruled.

Danckwerts, Q.C., and *R. E Moore* (*H. Courthope Munroe* with them), for the guardians of the parish of Willesden.

A. L. SMITH, M.R.—This is an appeal from the judgment of my brothers Bigham and Channell, JJ. I cannot read the judgment of Channell, J., without seeing that he felt considerable difficulty in the matter, though he agreed with Bigham, J., and they both agreed in discharging the rule. From that decision the Hendon Union now appeals to this court.

The real point in this case is what is the true construction of section 32 of the Poor Law Amendment Act, 1834.

Now the facts which raise this point are very short. The parishes of Hendon and Willesden had been in one and the same union. In 1896 Willesden was taken out of the Hendon Union and became a parish by itself. Now comes the question as to how the property of the Hendon Union is to be divided between the union as remaining and the parish of Willesden. Section 32 provides that in every case where a parish has been divided from a union the commissioners—that is now the Local Government Board—"shall and they are hereby required to ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor . . . and they shall thereupon fix the amount to be received or paid or secured to be paid by every parish affected by such alteration." What is the meaning of these words? When are the commissioners to ascertain the value? That is the first question which arises. In my opinion, the true meaning of the section is that they shall do so then and there—that is, upon the separation of the parish from the union. There is to be a complete division between the separated parish and the old union, they are to have nothing more to do with each other, and the property which belongs to the union is to be divided once and for all between the outgoing parish and the union that is left behind.

Now as to the words "Workhouses or other property" one knows perfectly well that in a good many parts of England parishes hold parish lands and fields, and at the time this Act was passed it seems to me that that was the class of property that it dealt with. In 1834 the Legislature had not in its mind the different class of property which came into existence under the Local Government Act, 1888—namely, the Parliamentary annuity under section 26, sub-section 1, of that Act. Under that Act parishes, unions, and in this case the union of Hendon became possessed of this Parliamentary annuity. In my opinion the difficulty has arisen on account of this new class of property. Now it is said on behalf of the Hendon Union that these annuities are not "property" within the meaning of section 32 of the Act of 1834. It is quite clear, and I agree, that such an annuity was not property which was in the mind of the Legislature when the Act was passed. But it is impossible for me to say that an annuity subsequently sanctioned by Parliament to be paid *de anno in annum* to a union is not property. In my judgment it is "property" within the meaning of section 32.

Now how is the proportionate value to every parish of this property to be ascertained?

I agree that it is difficult, but, in my opinion, it is not impossible. If the annuities were to be put up for sale in Tokenhouse-yard there would be persons who would come and buy them although they did not know how long Parliament would continue to sanction such annuities. In my opinion they have a marketable value. Although that course may be inconvenient I think it is what this section contemplated. It contemplated capitalization; in other words, the ready-money value.

If the Local Government Board had come to the conclusion that this property was to be divided between Hendon and Willesden according to the then rateable value of the two, I do not think I should have said it was wrong, but that is exactly what they have not done. They have ascertained the proportionate value according to the rateable value of those two bodies in future years, and that, I think, is the vice of this order of the Local

Government Board. The Act does not contemplate anything being done in the future, but in the present. It contemplates the property being divided then and there at the time of the separation, and if more were wanted to show that this was the scheme of the Act, I would go on and refer to the later portion of the same section: "And the said commissioners shall thereupon fix the amount to be received or paid or secured to be paid by every parish affected by such alteration." I cannot bring myself to think that what has been done in this case is legal. It was said that the *certiorari* could not go unless what the Local Government Board has done was illegal; in other words, that no *certiorari* shall go unless they have done something they have no jurisdiction to do. I have endeavoured to point out where I think they have exceeded their jurisdiction in this case, and for these reasons the order must be brought up, and paragraph 5, which is the only one in dispute here, must be quashed, and this appeal will therefore be allowed with costs.

COLLINS, L.J.—I am of the same opinion. I think my brother Channell has admirably put the reason why he ought not to have concurred with my brother Bigham, and that he ought to have insisted on his own doubt in the matter. He says: "The difficulty in my mind was this, whether or not the Local Government Board had not, in this case, fixed the proportion between the two unions in reference to a matter which it was the very object and intention of the order to put an end to. When this was one union the different parts profited by any increase in the value of any other part, and supposing that Willesden increased in value the ratepayers of Hendon profited by that value when it is one body; if Hendon increased in value the ratepayers in Willesden profited by that increase in value, and one of the very objects of dividing the unions is because they had both grown rather large, and it is to make them entirely independent of any increase of the one or of the other." I agree that that really is the scheme of this Act, and I think that when we come to read it we do actually get direct confirmation of that in the language used. Now, what is to be done on the division? The section says that the commissioners shall "ascertain the proportionate value to every parish of such union of the workhouses or other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers therein, and also the proportionate amount chargeable on every parish in respect of all the liabilities of such union existing at the time of such dissolution or alteration of the same, and the said commissioners shall thereupon fix the amount to be received."

Surely that is an amount ascertained in reference to the state of facts existing at the time of such dissolution or alteration. Those are the words used in the Act in respect of the liability, and it seems to me that it involves, with reference to the rights as well as the liabilities, an ascertainment there and then *in presenti* of the respective rights of the two parties, the object being that they shall no longer be partners in a joint adventure reaping the benefit of the fluctuating fortunes of the one or the other, which all inured to the common benefit or the common liabilities before, but that they should each stand on their own base, and that, before they part, their rights shall be finally ascertained.

Now, when we come to consider what is to be done under this section, we find this. On this valuation, which, it appears to me, is to be made once for all, an amount will be ascertained—not an obligation to be renewed from time to time hereafter according to a fluctuating standard, but an amount then and there ascertainable—which can only, by the terms of the statute, be paid or charged in a particular way.

With reference to the question whether these annual payments are "property" within the meaning of section 32, I feel no doubt whatever. I think that though it may be difficult to appraise the capitalized value of this uncertain annuity, it is not impossible, and the fact that the Legislature appears to contemplate the possibility of its being retracted, does not appear to me to materially alter the case. Therefore I think that it is "property," and that it is capable of assessment, and it seems to me that the proper way to assess it is by reference to the existing proportions to which the parties are entitled. I do not think it would be right to apportion the capitalized value, except upon the one principle of dividing it then and there once for all upon the existing valuation. I do not think it would be possible to conciliate with that a right to divide an annual sum upon the principle of the fluctuating values *in futuro*. I cannot conciliate the two things. If one is right the other is wrong; they cannot both be right. I think the right one is that which depends upon a valuation on the existing basis.

STIRLING, L.J.—I am of the same opinion. It seems to me that one cannot read the enactment without seeing that the scheme of the Legislature was that the rights of the parishes, or rather of the separated bodies, were to be ascertained once for all at the time when the separation takes place. The commissioners are to ascertain the value, though no mode is prescribed, in particular, of ascertaining the value of the "workhouses and other property." Obviously, as regards the workhouses, the view of the Legislature was that the capital value should be put upon them, and then if a particular workhouse was kept by one particular parish or body, the other should pay the proportionate value of the interest to the parish or the body which did not take the workhouse in the way that is pointed out. Section 32 contains a direction for, first of all, ascertaining the fixed amount to be received or paid, and the mode in which that sum, which is so ascertained, is to be received or paid. There is no difficulty in working that out in regard to property such as workhouses. The difficulty which arises in the present case springs from this, that in the year 1888 the Legislature provided for the enjoyment by parishes and unions of sums of money of a totally different kind from anything that had gone before. The payment of these sums is limited by the will of Parliament and consequently there arises a difficulty in putting a value upon these annual sums in the same way as it would be put upon a workhouse. Still it seems to me that a value can be put upon these annual sums.

I have no doubt that these annual sums constitute "property" within the meaning of section 32 of the Act of 1834, and that a value can be put upon them and that the amount is to be ascertained on the same principle as applied to a workhouse or similar property. I do not think that there is any difference in principle between the two, and that being so, it seems to me that the Local Government Board have not complied with the terms of the Act, and, consequently, that this appeal ought to be allowed.

Appeal allowed with costs, and the order varied accordingly.

Solicitor for the appellants, *D. R. Soames.*

Solicitors for the Local Government Board, *Sharpe, Parker, & Co.*

Solicitor for the parish of Willesden, *W. Grant Greig.*

From Q. B. Div. (A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Dec. 3.

ATTORNEY-GENERAL v. JEWISH COLONIZATION ASSOCIATION. (a.)

Inland revenue—Estate duty—Succession duty—Property situate abroad—Disposition by foreigner domiciled abroad—Gift to English company on trust for foreign beneficiaries—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act,* 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 16, 44.

A foreigner domiciled abroad, by a deed made in the English language and in English form, but executed abroad, gave to the defendants, an English company registered under the Companies Acts, and having its registered office in London, certain stocks, shares, and securities on the terms that the defendants would, during the life of the donor, permit him to receive the income thereof, and after his death would apply the said stocks, shares, and securities for the benefit of Russian Jews generally, and principally for the promotion of their emigration and settlement in North and South America and other countries, which was the object for which the company had been formed. The stocks, shares, and securities were duly transferred by direction of the donor to the account of the defendants. The defendants, under their articles of association, carried on business in Paris, but the annual general and other meetings were held in London. The defendants paid the income of the property to the donor during his life. At the date of his death the greater part of the property was situate abroad, and only a small portion in England.

Held, that, the deed being an English deed enforceable by the English courts, all the property comprised therein was property to which section 2 of the Succession Duty Act, 1853, *applied; and that the defendants were therefore liable to pay estate duty and succession duty thereon.*

Judgment of Ridley *and* Darling, JJ. (ante, *p.* 59, [1900] 2 *Q. B.* 556), *affirmed.*

Appeal from the judgment of a Divisional Court (Ridley and Darling, JJ.), on an information by the Attorney-General, reported *ante*, p. 59, [1900] 2 Q. B. 556.

The information claimed estate and succession duty upon the death of Baron de Hirsch de Gereuth, a foreigner domiciled abroad, on property in respect of which he had made a disposition in favour of the defendants, the Jewish Colonization Association.

The facts of the case are fully set out *ante*, pp. 59, 60.

The Divisional Court gave judgment for the Crown.

The defendants appealed.

Sir Robert Reid, Q.C., Dicey, Q.C., Swinfen Eady, Q.C., Danckwerts, Q.C., and *E. Schuster,* for the defendants.

Sir Robert Finlay, A.G., Sir Edward Carson, S.G., and *Vaughan Hawkins,* for the Crown.

Cur. adv. vult.

Dec. 3.—A. L. SMITH, M.R., read the following judgment: In this case the Crown claims estate duty at 8 per cent. and succession duty at 10 per cent. (18 per cent. in all) upon a sum of seven millions of money given by Baron de Hirsch in his lifetime, subject to a life interest therein, to the defendant company under the circumstances hereinafter mentioned; and the question is whether upon the death of the Baron, which took place on the 21st of April, 1896, a succession to property took place within the meaning of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, for if so, succession duty and also estate duty are payable on the £7,000,000 as claimed by the Crown; because the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (2), enacts that estate duty shall be payable upon property passing on the death of the deceased when such property is situate out of the United Kingdom (which was the position of the bulk of the £7,000,000 in this case) if by the law in force before the passing of that Act legacy or succession duty was payable in respect thereof. It is said on behalf of the defendant company, the Jewish Colonization Association, that the facts relating to the money are such that the Succession Duty Act of 1853 has no application thereto, as this money was not "property" within the meaning of section 2 of that Act.

The facts are these: In the year 1891 Baron de Hirsch, who was a domiciled Austrian, without children, and who had a permanent residence in Paris and a temporary residence in London, conceived the idea of ameliorating the condition of certain Jews, and for that purpose determined to make and did make in the first instance a donation of two millions of money. To carry out his project he then brought out and formed in this country a limited company under the provisions of the Companies Act, 1862, which company was incorporated on the 10th of September, 1891, and registered under the name of the Jewish Colonization Association, which is the defendant in this information. The memorandum of this company shows in detail the object for which it was incorporated, and it sufficeth to state that the object was that it might hold and administer the donation of two millions of money which was then handed by the Baron to the company for the benefit of the Jews, and also might hold and administer any other donations it might receive towards promoting the welfare of the Jews. There is a clause in this memorandum, and it is the only one to which I will specifically refer—namely, the seventh—which provides that in the event of the company being wound up or dissolved, if any property then remained, it should not be distributed amongst the members of the company, but be transferred to some institution with objects similar to that of the company, and in default of selection of such an institution by the members, a judge of the High Court of Justice—that is, an English judge—should make the selection. The registered office of the company is now and always has been at the offices of Messrs. Tatham & Lousada, the English solicitors of the defendant company in the City of London, but it is stated that no part of the offices has been at any time in the possession or occupation of the defendant company. The defendant company had, besides its registered office, offices in Paris with branches at St. Petersburg and Buenos Ayres. All the general and extraordinary meetings of the company were held in London. By the articles of association the affairs and business of the company were to be under the general control of a council of administration, the meetings of which council were to be held at such places in Europe as the council should determine. The whole of the business of the company was always and still is transacted by the council in Paris. The books of the company (other than the register of members) were kept in the offices in Paris, St. Petersburg, and Buenos Ayres, according to French methods and in the French language, and the common seal of the company was kept at its principal offices in Paris. By the articles of association it was also provided that any notice to be given by the company to any member should be sufficient if posted in any of the European capitals

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

addressed to such member at his registered place of address and advertised in the *Times* newspaper, and the company might in general meeting substitute some other English paper for the *Times*.

I stop here for a moment to inquire into the object which Baron de Hirsch had in view when, for the initiation and carrying out of his scheme to benefit the Jews, he formed and incorporated the company in England. That it is an English company I do not doubt, subject to English law, and the fact that there was a council of administration which carried on the business of the company outside of England does not, in my judgment, render the company any the less an English company and subject to English law. In my opinion there is but one answer to be given to the inquiry, which is, that the Baron had resort to an English corporation, which the company is, in order that his donation of two millions of money might, if need be, be administered by English judges according to English law. In truth and in fact the Baron deliberately and intentionally submitted his scheme to English law and indelibly stamped it as being an English scheme. These two millions of money having been given by him absolutely to this English company for the benefit of the Jews, no question of succession arises thereon upon the death of the Baron, and these two millions consequently take no further part in this case.

In the next year—viz., in the year 1892, the Baron determined to increase his benefactions to the Jews, and he gave to this English company a further sum of seven millions of money for this purpose. The circumstances attending this further donation are these. By indenture dated the 26th of August, 1892, and made "between Baron de Hirsch, of 82, Piccadilly, in the county of Middlesex, of the one part, and the Jewish Colonization Association, having its registered office at 17, Old Broad-street, in the City of London, of the other part," after reciting that the Baron had agreed to give, and the association had agreed to accept the stocks, shares, bonds, and securities specified in the schedule thereto, subject to the conditions thereinafter expressed, and the same had been or would shortly be duly transferred and handed over to the association, it was witnessed, so far as material, as follows: (*a*) That the association during the life of the Baron would deal with the securities as directed by the baron; (*b*) that the association would permit the Baron to receive and would pay to him the income of the investments during his life; (*c*) that after the death of the Baron the association would apply the stocks, shares, and securities subject to the provisions of the deed, for the benefit of Russian Jews. These securities form the seven millions now in question. At the date of the deed in August, 1892, as also at the time of the death of the Baron in April, 1896, they may be taken as consisting of about £1,000,000 of securities in the London and Westminster Bank in this country and of about £6,000,000 of securities in other banks outside of England. A list of the securities will be found in the schedule to the deed, and they are all securities upon foreign properties. On even date to that of the deed the Baron wrote to the respective bankers who then held the securities instructing them to transfer them to the securities account of the Jewish Colonization Association, and this was done. After the execution of the deed the Baron during his life received the income of the moneys represented by the securities, and upon his death the question arises—Are these seven millions "property" within the Succession Duty Act, 1853? If they be, then it seems to me that the defendant company, although not beneficially entitled to the money, is bound to account to the Crown for succession duty by reason of sections 16 and 44 of the Act of 1853, and, if so, also for estate duty.

It is not denied that when Baron de Hirsch died the £7,000,000 was in the control of the English company. In my judgment the deed of the 26th of August, 1892, is an English deed. It is in the English language and executed according to the formalities of English law, and it conveys personal property, some of which was in England, to an English company. It is true that Baron de Hirsch, though describing himself in the deed as of No. 82, Piccadilly, in the county of Middlesex, executed it when he happened to be either in Paris or Ems, but this of itself makes it none the less an English deed. Moreover, the fact that a deed embraces foreign securities by no means makes the deed a foreign deed, for many English deeds do this. In my judgment it is not true to say upon the facts of this case that this deed is other than an English deed. It is a deed which for a purpose appointed English trustees subject to the English law, and any action brought to enforce the provisions of the deed would have to be brought in an English court of justice. It is said, and truly said, on behalf of the defendant company that, although the words of section 2 of the Succession Duty Act, 1853, are general—the words are "every past or future disposition of 'property' . . . shall be deemed to confer . . . a succession"; yet these words are not to be read without some limit being placed thereon, for as Lord Cranworth, L.C., said in *Wallace* v. *Attorney-General*, 14 W. R. 116, L. R. 1 Ch. App. 1, "These words . . . could not in reason extend to all persons, whether subjects of this country or foreigners and wheresoever domiciled"; and that some limit is to be placed thereon is not disputed by the Attorney-General. The question is, What is that limit? I do not propose to go through the authorities in detail which have been produced and cited in argument, for in my opinion it will be found to have been satisfactorily done by my brothers Ridley and Darling in the Queen's Bench Division. In order to ascertain what the limit is I will cite the case of *Wallace* v. *Attorney-General*, in which Lord Cranworth in unmistakable terms lays down what the limit is. He says: "The only safe way of solving this question . . . is to consider the duty as imposed only on those who claim title by virtue of our law. . . . Some limitation must be implied . . . confining the operation of the words to persons who become entitled by virtue of the laws of this country." This, in my opinion, is precisely how the defendant company, upon the facts of the case, have become entitled to the £7,000,000 upon the death of Baron de Hirsch.

Sir Robert Reid, for the defendant company, argued that the above was not now the true rule, and he said that to ascertain the limit all the circumstances of the case must be considered; and he said that was so because Sir George Jessel, in the case of *In re Cigala's Settlement Trusts*, 26 W. R. 257, 7 Ch. D. 351, and other judges had recapitulated and dealt with all the facts of the case before them when determining whether succession duty was payable or not. That very learned judge and other learned judges have done this, and, though they did go through the facts of the case, it was, as it seems to me, to adopt Lord Cranworth's rule and not to overrule it, and Sir George Jessel pointedly says: "This is personal property in the hands of English trustees, and you cannot get it from them except by an action in England. That is the true test." If Sir Robert Reid is right in his contention, which I think he is not, and all the circumstances are to be considered and this is the rule, then Sir Robert Reid would not, in my opinion, get out of the difficulty he is in any

more than if Lord Cranworth's rule applied, which I think it does, for I have no doubt that from first to last the scheme of the Baron was essentially and solely an English scheme to be governed from first to last by English law. The £7,000,000 of money is therefore property within the Succession Duty Act, 1853.

Sir Robert Reid further argued that, if there had been children of the Baron's, inasmuch as by Austrian law an Austrian father cannot divest himself of property so as to impair the rights of his children to *legitim*, and any alienation at any time having that effect may on the death of the father be set aside, to the extent to which it has that effect, Austrian and not English law governs the case. I do not agree. The trust and the administration of the trust can only be enforced or the trust got rid of by having resort to English law—*i.e.*, to an English court of justice. Till that has been done the English company is entitled to hold the £7,000,000, subject, of course, to the trusts in favour of the Jews. In any proceedings to set aside the trust, evidence of what is the Austrian law as regards the father's rights might, I think, be given to show that the trust was non-effective; but this question would have to be decided by an English court before the company could be deprived of its money. For the reasons above, in my judgment, the appeal must be dismissed.

COLLINS, L.J., read the following judgment: Notwithstanding the very able argument for the appellants, I cannot bring myself to entertain a doubt that the view of the Crown and of the court below must prevail. We are not troubled in this case with questions which arise upon the death of a domiciled foreigner, testate or intestate, as to property vested in him which is the subject of the proceedings. When Baron de Hirsch died in 1896, the property, in respect of which the Crown allege that succession duty is payable, was vested not in him, but in the English company which he had called into existence. By a deed executed in his lifetime in 1892 between himself and the company, after reciting that he had agreed to give, and the company to accept, the property in question, consisting of certain shares, stocks, and securities therein set out, on certain conditions, and that the same had been, or would shortly be, transferred to the company, the latter had declared and covenanted with him that it would permit him to receive the income of the said stocks, &c., for life, and, after his death, apply the corpus for a charitable purpose therein defined. If the property in question were English, there would, therefore, clearly be a succession, in respect of which, under sections 2 and 16 of the Act of 1853, the company would be bound to pay the duty. That the company was in possession of the property at the time of his death is, I think, quite clear. The securities of which it consisted were held by different banks in England, and elsewhere in Europe, who, by the orders of the deceased, given on the same day on which the deed was executed, transferred them from his account to that of the company, for whom they thenceforth continued to hold them, honouring cheques drawn by the company on them for the interest received thereon. The property in question, therefore, formed no part of the estate of the deceased, and no presumption, therefore, arises as to its locality, such as might have arisen by virtue of the doctrine *Mobilia sequuntur personam*, had it done so. He had parted in his lifetime with the entire legal estate in it, and his beneficial interest ceased upon his death. We begin the discussion, then, with the property in the hands of an English trustee, and it seems to me that the presumption is that it is English, and the burden lies on those who say it is not. It was contended indeed by Sir R. Reid, but I think somewhat faintly, that the company was not really an English company, having regard to the nature of its business, the place where the meetings of its council were held, and also some peculiarities in its constitution. But I think it is clear beyond possibility of doubt that the company was not only in name but in fact an English company, deliberately created as such by its founder. It is not necessary to refer in detail to the points in its memorandum and articles, which are set out in the information, and which were emphasised by the Attorney-General, which evidence, not merely an implied, but an express intention to bring it under the jurisdiction of the English law. The appellants therefore are confronted with the presumption arising from the fact that the legal owner of the property at the date of the Baron's death was not foreign, but English. If then they are to establish that it is, nevertheless, still foreign, they must fall further back, and show that the foreign donor, in vesting his property in the English trustee, nevertheless intended to preserve its foreign locality—that is, that it should continue to follow the person, not of the new owner, but of the original donor. I have said that I think the presumption is against such a contention, but, even if it were not, I think the facts show conclusively that nothing could have been further from the intention of the donor. Having called into existence a company to which, having the whole world open to choose from, he had deliberately given an English nationality for the purpose of making it the instrument for carrying out his scheme, he began by handing it over personal property to the value of about £2,000,000 sterling out and out; and he showed that he contemplated that in certain events his main scheme might become impracticable, and provided for the substitution of another at the discretion of an English judge. Could it be contended that he did not intend to stamp on the property comprised in this, his first gift, the character of English property subject to English law? It is, of course, quite immaterial where the property, being movable, was actually situate: it followed the person of its owner; but the company were empowered to vary the investments, and might, had they chosen, have placed it all in English securities. It seems to me impossible to contend that this sum of £2,000,000 continued to follow the domicil of the donor. But, if so, why are we to conclude that there was a different intention in the case of the property in question? The transfer was between the same parties, and for a special branch of the primary general purpose, after the life of the donor, and was carried out by a deed in English form in the English language, though executed in Paris. I regard the case of *Attorney-General* v. *Campbell*, 21 W. R. 34*n*, L. R. 5 H. L. 524, as a conclusive authority in favour of the Crown. Indeed, the present case is much simpler, as the property in question had not, as there, to be got in under the will of a foreigner before the trust which was held to let in the operation of the English law became effective. It was, as I have already pointed out, in the actual possession of the English trustee at the date of the Baron's death. I think this case also falls within the principle of *In re Cigala's Settlement Trusts*, though I think the facts here ground a more obvious inference that it was the intention of the settlor to place the fund under the jurisdiction of the English law. There the inference drawn was that the settlor, an English lady, domiciled in England, but about to marry a domiciled Italian, desired to preserve the jurisdiction of English law over the settled property, although the beneficiaries would presumably be persons with a foreign domicil.

In this case, the inference, as pointed out by the Solicitor-General, of intent on the part of the Baron to substitute the law of another country for that of his domicil is irresistible, when we find him not merely not choosing an individual of his own domicil, but going out of his way to call into being a *persona* incapable of existence except as a creature of English law, and then by an instrument, not in his own language, but in English and in English form, making it the trustee for carrying out his purpose with regard to the property entrusted to it. Whether, therefore, the test be that the appellants become entitled to the succession by virtue of English law, as stated by Lord Cranworth in *Wallace* v. *Attorney-General*, or that the intention that the property is to be brought under the protection of the English law must be gathered from all the circumstances, or, what is probably only another way of arriving at the same result, that the property in question must have an English character, as Lord Westbury called it in *Attorney-General* v. *Campbell*, stamped upon it, I think the succession here falls within the Act, as interpreted and limited by the decisions referred to in the argument. I think the principle at the bottom of these tests is really the same, and whether we arrive at the conclusion that it has become English property because an indelible incident of English property is stamped upon it—namely, that the rights thereto shall be ascertained by English law, or conclude that, being English, it is therefore subject to our law, the result is the same, and in either view it is quite immaterial where the property is physically situated, and such I think is the effect of the authorities. Sir R. Reid contended that the right to the succession here was created, not by the trust deed, but by what was done abroad before it was in fact executed, and he relied on the notices sent by Baron de Hirsch to the banks, and the minute of the 22nd of July, 1892, as establishing this view, his object being to displace Lord Cranworth's test. But, even if this were the case, the trust created would by the terms of the minute itself be that of the draft deed therein referred to, and the rights of the parties would therefore be regulated by it. He also contended that it must depend on foreign law whether the property, the subject of the trust, could ever be brought under it. If the property had not been got in, I think this difficulty might possibly arise, and to the extent, if any, that the property could not be got in, the succession might be defeated, but for the reasons I have given I think the point does not arise.

STIRLING, L.J., read the following judgment: It is unnecessary in this case to state the facts in detail. It seems right, however, to say that it was admitted (and properly admitted) at the bar that, by virtue of directions given by Baron de Hirsch about the 26th of August, 1892, there was conferred on the defendants a complete legal title to securities of the estimated value of £7,000,000 sterling which were locally situate partly in this country and partly abroad. As from the 26th of August, 1892, these securities have been held by the defendants upon the terms of an instrument of that date under which Baron de Hirsch took a beneficial interest during his life. The substantial question to be determined is whether, upon the death of Baron de Hirsch, which occurred on the 21st of April, 1896, the securities so held by the defendants became subject to the payment of succession duty under the Succession Duty Act of 1853. It was not disputed that, if the Succession Duty Act of 1853 applies to this case, the death of Baron de Hirsch was an event upon which, by the operation of sections 2, 16, and 44, succession duty became payable by the defendants.

It seems unnecessary to decide a question which was mooted, but not very fully discussed—namely, whether the defendants are to be regarded as themselves "successors" within the meaning of the Act, or only as trustees accountable under sections 16 and 44 for the payment of the duty.

The language of section 2 of the Act of 1853 is sufficiently wide, if read literally, to impose on the defendants the duty claimed; but it is said, and with truth, that the cases show that some limitation must be imposed on the generality of the words employed. The question is whether the limitation is such as to free the defendants from liability to duty.

In the first case in which this question arose—namely, *In re Lovelace's Settlement*, 7 W. R. 401, 575, 4 De G. & J. 340, it appears to have been contended that the operation of the Act was limited to settlements made by settlors domiciled within the United Kingdom, by analogy to the rule laid down in *Thomson* v. *Advocate-General*, 12 Cl. & F. 1, with respect to liability to legacy duty. It was, however, pointed out by Turner, L.J., in that case, and also in *In re Wallop's Trusts*, 12 W. R. 587, 1 De G. J. & S. 656, that such a rule was inapplicable to the Succession Duty Act. The contention was overruled, and foreign domicil has never since been regarded as the sole test applicable in every case of liability to succession duty.

The question came next to be considered in *Wallace* v. *Attorney-General*, where it was decided that succession duty is not payable on legacies given by the will of a person domiciled in a foreign country. This decision does not govern the present case, for the title of the defendants and the beneficiaries, whoever they may be, under the instrument of the 26th of August, 1892, is not derived under a will or testamentary instrument of any kind, but under an act or acts *inter vivos*. The case, however, is important by reason of it being laid down by Lord Cranworth, L.C., that the limitation on the language of section 2 of the Act of 1853 must be one "confining the operation of the words to persons who become entitled by virtue of the laws of this country." At the close of his judgment Lord Cranworth distinguishes the case before him from *In re Lovelace's Settlement* and *In re Wallop's Trusts* by saying, "They were both cases of testamentary appointment under English instruments, not of wills; and such an instrument must necessarily be construed by our own laws, not by that of the domicil of the person executing the power." From this it may perhaps be inferred that Lord Cranworth would have considered a person claiming under an instrument which had to be construed by the law of a foreign country as not claiming under the law of England.

The next case of importance is *Attorney-General* v. *Campbell*. There a testator domiciled in Portugal made in England and in the English language and form a will by which he appointed four executors, three of whom were resident in London, and directed them to collect his personal estate, the bulk of which was locally situate in Portugal, and convert it into cash, and invest the residue, after payment of debts and legacies, in the English funds, and to hold the investment upon trust to pay certain annuities (one of which he gave to his sister), and directed them for this purpose to appropriate and set apart in their names such an amount of Consols as they should think fit; and further that, when the annuity in respect of which an appropriation was made, should cease, the amount appropriated should revert to and become part of his residuary estate, and be in trust for his son and daughters who resided in Portugal. The testator's sister died in 1870, and thereupon the Crown claimed succession

duty. Lord Romilly, M.R., held that duty was not payable, but his decision was reversed by the House of Lords. The *ratio decidendi* is thus stated by Lord Westbury: "If a man dies domiciled abroad possessed of personal property, the question of whether he has died testate or intestate, and also all questions relating to the distribution and administration of his personal estate, belong to the judge of the domicil, and that on the principle of *Mobilia sequuntur personam*. His domicil sets up the forum of administration. Now, apply that to the present case. The legatees would resort to that forum to receive their legacies, and the executors and trustees, when the residue has been ascertained, would resort to that forum to receive it. When they have received it, the legacy is discharged, and all things that are incidental to the legacy cease. They receive it bound with the duty of bringing it to this country, and investing it here in Consols, which they are directed to hold upon certain trusts mentioned by the will. But the character of the ownership is no longer that of a legacy. The character of the ownership is under the trusts directed to be created by the will. There is, therefore, a settlement made of the property which is brought into this country and invested here in such mode of investment as gives to the property whilst it remains here the character of English property in respect of locality. That settlement, so made, undoubtedly becomes subject to the rules of English law under which it is held, by virtue of which it is enjoyed, and under which it will be ultimately administered. That, therefore, is a description of ownership which falls immediately within the provisions of the Succession Duty Act. There can be no doubt that, when a partial interest created by one of the trusts so directed to attach upon the residue after it has been received and invested, and when all the purposes of the administration have been answered—when such a partial interest, I say, ceases, and the interest next in order comes into being, succession duty attaches upon that devolution of property." A similar view was taken by Lord Hatherley, L.C., who also advised the House. The most important elements relied on appear to be that the testator, though domiciled abroad, directed a certain portion of his property to be brought within the jurisdiction of this country, and retained here upon trusts the proper forum for the administration of which was an English court.

The last case which requires notice is that of *In re Cigala's Settlement Trusts*. There, on the marriage of an English lady with a domiciled Italian, French Rentes, shares in the Bank of France, and English Government securities were transferred to four trustees, three of whom were English and the fourth an Italian, on the ordinary trusts of an English marriage settlement. The husband and wife lived in Italy; and, on the death of the survivor, the persons entitled under the settlement were two children of the marriage, who were domiciled Italians. The Italian trustee had died, and the trust funds stood in the names of the English trustees. Sir G. Jessel, M.R., held that succession duty was payable, saying: "The settlement then being a British settlement, the trustees being subject to British jurisdiction, the forum for deciding upon the claim" (*i.e.*, of the children of the marriage) "being a British court, and the property being in fact English property, it appears to me that this is property coming within the second section of the Act." The decision in *Attorney-General* v. *Campbell* is binding on this court; that in *In re Cigala's Settlement Trusts* is not binding, but is nevertheless a decision of great weight. It has moreover been followed by a Divisional Court in *Attorney-General* v. *Felce*. 10 Times L. R. 337.

The case of *Attorney-General* v. *Campbell* appears to me to show that one contention put forward on behalf of the defendants is unfounded. This was based on the rule laid down by Lord Cranworth that the operation of the Act of 1853 is to be confined to persons who become entitled by the law of this country. It was sought to treat that rule as referring to the law of this country *exclusively*; so that, if the law of another country had to be considered for any purpose, as, for example, to ascertain the capacity of the settlor or the validity of his acts, it was to be taken as established that duty was not payable. If the rule laid down by Lord Cranworth is so understood, then it seems inconsistent with the decision in *Attorney-General* v. *Campbell*, for in that case the law of the testator's domicil had to be regarded for the purpose of ascertaining his testamentary capacity and the validity of his bequest. Even as regards the interpretation of such a will it is the general rule that "a will of movables is to be interpreted with reference to the law of the testator's domicil at the time when the will is made," though there is an exception—namely, that, "where a will is expressed in the technical terms of the law of a country where the testator is not domiciled, the will should be construed with reference to the law of that country": see Dicey's Conflict of Laws, p. 695. It may be, though it is not expressly stated, that the will in *Attorney-General* v. *Campbell* was regarded as falling within this exception. However this may be, it was held that the operation of the law of the domicil was exhausted when the executors and trustees of the will obtained possession of the legacy, and held it upon the trusts declared by the will. Lord Cranworth's rule, therefore, if it is to be treated as now binding, must be taken to be satisfied, where property is found to be legally vested in a person subject to the jurisdiction of English courts, and the title to the beneficial interest in that property is regulated and capable of being enforced by the laws of England, even although the operation of the instrument creating that title may to some extent be governed by foreign law. It is, however, to be remarked that of all the judges who have dealt with the question Lord Cranworth alone has formulated any general principle to govern all cases; the others, Turner, L.J., Lord Westbury, Lord Hatherley, and Sir G. Jessel, are content to deal with each case on its special circumstances, and to determine whether the particular disposition under consideration is fairly within the purview of the Act; and not one of them has expressly adopted the rule laid down by Lord Cranworth. In each such case certain special circumstances have been pointed out as the basis of the conclusion which was arrived at; but it has nowhere been said that all or any of the circumstances relied on are essential, or that, where another and new set of circumstances is found to exist, the court which has to deal with that particular case may not proceed to treat it after the same fashion as the eminent judges whom I have last named, and investigate *de novo* whether or not it is fairly brought within the enactment.

Now, the facts of the present case are very remarkable. Baron de Hirsch, being a domiciled Austrian, chiefly resident in Paris, but having also a residence in London, brought the defendant company into existence under the provisions of the English Joint Stock Companies Acts. The memorandum of association contains provisions which show that the framer of it contemplated that the company would be subject to the jurisdiction of the ordinary English courts, and might in certain events become subject to the jurisdiction of the Charity Commissioners. The defendant company thus constituted is to all intents and purposes an English company. This being done, the

Baron proceeded at a later date to transfer to the defendants funds of large amount upon the terms of the document of the 26th of August, 1892. This document is in the English language, and was prepared by the legal advisers of the defendant company—namely, English solicitors. It is under seal, and is expressed in terms well known in English law. For example, it commences with the familiar words, "This indenture." "Indenture" is a term peculiar to the law of this country, and of countries whose law is based on that of England (as, for example, Ireland, some English colonies, and some of the United States of America), and would not be intelligible to a lawyer instructed only in the law of most Continental countries. The parties are described, one as of an address in London, and the other as having its registered office there. The deed is based on the assumption that the valuable securities described in the schedule had been or would be duly transferred and handed over to the defendants: and, as I have said, it is admitted that those securities were so transferred or handed over, so that a complete and effectual gift was made of them by the Baron de Hirsch to the defendants. The deed provides that Baron de Hirsch is to have the income of the funds during his life and that, after his death, the defendants will apply these funds for the benefit of Russian Jews; and that separate accounts of these funds are to be kept. It is also provided "that, on the death of the donor, they" the defendants "shall retain so much of the property as shall be then held by them for their own exclusive benefit, subject to their accounting to the executors or assigns of the donor for the arrears of income down to his death." There is found therefore, first of all, this circumstance, that large funds are placed under the legal control of an English corporation created by the donor of the funds for the purpose (amongst others) of accepting and administering such gifts. Being an English corporation it is necessarily under the jurisdiction of English courts, and, while it may acquire a foreign residence and domicil so as to be capable of being sued in a foreign country, it must, I apprehend, be capable, as long as it exists, of being sued in the country of its origin. On this I may refer to sections 39 and 62 of the Companies Act, 1862, which contain provisions which enable the company to be served with process in England: ord. 9, r. 8. I may add that in the present case there appears to be no sufficient evidence that the defendants ever acquired a foreign domicil. Secondly, the title to the beneficial interest in these funds is governed by the deed of the 26th of August, 1892. It appears to me that this is an English instrument intended to be interpreted and to take effect in accordance with English law. The deed is at least as much an English instrument as was the will of the Portuguese testator adjudicated upon by the House of Lords in *Attorney-General* v. *Campbell*. I have already pointed out that a will expressed in the technical terms of the law of a country where the testator is not domiciled, is to be construed with reference to the law of that country; and in this case a similar rule may properly be applied to a deed. The property to which the deed relates was locally situate in many countries; it cannot have been intended that the law of each of those countries should apply. The law applicable must, as it seems to me, either be that of England, or of France, where the Baron de Hirsch chiefly resided, or of Austria, where he was domiciled. If it was intended that the law of France or Austria should govern, why was not the instrument of the 26th of August, 1892, expressed in the appropriate language and legal form? Why, on the other hand, was it expressed in the English language, and in a distinctive legal form peculiar to English law? I can see no reasonable answer to these questions except that English law was intended to govern. Now the defendants must be regarded either as the owners of these funds or as trustees for the benefit of Russian Jews. If the former alternative be adopted, then the funds are the property of an English corporation, and consequently English property on the principle of *Mobilia sequuntur personam*. If the second alternative be correct, the only mode in which the due and complete administration of the trusts of these funds can be enforced appears to be by proceedings at the instance of the Attorney-General in the courts of this country; or, in other words, an English court is the proper forum of administration. If, then, the rule laid down by Lord Cranworth is to be applied in the sense in which I understand it, I think that in this case there exists property under the legal control of an English corporation, subject to the jurisdiction of English courts, and that the title to the beneficial interests in that property is to be regulated and enforced by English law. If, on the other hand, the whole circumstances of the case are to be looked at, those relied on by the learned counsel for the defendants must be taken into consideration. These were, mainly, the following: (1) That the original donor of the funds as to which the question arises was domiciled and chiefly resident abroad; (2) that the deed of the 26th of August, 1892, was executed by him abroad; (3) that the property which forms the subject-matter of that deed was, to a great extent, locally situate abroad; (4) that the council of administration of the defendants held its meetings and carried on its operations in Paris; and (5) that the persons intended to be benefited were foreigners. As to the first, it seems to me that the effect of the domicil of the donor was exhausted when, as is admitted, the funds were placed under the legal control of the defendants. As to the second, it does not seem to me to be one to which any great weight can reasonably be attached, regard being had to the other circumstances in evidence as to the preparation and execution of the deed. As to the third and fourth, it is to be borne in mind that the defendants cannot escape from the jurisdiction of the English courts by continuing or selecting investments which may be locally situate out of the jurisdiction, or by carrying on operations in a place without the jurisdiction. As to the fifth, I see no way in which the rights of the beneficiaries, whether native or foreign, can be completely enforced except through the intervention of her Majesty's Attorney-General, or, it may be, the Charity Commissioners. Weighing all these circumstances as best I can, I think that there is nevertheless a strong preponderance in favour of the view that, inasmuch as the settlement in question is an English settlement, the property in question is under the legal control of an English corporation, and the proper forum for the administration of the trusts relating to the property is an English court, the case is fairly brought within the purview of the Succession Duty Act, 1853. For these reasons the judgment of the Divisional Court ought, in my opinion, to be affirmed.

Appeal dismissed.

Solicitor for the Crown, *Solicitor of Inland Revenue.*

Solicitors for the defendants, *Tatham & Lousada.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Nov. 21, 22.

BAGLIONI v. CAVALLI. (a.)

Mortgage — Lease — Goodwill — Priority—Marshalling —Apportionment.

A mortgagor on three different occasions mortgaged a leasehold house where he carried on a business, and included the goodwill of the business in the first and third mortgages, but not in the second mortgage. The first mortgagee sold the whole security for a sum allocated in specific proportions to the lease and the goodwill respectively.

Held, that the goodwill of the business was something apart and different from the lease, and that the purchase-money ought to be apportioned between the lease and the goodwill.

This was a summons to vary the master's certificate which purported to settle the priority of the incumbrances on leasehold property.

On the 26th of February, 1894, Bargonzi executed to Cavalli a legal mortgage of the lease and goodwill of a house in which the mortgagor carried on the business of a restaurant.

On the 16th of July, 1894, Bargonzi made a second mortgage of the leasehold premises to Baglioni, reciting the previous mortgage, but making no reference to the goodwill of the business carried on at that place.

On the 26th of August, 1894, Bargonzi made a further mortgage of the lease, goodwill, and fixtures to Hales.

In December, 1894, Cavalli entered on the premises, and subsequently sold the lease, goodwill, and fixtures for £1,300; of this sum, £160 represented the value of the lease, £1,000 the value of the goodwill, and £140 the value of the fixtures.

In July, 1895, a receiver was appointed, and in 1898 an action for an account was commenced by Baglioni.

North, J., made an order in the action on the 12th of December, 1899, that Cavalli should pay into court the proceeds of sale.

The question now was, who was entitled to the residue in court on payment of the taxed costs?

The master took the view that the plaintiff Baglioni was entitled to marshall and took priority of the other mortgagees.

Nield, for the first mortgagee, referred to the cases of *Flint* v. *Howard*, [1893] 2 Ch. 54, 41 W. R. Dig. 147; *Barnes* v. *Racster* 1 Y. & C. Ch. Cas. 401; *Moxon* v. *Berkeley Mutual Benefit Building Society* 59 L. J. Ch. 524, 38 W. R. Dig. 138.

G. Henderson, for the second mortgagee.—The presumption of law is that the goodwill is included in the mortgage: *County of Gloucester Bank* v. *Rudry Merthyr Colliery Co.*, 43 W. R. 486, [1895] 1 Ch. 629.

Ashton Cross, for the third mortgagee.—The goodwill, unless expressly mentioned, is treated as separate from the mortgaged property: *Whitley* v. *Challis*, 40 W. R. 291, [1892] 1 Ch. 64; *Cadogan* v. *Lyric Theatre (Limited)*, [1894] 3 Ch. 338, 43 W. R. Dig. 145; *In re Bennett, Clarke* v. *White*, 47 W. R. 406, [1899] 1 Ch. 316; *West London Syndicate (Limited)* v. *Commissioners of Inland Revenue*, [1898] 1 Q. B. 226, 46 W. R. Dig. 74.

COZENS-HARDY, J.—This summons raises points which might have been of great difficulty. The two points raised have, however, really been decided by the authorities. We have, firstly, the mortgage of a leasehold house in which the mortgagor carries on his business. Then the mortgagor mortgages the lease alone, and afterwards creates charges on the lease and goodwill. The property was sold by the first mortgagee. The second mortgagee says he is entitled to the entirety, though he has only a mortgage of the lease alone, those behind him having charges on the lease and goodwill. The decision of the Court of Appeal in *West London Syndicate (Limited)* v. *Commissioners of Inland Revenue* shows that the goodwill of a licensed house is something apart from the value of the land. I think the position of the mortgagee of a leasehold is something very different from that of the mortgagee of the goodwill and the lease. I must therefore hold that this is a case in which the position of the first and third mortgagees is different from that of the second. That being so, what are their respective rights? Here again I have the direct authority of Kay, J., in the case of *Moxon* v. *The Berkely Mutual Benefit Building Society*, a view which he himself amplified in the case of *Flint* v. *Howard*. I think I am therefore relieved from going through the long list of cases cited. It is sufficient to say in the words of Kay, L.J., "The right of a subsequent mortgagee of one of the estates to marshall—that is, to throw the prior charge on both estates upon that which is not mortgaged to him —is an equity which is not enforced against third parties—that is, against anyone except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate. If both estates are subject to separate second mortgages the court apportions the first mortgage between them." I feel myself bound to vary the certificate and to declare that the purchase-money ought to be apportioned between the lease and the goodwill.

Solicitors, *Sherwood & Balls*; *Yeilding, Piper, & Tallack*; *W. H. Hales*.

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div.
Farwell, J. } June 24, 1900.

In re GREAVES' SETTLED ESTATES.
JONES v. GREAVES. (a.)

Settlement — Portions term — Maintenance of infants entitled to portions on attaining full age.

Maintenance can, in a proper case, be obtained by infants entitled to portions under the trusts of a term, if the settlement creating the term was made by their father, or a person in loco parentis *to them.*

Adjourned summons taken out by the trustees of a settlement for the determination of the question whether they had power to apply any of the income of the settled property for the maintenance and education of two younger children entitled on attaining the age of twenty-one to portions under a term created by the settlement.

The settlement was made on the 16th of June, 1888, and by it certain freehold and leasehold estates were appointed and limited by J. Greaves and E. P. Greaves to the use that the wife of the latter should (in the events which happened) receive a yearly charge of £800 during her widowhood, with remainder to the use of J. Greaves for life, with remainder to uses to

(a.) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

secure the payment of certain rent-charges amounting together to £910 per annum, with remainder to the use of E. P. Greaves for life, with remainder to the use of the trustees, their executors, administrators, and assigns, for the term of 2,500 years to commence from the death of E. P. Greaves, with remainder to the use of the first and every other son of E. P. Greaves, successively in tail, with remainders over. The trusts of the term were by mortgage, sale, or other disposition of all or any of the settled estates or out of the rents and profits to raise and pay £10,000 for the younger children of E. P. Greaves, to be divided equally among them, sons at twenty-one, or daughters at twenty-one or marriage, the issue of any such younger son dying under the age of twenty-one years and leaving issue to take their deceased father's portion.

The applicants were also trustees of the settlement for the purposes of the Settled Land Acts and of section 42 of the Conveyancing Act, 1881.

The settlement contained no express power of maintenance.

The two tenants for life under the settlement were both dead, and the second left a widow and three infant children, the eldest of whom was the first tenant in tail under the settlement. The annual income of the settled property, after providing for the various rent-charges of £1,710 per annum above-mentioned, exceeded £1,400.

Clarkson, for the applicants.—Since the portions term has commenced by the death of the father of the infants, who made the settlement, maintenance ought to be allowed to the younger children: Lewin on Trusts (10th ed.) 470, 472; *Warr* v. *Warr*, Prec. Ch. 213; *Green* v. *Belcher*, 1 Atk. 505.

Gaddum, for the eldest son, contended that maintenance ought not to be allowed, because it would necessarily come out of the eldest son's share (*Butler* v. *Duncomb*, 1 P. Wms. 448), and distinguished the cases referred to in Lewin on Trusts as being cases of wills and not of settlements.

He also referred to *Beal* v. *Beal*, Prec. Ch. 405.

Heckscher, for the younger children, was not called upon.

FARWELL, J.—Without expressing any opinion upon the question whether the children under this settlement take vested interests or not, I shall deal with this case as a question of principle. I think the general rule stated in Lewin on Trusts, p. 472, is accurate. It is as follows: "It will be collected from the preceding cases that portions provided for children have this peculiar quality, that, whether made payable at a certain age or not, they are so far contingent as not to be raisable, but to sink into the land, where the children do not live to want their portions—that is, where the children being sons do not attain twenty-one, or being daughters do not attain that age or marry; but that, on the other hand, portions are so far considered vested as to carry with them such a rate of interest as the court may deem necessary for the reasonable maintenance of the children." I adopt this as an accurate statement of the law, and I think that this is a proper case for allowing maintenance to the younger children. A sum of £300 per annum, being interest at the rate of 3 per cent. on the total sum for portions, seems to me a reasonable allowance.

Solicitors, *Cunliffe & Greg*, Manchester.

Q. B. Div.
(Lawrance and Kennedy, JJ.) } Oct. 26; Nov. 3.

CAMERON v. WIGGINS. (*a*.)

Sale of goods—Trade description—Oral statement explaining meaning of mark upon goods—Merchandize Marks Act, 1887 (50 & 51 *Vict. c.* 28), *s.* 3.

A mark applied to goods, although it is unintelligible in itself, and is not, according to the custom of the trade, commonly taken to be an indication of any of the matters mentioned in section 3 (1) *of the Merchandize Marks Act*, 1887, *will, if orally explained by the seller to the buyer to be intended to indicate one of those matters, constitute a trade description within that sub-section.*

Case stated by justices of the borough of Blackpool.

The respondent was charged on the information of the appellant with having sold to the appellant a leg of mutton to which a false trade description—to wit, "New Zealand mutton," was applied contrary to section 2 (2) of the Merchandize Marks Act, 1887.

In the respondent's shop on the 16th of March, 1900, were several handbills announcing that the respondent's firm were selling "Canterbury New Zealand mutton and lamb of the very best quality at the following low prices . . . legs of mutton 5d. and 5½d. a pound."

The appellant entered the shop and showing one of the handbills said to the respondent, "I understand you are selling New Zealand mutton. I am desirous of procuring a leg of mutton; my wife objects to River Plate meat and I want New Zealand mutton. Do you supply it?" The respondent said, "I do." The appellant then said, "Have you got a fresh leg you can supply me with—one that will keep over the end of the week?" The respondent said, "I have one in this morning, it is perfectly fresh," and upon the request of the appellant he produced a leg of mutton weighing seven pounds. The appellant asked for an invoice, and the respondent gave him an invoice as follows, but without the letters "N. M." upon it: Dr. to Wiggins & Co., family butchers—7 lbs. leg mutton, at 5½d., 3s. 2½d. N. M. Paid, A. S. W.

The appellant said, "You have charged me 5½d. I see"—(pointing to the handbill)—"you have two charges, 5d. and 5½d." The respondent replied, "Sometimes at the end of the week I have River Plate meat and I charge 5d. for that and 5½d. for New Zealand mutton." The appellant said. "Then I understand this is New Zealand mutton?" The respondent said "Yes," and the appellant asked him if he would mind marking on the invoice that the mutton was New Zealand meat. The respondent then wrote upon the invoice, with intent to warrant to the appellant that the mutton was New Zealand mutton, the letters "N. M."

There was no evidence that the letters "N. M." have any particular indication in the meat trade.

The mutton was not New Zealand mutton.

The appellant contended before the magistrate that under the above circumstances the mutton was sold with a false trade description applied to it by the respondent.

The justices were of opinion that the letters "N. M." did not constitute a false trade description within the meaning of the Act, because it was not established that, according to the custom of the trade, those letters were commonly taken to be an indication of the country in which the mutton was produced, and that the facts [illegible] did not as a matter of law amount to [illegible] of the false trade description

(*a*.) Rep[illegible] COLQUHOUN DILL, Esq., [illegible]at-Law.

"New Zealand mutton" to the mutton so sold. They therefore dismissed the information without requiring the respondent to call any evidence.

The Merchandize Marks Act, 1887, s. 3 (1) provides that: "The expression 'trade description' means any description, statement, or other indication, direct or indirect (*a*) as to the number, quantity, measure, guage, or weight of any goods; or (*b*) as to any place or country in which any goods were made or produced . . . and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of this Act."

Avory, for the appellant.—The letters "N. M." were an indication as to the country in which the mutton was produced. The concluding words of the definition do not govern the earlier words; it was not necessary to prove that the letters were commonly taken according to the custom of the trade to indicate the origin of the mutton. Although a purely oral description is not enough (*Coppen* v. *Moore*, [1898] 2 Q. B. 300, 46 W. R. Dig. 163), a written mark explained by an oral statement may be a trade description. [KENNEDY, J.—Is not the latter part of the clause intended to confine the cases in which explanations of the mark may be given to cases where the mark is ambiguous but is well understood in the trade?] No; if the seller gives no explanation of an ambiguous mark, it is necessary to show that it has the particular meaning by the custom of the trade; it is otherwise if the seller himself supplies the explanation.

The respondent was not represented.

Cur. adv. vult.

Nov. 3.—LAWRANCE, J.—The question which we have to decide is whether upon the facts stated in the case the writing of the letters "N. M." upon the invoice amounted to a trade description of the meat which was the subject-matter of the sale within the meaning of the Merchandize Marks Act, 1887. The expression "trade description" is defined by section 3, sub-section 1, to mean "Any description, statement, or other indication direct or indirect," as to any of a variety of matters relating to the goods sold, including an indication "(*b*) as to the place or country in which any goods were made or produced," and the sub-section goes on: "and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, shall be deemed to be a trade description within the meaning of the Act." The question is whether the last paragraph governs what precedes it, so as to exclude in all cases oral evidence as to the meaning of any figure, word, or mark, other than evidence of its meaning according to a trade custom. I think it does not. It seems to me that the concluding paragraph was intended to apply to cases in which, apart from the custom of the trade, there is nothing to convey to the mind of the purchaser that the figure, word, or mark was intended by the vendor to have the particular meaning which is complained of, and that it has no application to a case in which the vendor by oral explanation made at the time of the sale intends to convey and does in fact convey to the mind of the purchaser that it was intended to have that particular meaning. In this case if the mutton had been sold simply with the letters "N. M.," and nothing had been said to show what the letters "N. M." meant, I think that in the absence of evidence that they were by the custom of the trade understood to mean "New Zealand mutton" there would be nothing to show that the respondent had applied that trade description to it. But that was not the case. The letters were added in compliance with the appellant's request for the very purpose of indicating on the invoice that the mutton to which it referred was "New Zealand mutton." In my opinion therefore, the justices came to a wrong conclusion. But as the respondent was not required to give any evidence, and is entitled to produce evidence in his defence if he so desires, the case must go back to the justices to be reheard, but with the intimation that if the facts remain as already found by them there ought to be a conviction.

KENNEDY, J.—I concur, and have nothing to add.

Case remitted to justices.

Solicitors for appellant, *Mackrell, Maton, Godlee, & Quincey.*

House of Lords.

From C. A. (England). July 12, 1900.

CAMBERWELL ASSESSMENT COMMITTEE v. ELLIS. (*a*.)

Metropolis — Rating — Supplemental valuation list — Alteration in value — Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), ss. 43, 46, 47.

To justify the inclusion in a supplemental list of an alteration in the value of a hereditament, as required by section 47 of the Valuation (Metropolis) Act, 1869, the alteration must be one arising from a cause which directly affects the value of the particular hereditament; and it lies upon those who desire to alter the assessment to prove the nature and cause of the alteration in value.

The fact that, after the quinquennial valuation, a premium was paid for the lease of the premises is not of itself sufficient evidence of alteration within the meaning of the statute.

Decision of the Court of Appeal (48 *W. R.* 162, [1900] 1 *Q. B.* 68) *affirmed.*

This was an appeal from a decision of the Court of Appeal (Lord Russell of Killowen, L.C.J., A. L. Smith, and Vaughan Williams, L.JJ.), which reversed that of the Divisional Court (Lawrance and Channell, JJ.), upon a case stated by the London Quarter Sessions.

The facts are given at length in the report below, 48 W. R. 162, [1900] 1 Q. B. 68.

Balfour Browne, Q.C., and *Macmorran, Q.C.* (*Ryde* with them), for the appellants.

Littler, Q.C., *Page, Q.C.*, and *W. Russell*, for the respondent, were not heard.

Earl of HALSBURY, L.C.—In this case I am of opinion that the judgment of the Court of Appeal is right. The questions which are propounded to your lordships seem to me to get rid of some of the difficulties which would arise if we were to give a theoretical opinion upon what the whole effect of the statute is, because the questions which are reserved for your lordships are questions of law, as indeed they properly ought to be. With questions of fact your lordships have nothing to do. Indeed, if the quarter sessions had simply found that this public-house had increased in value from any cause, although they did

(*a*.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

not specify what the cause was, and had not reserved these questions of law for us, I do not suppose that there would have been any process by which, if it were wrong, that finding could have been set right. Dealing with it as a question of fact, the sessions would have been perfectly independent of any other tribunal; and if they had found as a fact that there was an "alteration of value" within the meaning of the statute, and that that amounted to an additional £100 a year, there would have been no power to alter the judgment and set it right.

But the sessions have in this case very properly asked certain questions on the facts which came before them. The first question they ask is this: "Whether the alteration in value which took place during the twelve months preceding the making of the said supplemental valuation list was in law an alteration within the meaning of section 46, sub-section 1, of the Valuation (Metropolis) Act, 1869." Now "the alteration in value which took place" assumes that there was an alteration and that there was an alteration in value. That evades the real question which it is intended to ask by putting it in a compendious form. But when the sessions have reserved that upon the case submitted to us, it appears to me there was no evidence whatever which would have justified them in saying that there was any alteration within the meaning of the statute, even if as a matter of fact the value of the house was greater in the one year than it was in the other.

The Legislature, by the Act of 1869, for very obvious reasons wishing to have a uniform assessment in the metropolis, and not wishing that from time to time these same questions should, at great expense to the parish and at great vexation to the ratepayers, be re-opened year after year, determined that for a period of five years the assessment once made should continue in force, and that it should not be competent to raise again the question which would be very properly and appropriately raised at the period of assessment. That is the meaning of the Assessment Act. It having once been ascertained what the value is, the statute proceeds to point out exceptional and peculiar difficulties which might arise if it was unalterable altogether, and it proceeds to say that if there is any alteration in value in one particular hereditament, and that hereditament is either increased in value by the addition of structural alterations (and then they add the words) "or any cause whatever" the proposition that the assessment is to last for five years is not to be so inflexible as to prevent, upon a proved alteration in the value either from a structural alteration or any other cause whatever, an inquiry into that circumstance.

The words which follow the provision as to structural alteration are very wide words indeed, and it is very intelligible that the statute should not have attempted to define the circumstances under which such an alteration should be properly inquired into. But still, if you give the construction to them which some words occasionally used by a learned judge might be supposed to give them—namely, that you shall not inquire into any alteration in value unless the value is altered—what would be the meaning of the statute altogether? Unless there is some circumstance beyond the mere fact of alteration in value to give rise to the inquiry, the statute has done nothing; because in every case where the overseer said, "This has been assessed at too low a value, and I want it assessed at a higher value"—in every case, without reference to any alteration of circumstances, the mere alteration of that which was put down as the value would justify a fresh inquiry. That, of course, would be an extremely absurd proposition, because the statute would enact with one hand a power which it took away with the other; and one cannot suppose that the statute would be so foolishly conceived. It would be disrespectful to the Legislature to suggest that it had, really, elaborately enacted nothing. On the other hand, to lay down as a rule a broad proposition which should embrace every case would be extremely dangerous, even if it were not, as I think it would be, impossible. Each case must depend upon itself, and in dealing with this particular matter I protest that I am not laying down any other general principle than this: that I think there must be something beyond the mere suggestion of the valuer that the house is worth more than it is assessed at. If there is nothing more than that, it seems to me there is nothing upon which a court ought to act; because that would be, in effect, to repeal the statute.

Therefore I say, in answer to the first question, that, as a matter of law, the mere giving of evidence that the house is worth more than it was assessed at at the quinquennial valuation is not evidence of an "alteration" in law which ought to be received. Now it is remarkable to observe that, giving the narrowest interpretation to those words, there is no evidence in this case at all of what was the supposed value at the period of the quinquennial valuation. The reason for that is obvious enough, because that valuation is conclusive on the parties—conclusive, that is to say, in any attempt to say that it was wrong; that is absolutely the valuation which has been arrived at. But I should have thought that, even if the mere alteration in value was the thing relied upon, the evidence ought to have been somewhat of this character: "Such and such was the value of the house at that date; the value of the house now is a great deal more, and therefore I have proved an alteration in the value of this public-house." I do not say that that would have been sufficient, but it would have given some colour to the argument; but here there is absolutely nothing. The gentleman who is called as an expert witness is called to say, "I had a premium paid when this man entered." That might be evidence; I think the second question must be answered in the affirmative, that it is evidence; but although it is evidence, it comes to nothing unless you establish a comparison between the two periods and show that you have got an enhanced premium given; but nothing of that sort is suggested. I decline to go into the curious ratiocination by which it was suggested that there must have been a less premium given before than was given then, because it seems to me to be rather reducing it to an absurdity. I say that there was no evidence at all of comparison, and it is only if there is a comparison that this is relevant or useful evidence. Of course, the fact of what was given by way of premium is evidence, and the sessions were right in receiving it; but what I point out is, that unless there is a term of comparison, although it is admissible evidence, it comes to nothing.

The third question is, "Whether the amount of such premium was in law any evidence of an alteration within the meaning of the sub-section." By itself it is no evidence in law of anything. It may be it shows what is the value of the public-house at that moment. I do not mean to say that it is not relevant evidence to show what is the value of the public-house; but as a term of comparison, when you have nothing to compare it with, it establishes nothing whatever as a matter of law.

Under those circumstances, it appears to me there was no evidence at all upon which any tribunal would be entitled to come to the conclusion that there was an alteration of circumstances such as I think was

pointed out by Cockburn, L.C.J., as giving rise to the permissibility of a fresh inquiry as to the value of the house.

I have said that I agree that the judgment of the Court of Appeal is right; but I hesitate very much to adopt all the reasoning of Vaughan Williams, L.J., because, although there are some illustrations which his lordship gave with which I concur, yet where he deals with the question of increased trade in the cycle industry, or such general propositions as that a war might affect the value of premises licensed for the purpose of carrying on the manufacture of gunpowder, and so on, I hesitate very much to say that those are circumstances which could be properly referred to, looking at the statute, which contemplates an alteration of circumstances in respect of the particular hereditament that is to be rated. That is the guiding line; and although I agree that the opening of a bridge, the opening of a new street — all these things which have relation to the particular hereditament to be rated—might be properly applicable and properly considered in relation to an alteration of circumstances to allow the hereditament to be valued again; when we are dealing here with the alteration contemplated by the statute it appears to me that the topics referred to by the learned judge are too wide and too much outside the particular hereditament in respect of which the inquiry is to be held, to be properly applied and considered for the purpose of establishing the proposition sought to be proved.

Under these circumstances I move your lordships that this appeal be dismissed with costs. I will only say that in giving judgment in this case I am simply endeavouring to give judgment upon these facts alone. I lay down no general proposition of law beyond this: That the statute has to be construed in each case and applied to the circumstances of each case. It appears to me that anything more dangerous, even if it were possible, than to lay down exactly where you are to draw the line it would be difficult to conceive. I therefore say that I think this judgment of the Court of Appeal is right in this case, for the reasons I have given, and I move your lordships to affirm it accordingly.

Lord SHAND.—I have come, after listening to the very able argument which has been addressed to us, to the same conclusion with your lordships, that this appeal ought to be dismissed. It appears to me that the argument maintained by counsel for the appellants is substantially contradictory to the principle of quinquennial valuation. The statute undoubtedly lays down the rule that there is to be a quinquennial valuation, and that it is only in the case of alterations in the value, which I think must be clear and explained upon grounds which the statute will admit of, that there is to be an alteration made in that valuation afterwards during one of the years of the current period of five years. It is required that the alteration must be proved. In that case the first clause of section 47 comes into operation, and that is really what we are construing in the present case. "If in the course of any year the value of any hereditament is increased by the addition thereto or the erection thereon of any building or is from any cause increased or reduced in value, then the following provisions shall have effect." If you are to read those words "is from any cause increased or reduced in value" in the wide way which is contended for by the learned counsel for the appellants, it appears to me that you would have no longer a quinquennial valuation, but it would come to be substantially an annual valuation by the mere proof that the value of the subject had from some cause or other (I do not care what it may be) either appreciated or depreciated. I do not think that can be the sound reading of the statute. I think the cases have perhaps gone rather far in that direction. I am of opinion that it must be something analogous, not necessarily closely analogous, but still analogous to the case that is there put, of "the addition thereto or the erection thereon of any building," or for some similar cause such as would affect the appreciation or depreciation of the particular building with which you are dealing. In this particular case the evidence alleged, as affecting apparently the mind of one witness only, of a large premium paid in the year before this attempted re-valuation took place, really, so far as that goes, drops out of the case. It was a scrap of evidence suggesting that a large premium meant an increase in value, but without a comparison upon substantial material with some other standard, such as the premium paid in the previous year, it is of no value.

The case therefore now before the House rests entirely upon the statement contained in the special case, which is to this effect: "Evidence was given by a valuer on behalf of the respondents that there had been since the date of the quinquennial valuation list a general appreciation of licensed premises throughout the metropolis, and that in his opinion the annual value of the said public-house had between April and October, 1896, increased by about £100." But it is added: "It was, however, admitted that there had been no structural alteration to the public-house. No evidence was given of any circumstances specially affecting the annual value of the public-house." The respondents "contended that they were not bound to give any such evidence, but that it was enough for them to show that the value had in fact increased." As I have already said, if it is enough for them to show that only, you destroy the quinquennial valuation and substitute for it an annual valuation, which is against the provision of the statute.

It appears to me to be clear that if "alteration" is alleged to have occurred either in the way of depreciation or in the way of appreciation, the onus is upon the person making the statement to prove it. Some circumstance I think especially affecting the particular subject must be shown—as, for instance, as has been put by his lordship on the woolsack, the building of a bridge which has greatly increased the traffic and produced larger profits in comparison with what had been obtained before, from a new locality; or the addition, as has been suggested by my noble and learned friend Lord Davey, of a large factory in the neighbourhood which has brought in an enormous amount of custom to the particular house or to the particular place; or, to take another illustration which has been put, the addition of pleasure-grounds to the particular house which, although there has been no additional building, have brought very large profits to the occupier of the house. In all those cases there has been an increased value plainly arising from circumstances admittedly affecting the particular house. And in the same way it may be depreciated by the shutting up of a road or by the erecting of a new house next door in competition, or by some other special circumstance of the kind. I think it must be taken generally that in each case some analogous circumstances must be proved to have caused either appreciation or depreciation. In this particular case nothing of the kind has been done, but there has simply been evidence that the value has risen.

I am not prepared to form a final judgment upon the cases which have been put by the Court of Appeal —the case of a taste for cycling causing a rise in value in the whole of the cycle factories and their

profits, or a rise in the price of gunpowder causing a rise in all premises where gunpowder is manufactured —I doubt very much whether such circumstances would bear upon any question of this kind; but it is not necessary to express a final opinion upon that matter at present. In this case I am clearly of opinion that there are no circumstances specially affecting the property in question which can entitle the assessor to raise the value.

Lord DAVEY.—I am of the same opinion. The first thing, of course, that we have to do is to construe section 47: "If in the course of any year the value of any hereditament is increased by addition thereto or the erection thereon of any building or is from any cause increased or reduced in value," then the provisions which follow in the section apply. I agree with the learned judges in the Queen's Bench Division that those words cannot be confined to structural alteration or addition or anything of that kind, but I think that the words "from any cause" are to be read as *ejusdem generis* in this sense, that it must be a cause which affects the value of the particular property. In other words, I think the point is very well put in Vaughan Williams, L.J.'s, judgment, that it lies upon those who desire to alter the assessment to prove the nature and cause of the alteration in value. What I mean is, that it is not sufficient to say that there has been an alteration in value, but you must also point to some definable cause to which that alteration is due, and that cause must be one which affects the assessable value of the particular property. It may affect the assessable value of other properties as well, but it must, in my opinion, be a cause which directly affects the assessable value of the particular hereditament in question.

I should have come to that conclusion merely by looking at the construction of this particular section, but I agree with my noble and learned friend on the woolsack, that if you look at the scope and object of the Act that is made even more plain, because the object of the Act was that a valuation should be made once every five years which should be conclusive and binding for a period of five years, in order to prevent the annoyance, the trouble, and the expense of a fresh assessment every year, and the inconvenience to people whose property is assessed. Now if it were sufficient to show that there has been an increase in value in order to obtain a new assessment, it appears to me, as it does to my noble and learned friend, that you would to a very large extent be nullifying the provisions of the statute and depriving the statute of much of the beneficial results which it was expected to have.

A great deal has been said as to what should be the character of the "cause." I think it is safer to confine myself to saying that it should be one, to use the language I have already used, which directly affects the value of the property itself. Various illustrations have been put, and many others might be put. I think it wiser to follow the course taken in the Act itself, of not too exactly defining what the alteration of circumstances must be that will give rise to the right to a fresh assessment. I will merely say this, that I should hesitate before I acceded as a general principle to some of the illustrations which were given in the judgment of the Court of Appeal. It is not necessary that I should express my concurrence with everything that was said in the Court of Appeal, but I do entirely agree in the conclusions at which the learned judges have arrived; and I do say this, that a mere alteration in value is not sufficient for the purpose. What I understand to have been found is that there has been an alteration in the value of these premises by way of increase in the period between April, 1896, and October, 1896, but that that alteration is due to a general increase in the value of public-house property in the metropolis. I do not think that is sufficient, and therefore I should answer the first question by saying that the alteration in value which was found to have taken place afforded no evidence which would support an alteration in the valuation list. I should answer the second question by saying that the amount of premium is no doubt evidence, but that the amount of premium received is not in itself evidence which would justify an alteration in the valuation list. I therefore concur in the judgment proposed.

Lord ROBERTSON.—I entirely agree in all that has been said by my noble and learned friends. The general scheme of the Act is that the valuation is to stand for five years, irrespective of fluctuations of general value which may occur during that period. But the Legislature also deals with the case of individual hereditaments, the value of which happens to have been altered, not by general economic or social change, but by change in their own individual conditions affecting value. In the present instance nothing appears in this special case to show anything special or individual in the cause of the alleged enhancement of the value of this house so as to bring the case within the scope of the sections founded on.

Appeal dismissed.

Solicitors for appellants, *Marsden & Son.*

Solicitors for respondent, *Maitlands, Peckham, & Co.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, M.R., and Collins and Romer, L.JJ.) — Jan. 17.

MCINTOSH v. SIMPKINS. (a.)

County court—Practice—Judgment summons—Judgment debtor outside the district of the county court—Leave to issue judgment summons—Affidavit—County Court Rules, 1889, *ord.* 25, *r.* 14a; *Appendix, Form* 52a.

Where a judgment debtor does not dwell or carry on business, and is not employed, within the district of the county court in which the judgment was obtained, the affidavit, on the application under ord. 25, *r.* 14a *of the County Court Rules,* 1889, *for leave to issue a judgment summons against the debtor, must contain all the material averments set out in Form* 52a *in the appendix to the rules.*

Therefore, where the affidavit only stated that the debtor lived in a certain house, apparently of the yearly value of £60, *and that he carried on the business of a builder, and did not state any facts showing that the business was profitable or that he had other means to pay a substantial part of the debt, and did not say whether he was married, and, if so, whether he had any children,*

Held, that the affidavit did not comply with the requirements of the form, and that the county court judge had no jurisdiction to give leave to issue the judgment summons.

Appeal from a judgment of the Divisional Court (Lawrance and Kennedy, JJ.) reversing an order of Bucknill, J., at chambers granting a writ of pro-

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

hibition to the judge of the Croydon County Court and to the plaintiff to prohibit them from further proceeding in the matter of a judgment summons issued from the said county court by the plaintiff against the defendant or of the order of committal made thereon.

The plaintiff recovered judgment against the defendant in the Croydon County Court for £4 10s.

The defendant did not dwell or carry on business nor was he employed within the jurisdiction of the Croydon County Court.

The judgment being unsatisfied, the plaintiff applied to the county court judge for leave* to issue a judgment summons under the Debtors Act, 1869.

The affidavit upon which the leave was applied for only stated that the defendant lived in a specified house apparently of the yearly value of £60, and that he carried on the business of a builder.

Leave having been granted, at the hearing of the judgment summons objection was taken on behalf of the defendant that the county court judge had no jurisdiction as the affidavit upon which the leave was obtained did not satisfy the requirements of Form 52*a*.

The county court judge overruled the objection and heard the summons.

Evidence was given to the effect that the defendant was living in a house apparently of the value of £60 a year, that he was a builder or a builder's foreman, and that he was employing workmen.

The defendant was not called as a witness and the county court judge made an order of committal.

Bucknill, J., at chambers granted a writ of prohibition as above, upon the ground that there was not sufficient evidence of means to justify a committal.

The Divisional Court discharged this order, holding that there was evidence of means.

The defendant appealed.

W. G. Clay, for the defendant.—The county court judge had no jurisdiction to give leave to issue the judgment summons, as the affidavit upon which leave was applied for did not fulfil the requirements of ord. 25, r. 14*a*., of the County Court Rules, 1889. The affidavit must be according to the form given in the appendix. Form 52*a* gives the requisite form of affidavit. In order to found the jurisdiction of the county court judge, the requirements of that form must be complied with. It was not sufficient to state, as the plaintiff's affidavit did, that the defendant carried on the business of a builder. The affidavit must go on to show in some way that the business is profitable. Nor is it sufficient to state that the defendant was living in a house apparently of the yearly value of £60. The defendant might have been occupying only one room in the house, or he might have been a lodger and not a tenant. Further, no mention is made in the affidavit as to whether the defendant is married and has any children. The affidavit has not, therefore, fulfilled the conditions laid down by the rules and the form. Secondly, there was no evidence of means before the county court judge to entitle him to make an order of committal.

He referred to *Chard* v. *Jervis*, 30 W. R. 504, 9 Q. B. D. 178; *Ex parte Koster*, 33 W. R. 606, 14 Q. B. D. 597.

W. Whately, for the plaintiff.—By ord. 25, r. 14*a*, the judge has to be satisfied before giving leave to issue the judgment summons that, upon the facts stated therein, he would be justified in making an order of committal. It is sufficient if the judge is satisfied that the defendant has, or has had since the date of the judgment, the means to pay a substantial part of the judgment debt. The judgment debt being for £4 10s., it is sufficient if the judge was satisfied that the defendant could have paid £1 off the debt The affidavit clearly showed evidence upon which the judge may well have been satisfied that the defendant could have paid £1. The form in the appendix is given as a guide to be followed. The affidavit is to be "according to" the form. It does not mean that the form is to be followed strictly, like the form in the schedule to the Bills of Sale Act, 1882. For instance, a plaintiff may not know whether the defendant's business is profitable or not, nor whether he is a married man with children. The fact that a man lives in a house worth £60 a year and is a builder is evidence upon which, unless contradicted, the judge could commit. Form 52*a* merely means that a plaintiff, upon applying *ex parte* for leave to issue a judgment summons, must tell the judge everything he knows about the defendant's means. There was therefore jurisdiction to issue the summons.

W. G. Clay replied.

A. L. SMITH, M.R.—The question we have to determine is whether the county court judge had any jurisdiction to issue the judgment summons. The defendant is a builder, and judgment was recovered against him in the Croydon County Court for £4 10s. The defendant did not dwell or carry on business within the district of that court. The judgment debt remaining unpaid, the plaintiff applied for leave, under ord. 25, r. 14*a*, of the County Court Rules, 1889, to issue a judgment summons against the defendant. That rule provides that the application for leave shall be made upon affidavit according to the form in the appendix, and leave shall not be granted unless the judge is satisfied that the evidence afforded by such affidavit, if uncontradicted, would justify the making of an order of commitment against the debtor. The affidavit must be made by the plaintiff before he can apply to bring the judgment debtor, who is outside the district of the court, within the jurisdiction. The form provided is given in Form 52*a*. Now, upon reading that form I can come to no other conclusion than that its intention is that the judge, before issuing a judgment summons, should know what is the position of the defendant and what are his family responsibilities. I do not say that the affidavit must follow the form precisely, but I do say that it must follow it in all its vital parts. The affidavit in the present case merely states that the defendant is living in a specified house of the yearly value of £60, and that he carries on the business of a builder. Speaking for myself, if the sole question here had been, assuming that the judgment summons was

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* Ord. 25, r. 14*a*.: "Where a debtor does not dwell or carry on business and is not employed within the district of the court in which the judgment was obtained, the summons" (*i.e.*, judgment summons) "shall not be issued from that court without the leave of the judge. The application for leave shall be made upon affidavit according to the form in the Appendix, and leave shall not be granted unless the judge is satisfied that the evidence afforded by such affidavit, if uncontradicted, would justify the making of an order of commitment against the debtor."

Form 52*a* in the Appendix (so far as material): "(3) The defendant C. D. now lives at , in a house (or shop) apparently of the yearly rent or value of £——; (4) the defendant C. D. carries on the business of a (state what) in a (state what) at (state where and any circumstances showing that the business is profitable or that he has means to pay); or the defendant C. D. is now employed as a , at (state the name and place of business of his employer, if known), and earns per week; (5) the defendant C. D. is unmarried [or is married and has (state how many) children, of whom (state how many) work and earn wages]."

rightly issued, whether this was evidence upon which the judge could have inferred that the defendant had the means to pay part of the judgment debt, I should be inclined to think that this was evidence upon which the judge could have come to that conclusion. The inference I should probably draw from this evidence is that the defendant had the means to pay the whole or part of the judgment debt, there being no contradiction on the part of the defendant. But that is not the question before us. The question is whether the affidavit contains the material particulars given in the form. The affidavit states nothing about the defendant's business being profitable, nor does it state any facts from which such an inference can be drawn. Nor does it state whether the defendant is married, and if so, whether he has any children. The affidavit, therefore, was insufficient to give the county court judge jurisdiction to give leave to issue the summons. For these reasons I am of opinion that the judgment of the Divisional Court must be reversed, and the order of Bucknill, J., restored.

COLLINS, L.J.—I am of the same opinion. Ord. 25, r. 14*a*, which is the rule we have to consider, is a provision for bringing a judgment debtor, who is outside the jurisdiction of the county court, within the jurisdiction, and it protects a judgment debtor of that class by means of additional safeguards. The rules have imposed certain conditions upon which alone that debtor can be brought within the jurisdiction. I do not think that we can approach this case without taking into consideration that there is an affidavit in a particular form provided for use in such a case. The question we have to determine is not the same as the question whether, assuming the judgment summons to have been properly issued and the judgment debtor properly before the court, there is any evidence of means so as to entitle the judge to make an order of committal. The rules have introduced additional safeguards for the protection of a judgment debtor outside the district of the county court against whom it is proposed to issue a judgment summons. I do not say that everything in the form given in the appendix must be followed, but the material facts as stated in the form must be followed. I cannot leave out of consideration that the form invites the person making the affidavit to make certain statements if he wishes to obtain a judgment summons. In the affidavit in the present case only two facts are stated—namely, that the judgment debtor was living in a house apparently of the yearly value of £60, and that he carried on the business of a builder. Are those two facts sufficient evidence, if uncontradicted, to satisfy the judge, within the meaning of the rule, that he could be entitled to make an order of commitment. In order to see whether they are sufficient, we must see what has been omitted from the affidavit. Paragraph 4 of the form invites a statement by the plaintiff, not only that the defendant carries on a business, but also of any circumstances showing that the business is a profitable one, or that the defendant has means to pay. This seems to me to be the place where any evidence of means to pay should be inserted, and this seems to me to be the place where it should be stated that the defendant is the tenant of the house in which he lives. Silence upon facts which the plaintiff is invited to state cannot be left out of consideration. There are only two facts stated here, and there is a refusal by the plaintiff to state other facts which he is invited by the form to state for the purpose of showing means to pay. The plaintiff therefore, in my opinion, has not made such an affidavit as the rules contemplate as necessary to found the jurisdiction of the county court judge to give leave to issue the judgment summons. I do not think that this affidavit was sufficient within the meaning of the rule, and therefore the county court judge had no jurisdiction to give leave to issue the judgment summons.

ROMER, L.J.—I am of the same opinion. We must bear in mind that the form in the appendix is only a form, and must therefore be adapted to the circumstances of each case. It is not a cast-iron form to be rigidly adhered to in each and every case. But at the same time it must be adhered to in substance. The form shows that it is essential to bring to the notice of the county court judge, upon the application for leave to issue the judgment summons, certain facts. For instance, it is not sufficient merely to state where the defendant lives and the rental value of the house. It is clearly contemplated by the form that, in the case of the defendant carrying on a business, circumstances should be stated showing that the business is profitable, or that the defendant has means to pay. In other words, means to pay cannot be inferred from the mere fact that the defendant is living in a house of a certain yearly value. Another circumstance which it is clearly contemplated that the judge must bear in mind, is whether the defendant is married, and if so, what family he has. I do not say that it is essential for the plaintiff to know the facts connected with the defendants' family. I can conceive that a plaintiff can get leave to issue a judgment summons against a defendant where he shows that, after making inquiry, he could not ascertain whether the defendant was married, and whether he had any children. But in such a case I have no doubt that the judge would assume that the defendant had a wife and children to support. The judge must be able to gather from the affidavit that the business is a profitable one, or that the defendant has other means to pay a substantial part of the judgment debt, bearing in mind his position as regards his liability to maintain his wife and family, if he has any. The affidavit in the present case does not comply with those requirements. It is consistent with the affidavit that the defendants' business is not carried on at a profit, and that he has no means to pay, and that he has a wife and family to support. Upon this affidavit the conditions precedent to the county court judge having jurisdiction to give leave to issue the judgment summons were not fulfilled, and the judge could not upon this affidavit be judicially satisfied that the evidence afforded by it was sufficient to justify him in making a commitment order within the meaning of ord. 25, r. 14*a*.

Appeal allowed.

Solicitors for the plaintiff, *Aird, Hood, & Co.*

Solicitor for the defendant, *W. H. Sturt.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Dec. 11.

ATTORNEY-GENERAL *v.* MIDLAND RAILWAY CO. (*a.*)

Inland revenue—Stamp duty—Railway company—Increase of nominal share capital—Conversion of stock—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 113.

The Midland Railway Co., in pursuance of a special Act, converted certain rent-charge stock and certain preference stock into stock of an increased nominal amount chargeable with interest at a correspondingly lower rate,

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

and converted their ordinary stock into preferred and deferred ordinary stock, the nominal amount of both the preferred and the deferred stock being the same as the nominal amount of the original ordinary stock.

Held, that the increase in the nominal amount of the stock of the company was an "increase of the amount of nominal share capital" within the meaning of section 113 *of the Stamp Act,* 1891.

Judgment of Ridley *and* Darling, JJ. (ante, *p.* 138, [1900] 2 *Q. B.* 353), *affirmed.*

Appeal from the judgment of a Divisional Court (Ridley and Darling, JJ.), on the hearing of an information filed by the Attorney-General for duty and penalties under section 113 of the Stamp Act, 1891, brought by way of special case: *ante*, p. 138, [1900] 2 Q. B. 353.

The Midland Railway Co., in pursuance of the Midland Railway Act, 1897, rearranged and consolidated the several classes and denominations of their stocks. The result of the rearrangement and consolidation was, *inter alia*, that £3,899,121 5s. 4 per cent consolidated perpetual rent-charge stock was converted into £6,238,594 2½ per cent. guaranteed stock; £6,337,076 12s. 6d. 4 per cent. consolidated perpetual guaranteed preferential stock was converted into £10,139,322 12s. 2½ per cent. guaranteed stock; £29,048,191 15s. 4 per cent. perpetual preference stock was converted into £46,477 106 16s. 2½ per cent. perpetual preference stock; and £35,434,947 8s. ordinary stock was converted into £35,434,947 8s. preferred ordinary stock and a like amount of deferred ordinary stock.

The Commissioners of Inland Revenue claimed that duty was payable under section 113 of the Stamp Act, 1891, in respect of the increase in the nominal amount of the above-mentioned stocks.

The Midland Railway Co. refused to deliver a statement in pursuance of section 113 with reference to such increase, and contended that they were under no liability to deliver such a statement.

The Attorney-General brought this information claiming duty under sub-section 2 and penalties under sub-section 3 of section 113.

The Divisional Court gave judgment for the Crown. The defendants appealed.

Sir Robert Reid, Q.C., and *Asquith, Q.C.* (*Lochnis* with them), for the defendants.—No duty is payable in this case under section 113 of the Stamp Act. The section taxes "any increase of the amount of nominal share capital of any corporation or company." Here there has been no such increase. No new capital has been raised, no new money has been paid to the company. There has merely been a rearrangement and consolidation of existing capital, a conversion of stock of one denomination into an equivalent amount of stock of another denomination. The words "nominal share capital" mean the whole amount of the capital which the company is authorized to raise by its constitution, the object being to tax all authorized capital, whether issued or not. But the statute does not apply unless there has been a real increase in the amount of authorized capital. Here the company has not been authorized to make any real increase in the amount of its capital. *Attorney-General* v. *Milford Docks Co.*, 69 L. T. Rep. 453, is distinguishable from this case.

Sir Edward Carson, S.G. (*Danckwerts, Q.C.*, and *Rowlatt* with him), for the Crown.—The case comes expressly within the words of the section, and the defendants ought to have delivered the statement required thereby. It is immaterial that no larger amount than before is paid to the shareholders in the way of dividend. In the case of the ordinary stock which is converted into preferred and deferred ordinary stock, the number of the shareholders must be altered by the conversion, and the incidents of the shares have been altered.

A. L. SMITH, M.R.—The question is whether there has been any increase in the amount of the nominal share capital of the Midland Railway Co. authorized by any Act of Parliament. Prior to what was done by the railway company with regard to its stock in pursuance of the Midland Railway Act, 1897, its nominal share capital was £74,000 000. In consequence of what it has done in pursuance of that Act its nominal share capital is now no less than £134,000,000. Therefore, in accordance with the Act, the nominal share capital has been increased by £60,000,000. It is argued that there has only been a splitting up of old securities into new securities, and that no new capital has been raised, and therefore there has been no actual increase in the capital. But section 113 of the Stamp Act, 1891, imposes a duty on an increase of the amount of nominal share capital, and, although it may be the stockholders get no benefit from the change, still there can be no doubt that there has been an increase of the amount of the nominal share capital. We have only to construe the words of the section, and in my opinion the case comes clearly within those words, and the judges of the Queen's Bench Division were right in their decision. The appeal must be dismissed.

COLLINS and STIRLING, L.JJ., concurred.

Appeal dismissed.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *Beale & Co.*

From Chan. Div.
(Lord Alverstone, L.C.J., and Rigby and Vaughan Williams, L.JJ.) — Dec 5.

DALY v. EDWARDES. (*a.*)

Landlord and tenant—Lease—Lease of theatre—Covenant not to assign—Grant of right to supply refreshments—Breach of covenant.

The lessee of a theatre covenanted "not to assign, demise, or otherwise part with the indenture" of lease, "or any estate or interest therein," without the licence of the lessor. Subsequently the lessee granted to a third person the free and exclusive licence and right to use the refreshment rooms and bars in the theatre.

Held, that the lessee had not assigned any estate or interest in the premises so as to give rise to any breach of his covenant.

Decision of Kekewich, J. (48 *W. R.* 360), *affirmed.*

This was an appeal from a decision of Kekewich, J. (reported 48 W. R. 360).

On the 8th of February, 1894, the defendant, Mr. George Edwardes, being lessee from Lord Salisbury of premises in Cranbourn-street, now known as Daly's Theatre, granted an underlease to the late Mr. Augustin Daly, for a term of twenty years, from the 25th of December, 1893, at a yearly rent of £5,500. Mr. Daly entered into a covenant with Mr Edwardes not at any time during the term thereby granted to assign, demise, or otherwise part with the indenture, or any estate or interest therein, for all or any part of the said term, to any

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

person or persons whomsoever, without the licence of the lessor or his assigns first had and obtained in writing under his or their hand or hands for that purpose, but such consent should not be unreasonably withheld in the case of a respectable and responsible tenant, it being the intention that the lessee should be at liberty at all times to produce and perform by himself and company or his licensees any first-class comedy, drama, or opera without the necessity of applying to the lessor or his assigns for his consent in that behalf, but that such licensees should not be at liberty to assign, underlet, demise, or otherwise part with their term without the licence of the lessor first had and obtained.

There was a proviso for re-entry if the rent was in arrear for twenty-one days, or on any breach of any of the covenants by the underlessee therein contained.

At the date of the underlease Messrs. Frank Warr & Co. had the exclusive licence to supply refreshments in the theatre and the exclusive privilege of advertising.

Mr. Daly subsequently by several agreements granted the free and exclusive right to use the bars and smoking-rooms in the theatre to Messrs. Warr for the purpose of supplying refreshments and advertising, and finally entered into an agreement with them, dated the 15th of April, 1898.

In this agreement Mr. Daly was called "the landlord," and Warr & Co. were called "the tenants," and it was thereby witnessed that, in consideration of the sum of £1,400 paid by the tenants to the landlord, and of the weekly rent of £15 to be paid by the tenants to the landlord as thereinafter provided, the landlord, as beneficial owner, did thereby grant to the tenants the free and exclusive licence and right to the use of all the refreshment rooms, bars, smoke-room, wine cellars, and offices, then or at any time thereafter during the term of the agreement in or connected with Daly's Theatre, together with the free right of access by the tenants, their servants and agents, to and from the same by and through the various entrances and exits of the theatre and premises necessary or convenient for the purpose of exercising the rights thereby granted, and also the sole and exclusive privilege during the term of the agreement of advertising and letting spaces for advertisements in, about, and within all such refreshment rooms, smoking-rooms, and bars of the theatre; to hold the premises for the term of 13¾ years from the 25th of March, 1898, wanting ten days, subject nevertheless to the covenants and conditions thereinafter contained.

One of these conditions was that the landlord might at any time by notice in writing determine the agreement and the term thereby created, in the event of the rent being in arrear for twenty-one days, and on other specified events.

Another condition (No. 6) was that "the refreshment rooms and bars shall in all respects be conducted in a proper and orderly manner, and in accordance with the rules of the theatre and customs of refreshment rooms in first-class theatres."

Another condition (No. 10) was that "the landlord or his agent or manager, or the occupier or the occupiers for the time being of the said theatre, his or their representatives shall have full power to discharge any servant or servants of the said tenants who shall have misconducted himself or herself or themselves to the prejudice of the good conduct of the theatre."

No licence for this agreement was obtained from Mr. Edwardes, as required by the covenant.

On the 4th of September, 1898, Mr. Edwardes took possession of the theatre and premises, on the ground that the agreement of the 15th of April, 1898, with Warr & Co. was a breach of the covenant in the underlease of the 8th of February, 1894.

On the 6th of September, 1898, Mr. Daly issued his writ in this action and claimed a declaration that the re-entry by Mr. Edwardes was not authorized by the underlease, and an injunction restraining the defendant from putting up bills and posters without the name of "Augustin Daly" upon them as lessee and manager.

On the 7th of June, 1899, Mr. Augustin Daly died, and Mr. B. E. E. Barrington obtained a grant of letters of administration to his estate.

The action was then revived by the administrator.

Kekewich, J., held that there had not been any breach of the lessee's covenant in the underlease, and that the defendant had no right to re-enter, and must give up possession of the premises.

The defendant appealed.

Warmington, Q.C., P. O. Lawrence, Q.C., G. Cave, and *Herman Cohen,* for the defendant.

Warrington, Q.C., J. E. Bankes, Bristowe, Newton Crane, and *De Vere,* for the plaintiff, were not called upon.

Lord ALVERSTONE, L.C.J.—I am of opinion that the learned judge in the court below has come to a perfectly right decision in this case. I do not at all deny that the arguments which have been urged by Mr. Warmington and by Mr. Lawrence are well worthy of consideration. But it seems to me that when one looks at the document there is no doubt that the true construction of this agreement with Frank Warr & Co. is to give them exclusive rights in the theatre and the use of various parts of the theatre, the enjoyment of which for many purposes "the lessee" (and by the lessee I mean Daly) is also himself intended to enjoy. I further have very grave doubt indeed whether it could possibly be contended that this agreement is a breach of the covenant not to assign in the original lease. The lease was granted in the year 1894; was of a theatre already built, and it is not denied that the theatre contained at that time—probably on every floor—if not the refreshment bars it now has, at any rate, some bars. It is not denied either that it is the practice in all theatres to have refreshment bars, which are open during the performance. Now it is in that state of circumstances that this covenant was inserted: "Nor at any time during the term hereby granted to assign, demise, or otherwise part with this indenture, or any estate or interest therein, for all or any part of the said term to any person or persons whomsoever without the licence of the lessor or his assigns first had and obtained." I do not think that I need read any other part of the covenant, because it is contended the agreement of 1898 has created, or has granted, by way of assignment, demise, or otherwise, an interest or estate in the theatre. If it were necessary to strictly construe that covenant, I should myself have doubted whether it was originally intended to apply to any subordinate use of a part of the theatre which was used for other purposes than a theatre. But I do not wish to be thought to express a final opinion upon that. I think that we should have to give consideration to the fact that the words "part of the theatre" are not in the covenant, and we might have to consider what was the real effect of the words "any estate or interest therein," having regard to the subject-matter that was being demised. But I do not wish to base my judgment on that, because I want, as far as I can, to express my opinion with reference to what has been done. I do not think that it has been seriously contended that the landlord, Edwardes, contemplated that all the liquors must be supplied by the tenant Daly, and in

fact Mr. Warmington and Mr. Lawrence both put it there might be a sub-contract of some kind or a licence of some kind if it did not infringe the provisions as to creating an estate or interest. By the agreement of 1898, it must be said, in favour of Mr. Warmington's and Mr. Lawrence's contention, that Messrs. Frank Warr & Co. did get for thirteen years the exclusive use of the existing bars, or of any bars that were erected. I confess that for myself I think the words "or at any time hereafter during the term existing" point more to the question of a licence to sell than the right to any particular refreshment bars; but I will assume for the purpose of the judgment I am now delivering that Mr. Lawrence's contention may be right, and that they have the right to have these particular bars during the whole term. I also agree that there are a number of words in the agreement, such as the word "demise," the word "rent," and other words which, if you are to regard them from a strict conveyancer's point of view, without considering what the real substance of the agreement is, might be held to be the granting of an interest or an estate in some part of the theatre. On the other hand, I think it is clear that there must be some limit put upon this kind of agreement and this kind of covenant in the lease. I ventured to suggest in the course of the argument that you can imagine the grant of an interest in a small part of a house—a cupboard or cellar, or something of that kind—which, to a conveyancer, might no doubt be an estate or interest in land, and yet there would not be a breach of the covenant if it was clear on the face of the whole document that that was not the intention of the parties. It is clear that all these spaces are to be open during the whole of the performance, and that the audience or the visitors to the theatre have the right to go in and out of the greater part of those spaces, the right to use the lavatories, and the right to sit and smoke, and go in to get refreshments. I agree with Mr. Lawrence that in all probability if Daly himself, or if one of the audience, endeavoured to go behind the refreshment bar, and to interfere with the carrying on of the business of the bar, he would have been put out, not because there was any technical demise of a portion of the premises to Frank Warr & Co., but because the whole agreement contemplates that they shall have the exclusive right of managing the bars, and of carrying on the business of the supply of liquors; and it would be wholly inconsistent with that that they should not have the right of keeping improper people out, or of keeping Daly out, during the time that they were carrying on their business of supplying liquors. That would not be, in my opinion, because they had got an interest or estate created in the land, but because they had got a particular privilege, which privilege carried with it particular rights, and was subject to particular obligations. Now, as I have said, to all these spaces Daly, and the servants of Daly, and the visitors to the theatre had more or less access. I put it to Mr. Warmington whether he contended that Frank Warr & Co. could have closed any of the bars at the top if they did not find it pay; and I think he very properly replied "No," not because he did not admit that it was not a demise, or interest or creation of an estate, but because it would be inconsistent with the other clauses of the agreement. I think that that drives one to the conclusion that you must look at the agreement as a whole. Without going through the different clauses I think that the whole of the substantial clauses of the agreement point to the view which the learned judge has taken in the court below—namely, that it was an exclusive privilege for the supply of refreshments, with, for that purpose, the limited exclusive use at times of portions of the spaces that were given for refreshments. But concurrently with that exclusive use of portions of the premises during the time that they wanted to supply the refreshments, there was the right of the audience to pass through to other parts, and the right on the part of the landlord to go for the purpose of repairs and lighting, and different things of that kind, and also for getting at the stores which Mr. Warmington said were jointly used by the two. I do not think that this kind of case is ever to be decided by looking at the mere expressions in particular clauses, or by considering the covenants and shutting one's eyes to what the general effect of the whole document is. I repeat, therefore, that I come to the conclusion that the fair effect of this agreement is that which has been arrived at by the learned judge in the court below—namely, an exclusive privilege granted to Frank Warr & Co. to supply refreshments, and the appropriation for the purpose of that privilege of certain spaces on the various floors of the theatre with the concurrent right on the part of Daly and his servants, and the visitors to the theatre, to use such parts of those spaces as were not for the time being required in the due exercise by Frank Warr & Co. of the privilege they had. Without saying at all that the form of the agreement does not fairly give rise to the argument which Mr. Warmington and Mr. Lawrence have very ably presented to us, I come to the conclusion that the decision of the learned judge in the court below was perfectly right. The appeal will therefore be dismissed with costs.

RIGBY, L.J.—Not only does the form of this agreement naturally give rise to the arguments that have been presented to us on the part of the apellant, but I must say that at the first sight of the agreement I was very much inclined to take the view for which they have contended. It is only after consideration, and careful consideration, that I have come to the conclusion that a licence instead of a lease of the hereditaments was really what was intended. No doubt there are words that would lead you to the other conclusion—*primâ facie*. words like "landlord" and "tenant," and particularly I may refer to that which has affected my mind—viz., what is called the covenant for quiet enjoyment. It looks very much like a lease of land. But I do not think that any of those considerations, or all of those considerations put together, should take us away from the real substance of the matter as I deduce it from the words used, not only, however, from those words, but first of all from those words, and afterwards from the rest of the agreement. It is the free and exclusive licence and right to use. Those are not words *primâ facie* of a demise of land, although they may, under certain circumstances, have the effect of a demise of land. But what are Frank Warr & Co. to have the use of? The refreshment rooms, bar and smoke-rooms—I stop there because that is enough for my purpose. They are to have the same right in the bars, for instance, that they are to have in the refreshment rooms and smoke-rooms. I cannot get over the fact that they never imagined that they were to have a lease of the refreshment rooms and the smoke-rooms, and if not of those, then not of the bars. Let us look at the state of the admitted facts, the smoke-room was to be used by those persons who paid for places in the theatre or were admitted by the order of the lessee of the theatre. The refreshment rooms were to be used in like manner by the same class of people, and it did not follow that they were going there for refreshments. They might obviously not intend that at all; they might go to obtain a change of atmosphere and of scene, or, if they did not smoke,

at any rate to get relief from the tedium of their places in the theatre. No doubt the bars were peculiarly required for the purpose of serving out refreshment. But I cannot see how in any other way they differed from the rest of the rooms, the refreshment rooms, and the smoke-rooms. No doubt the persons who had got a licence to sell refreshments had a perfect right to say to others "You must not come behind our bars because you will interfere with us," not "because you would be trespassers." They would say, whether to the lessee of the theatre or to anybody else, "You must not come here because we have the right by contract to do everything that is required for serving refreshments, and we cannot do that effectually and properly if you come behind the bars." That is not treating intruders as trespassers on land. I cannot see that that was in their minds. I asked a question which probably was a very small matter, but it seemed to me not immaterial, "Who lights the rooms," and it appears that the lessee of the theatre does so. That lighting probably would not involve much interference. If the lights were turned on once, probably it would not be likely that they would have to be interfered with during the whole of the entertainment that was then going on. But still, without a reservation in the lease, as a mere consequence of his ownership, I apprehend that if there had been any difficulty about the electric light during the performance it would have been the lessee of the theatre who would have been entitled to see that the lights were put right. At any rate, if any catastrophe had happened it would be set right by him, and not by the alleged lessees of the refreshment rooms. On the whole, I think that the proper conclusion is that Frank Warr & Co. took no estate or interest in land, but that they were entitled for all reasonable purposes to consider themselves as having an exclusive licence to provide refreshments and all that follows from that privilege, and nothing else at all. Therefore I join in affirming the decision of Kekewich, J.

VAUGHAN WILLIAMS, L.J.—I agree. No one has contended, so far as I can understand, that the grant of a licence and right to the use of all the refreshment rooms, bars, smoke-rooms, &c., during the term of this agreement would amount to an assignment or demise of any estate or interest in the subject-matter of the principal indenture if in fact such grant of a licence and right was a grant upon the basis that the landlord should retain dominion and control over the whole of the premises. In my judgment, although the lawyers have chosen to array this grant of a licence or this grant of a privilege in the dress of a lease of land, yet when one comes to look closely at the provisions of the document it is plain that it is really a grant of a privilege and licence merely masquerading as a lease. Under those circumstances I think that the decision of Kekewich, J., is perfectly right.

Appeal dismissed.

Solicitors, *Slark, Edwards, & Co.; J. C. Button & Co.*

From Chan. Div. (Rigby, Vaughan Williams, and Romer, L.JJ.) — Nov. 15.

BOWDEN *v.* YOXALL. (*a.*)

Practice—Motion to commit—Refusal to commit—Interlocutory appeal—Leave of court—Liberty of subject—Supreme Court of Judicature (Procedure) Act, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (1) (b) (i).

An interlocutory order dismissing a motion to commit is not a case where the liberty of the subject is concerned within the exception in (i) of section 1 (1) (b) of the Supreme Court of Judicature (Procedure) Act, 1894. *No appeal from such an order can be brought, consequently, without the leave of the judge or of the Court of Appeal.*

This was an appeal by the plaintiffs from an interlocutory order of Buckley, J., dismissing a motion brought by the plaintiff to commit the defendants for an alleged breach of an undertaking given by them to the court.

Buckley, J., refused leave to appeal, and no leave had been obtained from the Court of Appeal.

The Supreme Court of Judicature (Procedure) Act, 1894, provides, section 1 (1): "No appeal shall lie . . . . (*b*) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge, except in the following cases—namely . . . (*i*) where the liberty of the subject or the custody of infants is concerned."

Hart (*Rowden, Q.C.*, and *Lynn* with him) took the preliminary objection that, no order to commit having been made, the case was not within the exception "where the liberty of the subject is concerned." The appeal, therefore, could not be brought without the leave of the court, which had not been obtained.

Levett, Q.C., Alexander, Q.C., and *Condy*, for the appellant, cited *Lancashire* v. *Hunt*, W. N. [1895] 52, and in any case asked the court to give leave to appeal if necessary.

RIGBY, L.J.—I think that the preliminary objection is a sound one, and that an order refusing to commit is not an order where the liberty of the subject is concerned. I see no reason to give leave to appeal now. The appeal, therefore, must be dismissed with costs.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Solicitors, *Wingfield & Blew; Baker & Nairne.*

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div. Buckley, J. — Dec. 13.

ELLIOT *v.* NORTH. (*a.*)

Married woman—Will—Reversionary interest in personalty—Assent of husband after death—General grant of administration with will annexed—Old Probate practice—Construction of will and of assent—Costs.

When a married woman dies entitled to a reversionary interest in personal estate, it vests beneficially in her surviving husband immediately upon her death, and whether he takes administration to her estate or not; and if someone else becomes administrator, this latter holds the interest upon trust for the husband. And this is so, even if the wife has made a will not dealing with the reversionary interest, and the husband has assented to a grant of administration with the will annexed being made in general terms to the executors named in the wife's will.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

It is not necessary for the validity of the assent that it should have been given before the death of the wife.

The defendants, being the residuary legatees as well as the executors, ordered to pay costs.

This was an action by the representatives of a husband against the executors of his wife, who had died in his lifetime, claiming under the old law a reversionary *chose in action* to which the wife was at her death entitled.

The defence was that the wife had disposed of it by her will, to which the husband had assented.

The late Mr. J. L. Elliot married the Countess of Guilford, who was then a widow, on the 10th of February, 1863.

Previously, on the 6th of February, 1863, a marriage settlement was executed, by which the countess, who was entitled to certain property, settled it upon trusts under which she had a power of appointment by deed or will.

The Honourable Charles North was a son of the countess by the former marriage; he died on the 10th of November, 1871, intestate.

He was, at his death, entitled under his marriage settlement to a share of the settled estate expectant upon the determination of the life interest of his widow therein; and his mother, the countess, became entitled at his death to this reversionary interest as one of his next-of-kin.

On the 8th of April, 1872, the countess made her will. She appointed her son F. H. North and her son-in-law H. J. Bushby, the defendants, the executors of it; and after reciting the marriage settlement, and that a sum of £77,552 16s. 4d. was subject to the trusts thereof, she appointed the same to the defendants upon certain trusts, which included payment of funeral and testamentary expenses and legacies. And she "directed and appointed" the balance of the sum "and any balance I may have at my bankers, and all ready money, and all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of by this my will, and which I have not hereby disposed of" (but not including certain things which were included in the settlement) to the said defendants equally.

On the 16th of April, 1874, the countess died, leaving Mr. Elliot, her husband, surviving her. She had a balance at her bankers, which, it was admitted, formed part of her separate estate of which she could dispose.

On the 19th of May, 1874, Mr. Elliot signed the following consent to the grant of letters administration to the executors:

"In the goods of the Right Honourable Harriett, Countess of Guilford, wife of me the undersigned J. L. Elliot, deceased.

"Whereas the Right Honourable Harriett, Countess of Guilford, wife of me J. L. Elliot, of ———, died on the 16th of April, 1874, at ———, having during her coverture with me by virtue of certain powers and authorities given to and vested in her by an indenture of settlement, bearing date the 6th of February, 1863, and of other powers and authorities her enabling, made and executed her last will———, and thereof appointed ——— F. H. North, and ——— H. J. Bushby executors, and whereas, I, the said J. L. Elliot, as the lawful husband of the said deceased, am the sole person entitled to her personal estate and effects over which she had no disposing power. Now I, the said J. L. Elliot, of ———, do hereby declare that I expressly consent that letters of administration with the will annexed of all and singular the personal estate and effects of the said deceased be committed and granted to ——— the executors named in the said will."

Accordingly letters of administration were granted to the defendants in June, 1874.

These letters, after stating the facts recited in the consent, continued: "And also be it known that on the 2nd of June, 1874, letters of administration (with the will annexed) of all and singular the personal estate and effects of the said deceased were granted and committed by her Majesty's Court of Probate to ———, the executors named in the said will as aforesaid, they having been first sworn well and faithfully to administer the same by paying the just debts of the said deceased, and the legacies contained in her will, and distributing the residue of her estate according to law."

Mr. Elliot died on the 17th of September, 1898, and the plaintiffs were the executors of his will. The widow of the Hon. Charles North, who was the tenant for life of the reversionary interest in question, was still alive at the date of the action. The result, of course, was that Mr. Elliot, the husband, never reduced the interest into possession.

The plaintiffs now brought this action for a declaration that the defendants held the share of the countess in the personal estate of the Hon. Charles North, subject to the life interest therein of his widow, in trust for the plaintiffs as the executors of J. L. Elliot.

Hamilton, Q.C., and *J. W. Brodie Innes*, for the plaintiffs.—The reversionary interest was the husband's at the death of the wife and she could not dispose of it except so far as he gave effect to her disposition. A general grant of administration does not affect the beneficial interest of the husband: *Smart* v. *Tranter*, 38 W. R. 530, 43 Ch. D. 587; Coote, Com. Form. Prac. (3rd ed.), p. 41; Williams Exs. (9th ed.), p. 323. The assent of the husband must be given during the lifetime of the wife and continued after her death, otherwise it is inoperative. This was so in all the cases: *Squib* v. *Wyn*, 1 Peere Wms. 378; *Ex parte Fane*, 16 Sim. 406; *Brook* v. *Turner*, 2 Mod. 170; *Maas* v. *Sheffield*, 1 Rob. Eccl. 364. That this was so in *Ex parte Fane* appears from the petition. [The petition itself was produced in court.] Moreover, the will was not intended to deal with property which the countess could not dispose of, such as this: *In re Atkinson*, 46 W. R. 439, 47 W. R. 469, [1898] 1 Ch. 637, [1899] 2 Ch. 1. And the consent of the husband was in the common form of that date, and was not intended to affect the beneficial interest of the husband.

Hughes, Q.C., and *Gregson*, for the defendants—The wife had a disposing power, as she had such with the assent of her husband. An assent after death is sufficient, and when once given cannot be revoked: *Chappell* v. *Charlton*, 56 L. J. Prob. 73, 35 W. R. Dig. 230; *Noble* v. *Willock*, 21 W. R. 711, at p. 713, L. R. 8 Ch. App. 778, at p. 789. The husband's consent to probate under the old law, which applies here, bound him. The words of the will are wide enough to include the interest in question. It is a question of intention: *Chappell* v. *Charlton*; Hawkins on Wills, p. 28; *In re Pradel*, L. R. 1 P. & D. 454, 16 W. R. Prob. Dig. 7.

In re Price, 35 W. R. 596, 12 P. & D. 137, was also cited.

BUCKLEY, J.—Apart from the will and the construction of the will, one or two things at the outset are, I apprehend, plain. When the Countess of Guilford died on the 16th of April, 1874, entitled to this reversionary interest, the right to it vested in her surviving husband, and he was entitled to take it, and was master of it, and could give a discharge for it, if he took out letters of administration to his wife's estate. This also, I think, is plain—that, if he did not take out administration to his wife's estate, but

somebody else did, that the person who so took out administration would be a trustee for him. After the Statute of Distributions (22 & 23 Chas. 2, c. 10) had been passed a doubt seems to have arisen as to what was the effect of that statute upon the rights of surviving husbands in respect of their wives' personal estate, and accordingly there was appended to the Statute of Frauds—a place where one would scarcely expect to find it—a section which provided that for the purpose of explaining the Statute of Distributions it was declared "That neither the said Act, nor anything therein contained, shall be construed to extend to the estates of *feme covertes* that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said Act." There are authorities, beginning with *Squib* v. *Wyn*, extending to *Humphry* v. *Bullen*, 1 Atk. 458, and *Elliot* v. *Collier*, 3 Atk. 526, from which it is quite plain that the reversionary interest of the wife vests in the surviving husband immediately upon the death of the wife, even before he has taken administration to her; that the next-of-kin have no right under the Statute of Distributions at all, that the husband is the person entitled, and whether he takes administration or somebody else takes administration, that the beneficial interest in the wife's personal estate is vested in the husband. Those cases were reviewed, and the last authority upon them is to be found in *Smart* v. *Tranter*. Now, that proposition I do not understand to be disputed, but what the defendants say is this: A wife under the old law of course could make a will of personal estate with the assent of her husband. Mr. Hamilton has sought to argue that the assent of the husband must be given in the lifetime of the wife. I do not think that any such proposition can be maintained. I think that the doctrine rests upon this, that the wife under the old law being a person incapable of disposing of her personal property was nevertheless treated as being a person who could dispose of it if her husband, who was absolutely entitled if she did not dispose of it, was content to stand aside. He could stand aside by a consent given in her lifetime if he was so minded, and if he had consented he could revoke his consent, and if so it would not have any effect. And if she was dead he could equally, by taking certain steps, treat her will as effectual to pass the property adversely to him, although he could have taken up a different attitude. That is plain, not so much from the report of *Ex parte Fane* as from the way that decision has ever since been treated; as, for instance, in *In re Atkinson*, when Lord Lindley, then M.R., said: "As I understand the authorities, the husband is at liberty during the life of his wife to license her to make a will and to revoke that licence, but if after her death he has really assented to her will, he cannot revoke it. Now before Stirling J., the case was argued upon the question whether the husband had assented, and the plaintiffs relied mainly upon the ground that he had proved the will in general form in May, 1892, and no doubt under the old law that would have been an assent to the will." Lord Lindley meant not an assent to the will which could have no effect, but an effectual assent to the will so as to give validity to the disposition made by the wife, which otherwise would have been invalid. I consider, therefore, that here is an assent given by Mr. Elliot, after the death of the countess, to her will, and if it were a will disposing of this reversionary interest, would have been such as to constitute that an effectual disposition. But now what took place was this. The will in question was proved on the 2nd June, 1874, and at that time the practice of the Probate Court was different from that followed now, and which has been followed ever since 1887. Under the procedure as it was in 1874 the Court of Probate would give probate of a married woman's will limited to property over which she had a power of disposal and then would make a grant of administration *cœterorum* to the husband. That court does not do so now, it makes only one grant; but in 1874 the practice was to grant administration of the property over which there was a power of disposal, to the executors under the will exercising the power, and to grant administration *cœterorum* to the husband. That was not the course that Mr. Elliot took. What happened was this: On the 19th of May, 1874, he signed this consent. [His lordship read the consent and also the grant.] Now what was that consent? It seems to me that it was a consent by the husband to a general grant of administration to the defendants of all and singular the personal estate and effects of the deceased—namely, both those over which she had a testamentary power and those to which he was entitled as the sole person entitled to her estate and effects over which she had no disposing power, and concerning which she died intestate. In other words, so far as regards the property that was not included in the power, it was an assent by the person who was entitled according to the practice of the Probate Court to take administration—namely, the husband—to a grant of administration to somebody else. If that is so, it is within *Squib* v. *Wyn* and those cases, and the person who does get administration is a trustee for the husband, who is the person beneficially entitled. Then it is said that it is not so, because the will has a larger effect than that which I have attributed to it, and that it contained a disposition purporting to be of property not included in the settlement and of which the lady could only dispose with the consent of her husband. In my opinion that is not the true construction of this will. It is "all and singular other the personal estate which at the time of my decease I shall have power to appoint or dispose of and which I have not hereby disposed of," that is to say, "I have made certain dispositions under my testamentary power, and if I have not exhausted the whole of that, then I dispose of anything else which I can dispose of by this my will." Now, as regards this reversionary interest, was it property which at the time of her decease she could dispose of by that her will? I answer No. The husband had given no consent in his lifetime to her disposing of it, and she could not sit down and make her will disposing of property which was not within her powers of disposition at the time of her decease. Whether her will could operate or not must depend upon whether *ex post facto* the husband chose to do an additional thing—namely, to divest himself of his rights to have that property and to say, "Notwithstanding that it is mine, I agree to its being treated as if it were yours, and as if you could dispose of it by your will." I do not think that as a matter of construction this interest falls within this will. I notice that Lord Lindley in *In re Atkinson*, after the passage which I have read, where he says that under the old law a probate by the husband of the will would be an assent to the will, goes on to say this: "His assent cannot give an effect to a bequest which it would not have upon the true construction of her will." Now, it appears to me that what I am asked to do here by the defendants is, as a matter of construction, to say that the fact that the husband subsequently assented to somebody having administration of the whole estate—which, for the purpose of my judgment, I treat as being the same thing as if he proved the will himself—that that was, for the purpose of construction, a thing

Q. B. Div.
(Wills and Kennedy, JJ.) } Nov. 19-21; Dec. 20.

THE QUEEN v. COCKERTON. (a.)

Education, Elementary — Powers of school board — Science and art classes — Provision out of rates — Day schools—Evening continuation schools—Adults —Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 3, 5, 7 (4), 54, 97—*Elementary Education Act,* 1873 (36 & 37 *Vict. c.* 86), *s.* 13—*Education Code* (1890) *Act,* 1890 (53 & 54 *Vict. c.* 22), *s.* 1.

It is not within the power of a school board to provide, out of the rates levied under the Public Elementary Education Acts, science and art schools or classes, either in day schools or in evening continuation schools. But, in both, such educational work may be carried on by the school board, provided the whole of the funds required for it are furnished from sources other than contributions from the rates.

Semble, *it is not within the power of a school board to educate adults in public elementary schools at the expense of the rates.*

Rule *nisi* for a *certiorari* to bring up and quash certificates, made by the auditor appointed to audit the accounts of the School Board for London, of disallowances and surcharges of three separate sums which had been expended upon the maintenance of classes registered under the Science and Art Department.

The rule *nisi* was granted at the instance of three members of the school board under the following circumstances: The total expenditure of the board for the half-year ending the 29th of September, 1898, amounted to £1,582,504 18s. 3d., out of which a considerable sum represented expenditure incurred by the board in connection with day and evening science and art schools and classes and schools of science maintained and registered under the Science and Art Department.

The auditor disallowed seven separate sums, selected as representing test items, entered and charged in the accounts of the board for the half-year as being payments illegally made out of the funds of the board, and surcharged those sums upon members of the board.

One of the sums so disallowed was surcharged upon each of the members of the board who had obtained the rule. Each of these sums had been paid out of the school fund of the board, referred to in section 53 of the Elementary Education Act, 1870. The sums were expended in maintaining and keeping efficient science and art schools and classes which were held in buildings provided and maintained by the board.

The first was a sum of £32 6s. 10d. paid to Mr. A. W. F. Langman for salary as drawing instructor. Mr. Langman was appointed instructor in drawing by a resolution of the board dated the 28th of March, 1889, and it was provided that he should give the whole of his time to the work at a salary of £300 per annum, rising by annual increases to a maximum of £350 per annum. The principal part of Mr. Langman's time was given to the supervision of drawing in accordance with the code of regulations for day schools under the Education Department. Among the classes and schools so supervised by him were art schools and classes under the Science and Art Department of the Committee of Council on Education. The second of the three sums was a sum of £4 paid to Mr. H. H. Crick for special instruction in chemistry at the science class No. 7,229, held at the Medburn-street Evening Continuation School. Mr. Crick was appointed by a resolution of the board dated the 21st of October, 1897. Under that resolution Mr. Crick taught theoretical and practical chemistry in evening schools under the Science and Art Department. A large part of Mr. Crick's duty was to supervise the science classes held in day schools and evening continuation schools. The third was a sum of £58 paid to the Polytechnic for science and art papers and as the remuneration for the services of Mr. Mitchell, the local secretary of the Polytechnic, in conducting science and art examinations, held in accordance with clause 20 of the directory of the Department of Science and Art at several schools.

In a special case stated pursuant to an order of the court the following facts were stated: At Lady Day, 1898, there were in London provided and maintained by the board 485 day schools containing altogether 547,106 scholars and 280 evening continuation schools attended by about 29,153 scholars. The number of individual students under instruction in science and art schools and classes in the day schools of the board in the session 1897-8 was about 2 644 in science and about 2,165 in art. The number of individual students under instruction in science and art schools and classes held in the evening continuation schools of the board in the session 1897-8 was in science about 1,768 and in art about 2,069. Grants were obtained by the board in respect of the students in the said schools other than the students under instruction in science and art schools and classes, from the Education Department at Whitehall. Grants were made by the Science and Art Department at South Kensington to the board as managers under that department in respect of the students in the said schools under instruction in science and art schools and classes.

The great majority of scholars in science and art schools and classes in day schools maintained by the board were over thirteen and below fifteen years of age. All of these scholars before entering science and art schools and classes had passed through the standards in the day schools, except a few who were allowed by virtue of clause 57 of the directory to enter a school of science on having received instruction up to and including the work of Standard VI. In evening continuation schools, under article 8 of the Evening School Code, no scholar under fourteen years of age was admitted unless he was exempt from the legal obligation to attend school. There was no superior limit of age in evening continuation schools and a great number of the scholars were adults.

The students in science and art schools and classes were inspected by inspectors under the Science and Art Department in accordance with clause 38 of the directory and registered under the Science and Art Department in accordance with clauses 15-18 of the directory. The scholars under the board other than such above-mentioned students were inspected by inspectors under the Education Department and registered under the Education Department in accordance with articles 8, 12, and 85 (*d*) of the code. With the exception of the cases mentioned in clause 18 of the directory a scholar might not during the half year to which this case relates be registered both under the Science and Art Department and under the Education Department.

The board have always obtained grants from the Education Department in respect of all their schools. Grants from the Science and Art Department have been made to them in respect of all science and art schools and classes maintained by them. Grants received from the Education Department and grants received from the Science and Art Department have in point of fact always been carried to the school fund.

a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The board have charged no fees for instruction in science and art schools and classes provided by them, so far as day schools are concerned since August, 1891, so far as evening continuation schools are concerned since the 1st of September, 1898.

The expenses incurred by the board in respect of science and art schools and classes under the Science and Art Department have always considerably exceeded the grants obtained from the Science and Art Department, and the deficiency has always been made good by the board out of the school fund and the rates levied under the Public Elementary Education Acts.

The questions for the decision of the court were whether it was within the powers of the board as a statutory corporation to provide science and art schools or classes either in day schools or in evening continuation schools, and whether it was lawful for them to pay the expenses of maintaining these schools or classes out of the school board rate or school fund.

Sir R. B. Finlay, A.G. (*H. Sutton* with him), showed cause on behalf of the auditor.—The Elementary Education Acts from which the school board derives its powers relate only to the elementary teaching of certain subjects. What is taught in the science and art schools and classes maintained by the board is not the sort of education on which they are entitled to spend the rates. In section 3 of the the Elementary Education Act, 1870, the term "elementary school" is defined to mean "a school or department of a school at which elementary education is the principal part of the education there given," and in section 5 of the same Act it is provided that elementary schools shall be provided by the school boards available for all children "for whose elementary education efficient and suitable provision is not otherwise made." The whole scheme of the legislation on this subject showed that it was intended to provide for elementary education. The Day School and Evening Continuation School Codes issued by the Education Department at Whitehall contained the maximum of what might be taught in elementary schools.

Lord R. Cecil (*M. Macnaghten* with him), showed cause on behalf of the Camden Science and Art Corporation.—The Elementary Education Act, 1870, sought to accomplish its object by two methods—namely, by grants to schools from imperial taxation and by means of school boards who were empowered to pay for the education given by them out of the rates. Two sets of provisions relating to these two methods are to be found running through the Act. By section 3 an elementary school is defined to be a school where the principal part of the education given is elementary. That includes all schools which, though not giving exclusively elementary education, yet give substantially the education which the Legislature has thought desirable. The idea of the Legislature was to provide for elementary education. They accordingly enacted that, where there was not a sufficient supply of such education to be had in a district, schools should be created, but they did not intend to create schools which were not strictly confined to elementary education. They also encouraged other schools which taught things other than elementary, but in which the principal part of the education was elementary. Thus, where in section 23 it was provided that schools established under a trust might be transferred to the school board, it was not provided that such schools should be carried on by the board on the same lines as theretofore. The same thing applied to endowed charity schools which school boards were empowered to take over by the Elementary Education Act of 1873. The net result of all the Acts is that the school boards are only entitled to give in the day schools and pay for out of the rates, elementary education. The same thing applies to the evening continuation schools. It was provided by section 1 of the Education Code (1890) Act, 1890, with regard to evening schools, that it should not be required for earning the Parliamentary grant that elementary education should be the principal part of the education there given. That provision only has reference to the grant, and it is only intended to apply in the case of endowed and voluntary schools, and did not authorize a school board to provide advanced education in their schools.

Danckwerts, Q.C. (*Loehnis* with him), also showed cause on behalf of the Corporation of the City of London.

Asquith, Q.C., and *Llewelyn Davies*, in support of the rule.—Science and art schools and classes have been maintained by the School Board for London since 1885, and, in other parts of the country, since 1875. They have received recognition by the Local Government Board, who, in a general order of 1880, reiterating one of 1873, required school boards to keep a ledger, and to enter therein the grants from the Committee of Education, including the grants from the Science and Art Department. What lies at the root of the whole matter is the construction which is to be placed on the definition of "elementary school" given in section 3 of the Act of 1870. The Legislature has refrained from defining elementary education. It is true that elementary education was defined in reference to the duty of a parent towards his child. For that purpose it was defined to include "reading, writing, and arithmetic." But when dealing with the powers of the school board the Legislature purposely abstained from defining the term. The term is flexible, and no clog or fetter has been placed upon the authorities appointed to administer the Act. The term might mean "the three R's," or it might be confined to the subjects mentioned in the codes or only to those which were obligatory, or it might extend to all subjects taught through both the Education Departments. The Legislature has, however, defined elementary school. The words of the definition are: "A school or department of a school at which elementary education is the principal part of the education there given." That is to say, not the education given to each child but at the school. Therefore, where there is a school in which the principal part of the education given is elementary education, that school is within the Act of 1870, and, provided it conforms to the other conditions of the Act, it is one which a school board has power to carry on and maintain out of the rates. With regard to evening schools the case is even stronger, because the restriction that the principal education taught there must be elementary has been removed.

Cur. adv. vult.

Dec. 20.—WILLS, J., read the following judgment: The concrete question we have to determine is whether certain items in the accounts of the London School Board have been properly disallowed by the auditor. It is common ground that such a question involves the inquiry whether the expense of maintaining either schools or classes of science and art in which the teaching follows the lines laid down by the Science and Art Department in its "Directory" as distinguished from those laid down by the Education Department in its Code can be thrown upon the rates, by which the board schools are maintained or assisted. The latter question is not, in my opinion, and for

reasons which will hereafter appear, exhaustive, but it may be usefully dealt with in the first instance.

It will be convenient, and indeed necessary, to preface a description of the Acts of Parliament the construction of which is involved, by a short statement as to the constitution and functions of the two departments. The Education Department means in the phraseology of the first Elementary Education Act, and that of every other Act unless the contrary intention appears (52 & 53 Vict. c. 63, s. 12), which it never does, "The Lords of the Committee of the Privy Council on Education." It is a department of Government having offices at Whitehall and exercising a number of definite functions. It had existed for many years before the first Elementary Education Act of 1870. It was, in fact, a Government office for the conduct of which the Lord President of the Privy Council was the Minister responsible to Parliament; and for many years before 1870 Parliament had annually allotted to it in the Appropriation Acts large sums of money for the promotion of public education to be distributed under rules framed by the Department. The distribution took the form of grants made to schools carried on otherwise than for private profit. The Science and Art Department was also a branch of the establishment of the Lords of the Committee of the Privy Council on Education, and separate grants were made to it which were similarly distributed under its regulations to schools and institutions not for private profit where science or art was taught. It is described as having then been "a department of the Government established for the promotion of science and art, and being under the superintendence of the Lord President of the Privy Council and the Vice-President of the Committee on Education of the Privy Council," but in the year 1864, by a Royal Charter, from the recitals in which the foregoing description is taken, the Lord President of the Privy Council for the time being, and the Vice-President of the Committee on Education for the time being were constituted a body corporate with perpetual succession, a common seal, &c., under the name of the Department of Science and Art. And, therefore, in 1870, the two departments, though having no doubt a common policy, were essentially distinct, and it is only in popular language that they can be described as branches of the same administration. The Science and Art Department has for very many years had its offices and its seat of administration at South Kensington. The forms which the grants assumed in the Appropriation Acts were generally "for public education in Great Britain" and "to defray the expense of the general management of the Department of Science and Art and of the schools throughout the kingdom in connection with that department, and of the Geological Survey of Great Britain and Ireland." The same language was used in the Appropriation Act of 1864, which received the royal assent three months later than the date of the charter of incorporation of the Science and Art Department. In 1865 the two grants were (1) "for public education in Great Britain"; (2) "for the general management of the Department of Science and Art and of the establishments connected therewith." In 1877 the first vote was described as "for public education in England and Wales, including the expenses of the Education Office in London." In 1868 the second vote was described as "for the salaries and expenses of the Department of Science and Art and of the establishments connected therewith." And since these respective dates practically the same designations have been used in every Appropriation Act down to the present time.

The departments were, therefore, in 1870, separate in name, separate in local habitation, separate in constitution, and separately entrusted with public funds to be administered by each department independently of the other. Each has from time to time published its own prospectus and laid down for itself the conditions under which it would make grants from the annual vote to schools and institutions engaged in teaching. For the sake, I presume, of avoiding confusion; the Education or Whitehall Department has called its syllabus of conditions "the Code." The analogous publication of the Science and Art or South Kensington Department has been called "the Directory." A comparison of the Code and Directory now in force shows that the Code deals with many subjects not embraced by the directory and with an education much less advanced in the subjects common to both than those dealt with by the directory. To some extent the course of study with which the Whitehall establishment is concerned in the common subjects may overlap the lower portions of the South Kensington scheme. but the broad distinction remains that the South Kensington curriculum, while narrower than the Whitehall scheme, is of a much more advanced character. South Kensington makes grants substantially larger than Whitehall, and the extreme limit of the teaching which it aims at encouraging reaches a very high standard and extends into the higher mathematics, into chemistry of a very advanced character, both theoretical and practical, into hygiene, geology, physiography, and a multitude of subjects in the domain of science which are carried as far as might well suffice to give a successful student a fair place in a Tripos or in the honour list of most of our universities. The department aims at the encouragement of what it calls science schools and science classes as well as schools of science. A school of science is an establishment with all the necessary staff and appliances for a complete and methodical scientific education adapted for students whose education is such as would fit them to enter Standard VII. of the Code (see Directory, articles 56, 57, and *passim*). No definition is given of science schools and science classes, but they are at all events schools or classes of the South Kensington as distinguished from the Whitehall type, and giving instruction in the subjects which they may happen to teach, aiming at the South Kensington standard and intended to earn the South Kensington grant.

The Act upon the provisions of which the present questions chiefly turn is the Elementary Education Act, 1870 (33 & 34 Vict. c. 35). By section 5, where in any school district (as defined by the Act) there is not a sufficient amount of accommodation in public elementary schools, in the Act referred to as "public school accommodation," available for all the children resident in such district for whose elementary education provision is not otherwise made, the deficiency shall be supplied in manner provided by the Act—that is to say, by the creation of a school board and the establishment of board schools. By section 19 the school board may, for the purpose of providing sufficient "public school accommodation" provide schoolhouses and supply everything necessary for the efficiency of the schools provided by them. By section 53 the expenses of the school board shall be paid out of the school fund, which is to consist of fees from scholars, money provided by Parliament or raised by loan or in any manner whatever received by the school board, and any deficiency is to be made up out of the rates to be raised as provided by the Act. The condition, therefore, of the existence of a school board, other than the School Board for London, is the want of proper provision by the existing schools for the elementary education of all the children in

the district; and in determining the question whether such deficiency exists the Education Department is to take into consideration every school in the neighbourhood which gives efficient elementary education to the children in the district. The School Board for London was constituted by section 37 of the Act without such inquiry, it being assumed, apparently, that there was no need of it. The board is directed to "supply their district with sufficient public school accommodation" (defined in section 8), which is exactly what any other school board has to do, and I cannot find in the Act any trace of any difference between the powers and duties of the School Board for London and those of any other school board. Wherever the deficiency does exist it is to be supplied by accommodation in "public elementary schools" as therein defined. This throws us upon section 7, which enacts that every elementary school which is conducted in accordance with the regulations that follow shall be a public elementary school.

I pause here to say that in section 3 an elementary school is defined as meaning "a school or department of a school at which elementary education is the principal part of the education there given," so that section 7 says that every school at which elementary education is the principal part of the education there given shall be a public elementary school if it conforms to the regulations therein contained; and as a board school by section 14 must be a public elementary school it follows that it must be conducted in accordance with those regulations. The only regulation that is material here is that it shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant (subsection 4). A Parliamentary grant means (by section 2) a grant made in aid of an elementary school out of moneys provided by Parliament for the civil service entitled for "public education in Great Britain," which, as I have shown, is always a distinct thing from the grant to the Science and Art Department, and is the fund which, from its establishment, has been administered by the Whitehall or Education Department. The conditions in question, by section 97, shall be those contained in the Minutes of the Education Department for the time being—*i.e.*, in the present case the Code of 1898. That Code provides for certain subjects as obligatory, and unless they are taught to the satisfaction of the department no grant can be obtained. Additional grants can be earned by efficient teaching in the other subjects mentioned as optional, the grant being so much per head in respect of scholars showing a certain proficiency. The board school, therefore, under the Act of 1870, must be one in which the principal part of the education is elementary, and, as the school board cannot come into existence unless there is a deficiency in the provision in the district for elementary education, it might very well have been enacted that the education to be provided out of the rates should be elementary only. Indeed, such would have been the natural conclusion had not a contrary intention appeared. I think, however, that it does appear. The definition of "elementary school" is not that it shall include a school at which the principal part of the education is elementary, but that it means such a school; and I do not see how any other conclusion can be arrived at than that the board schools may go beyond mere elementary education if the school board be so minded. It is quite clear to my mind that they are under no obligation to go beyond the subjects and the amount of education required by the Education Code in order to earn a Parliamentary grant. The extent of this obligatory teaching, though a varying quantity, has always been extremely moderate. But I see no indication of anything like a definite superior limit to what may be taught except in so far as such a limitation is involved in the proposition which I hope in due course to make clear—viz., that the only education contemplated by the Act as within the province of the school boards is education for children. I think there was good reason for the abstention in the Act from any provisions for a superior limit. The work of the Education Department in 1870 and for some two or three years later had very modest aims, and did not go beyond reading, writing, and arithmetic. No doubt the general standard of primary education was then extremely low. It must have been evident to everyone that if reading, writing, and arithmetic were properly taught there would soon be a great many children who, if they were to be taught anything fresh during their childhood, must learn something beyond that restricted range of instruction, and that there would certainly be exceptional children who could go far beyond it. The Code at that time provided for no grants for any instruction beyond what have been called the three R's. I cannot believe for a moment that it ever was intended that in board schools nothing beyond the very low standard to which elementary education as then understood had reached should be aimed at by the board schools. The legislation is general. It applies alike to board schools and to schools—not for private profit—maintained out of endowments or by voluntary contributions. Neither the Acts nor the Codes are confined to either voluntary schools or board schools. A vast deal of confusion and misunderstanding has, I think, arisen from a failure to appreciate this cardinal fact, and the most extravagant arguments have been founded upon the use of expressions of a general character and intended to apply to all elementary schools (as defined by the Act) and upon the application of them as if board schools were the only schools with which they dealt. It seems to me, therefore, that so long as the board school is devoted principally to elementary education there is not only no provision, express or implied, that the instruction shall not go beyond it, but a distinct intimation that it may, and that the only condition expressly imposed as to the *quantum* of education is that it at least must come up to the lowest standard required in order to obtain a Parliamentary grant—*i.e.*, must satisfactorily teach the obligatory subjects. Such subjects must almost necessarily form the principal part of the instruction to be administered in a board school which admits children from five years of age and upwards, and to which children from five till fourteen can be compelled to go. The higher the age the fewer the children, inasmuch as every child of ten or twelve must have been a child of five, whereas it is not every child of five who lives to be ten or twelve. There is, however, as it appears to me, a very important and a very reasonable practical limit imposed on the education to be given at board schools. From first to last the whole series of Acts relating to this subject, which are invariably designated as the Elementary Education Acts, deal with children. No definition is given of "elementary education," which is obviously a term that may shift with the growth of general instruction and attainment. The Code, in many instances, draws a line, in dealing with subjects for which grants may be made, between the elementary and advanced stages, but such division affects only the amount of the grants, and has really no bearing at all upon any question involved in the present case. Except for the purposes of one Act, dealing with compulsory attendance, no definition has been given of "child." It is impossible to lay down any definite boundary as

separating "children" from young men or young women, or any other description by which an advance beyond childhood may be indicated. Practically I suppose that at somewhere between sixteen and seventeen at the highest an age has been arrived at which no one would ordinarily call childhood. It seems to me that, as far as mere *quantum* is concerned, any education suitable for a child may be given by the school board, but that the one condition must always be fulfilled by the school—viz., that it is conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain a Parliamentary grant, which by the interpretation clause means the Whitehall grant. I think the clear intention of Parliament was to place the elementary schools under the sole administration of Whitehall. South Kensington is never alluded to. The Code at one time placed one of its subjects—drawing—under the Science and Art Department, but always with the proviso that the grant would come from that department. Of course, there was nothing to prevent either department from making or withholding a grant upon any terms not inconsistent with the Acts which it chose to impose, but that has absolutely nothing to do with what the public elementary school may or may not do. That depends entirely upon the Act of Parliament, which meant, I think, to give to public elementary schools of every sort the same rights and to subject them to the same control. And I think section 7 (4) meant to place them all under the control of Whitehall, and to say that all must teach what Whitehall laid down as obligatory in order to get a grant, and that in regard to instruction outside that narrow area, if and in so far as it was given, it was to follow the rules of the Whitehall Code, whatever they might be from time to time.

I have dealt at considerable length with the Act of 1870, because I believe that it strikes the keynote of all the subsequent legislation on this subject. Between 1870 and 1893 no fewer than nine Acts supplementary to the principal Act were passed, and in every Act the same phraseology is kept up, and in the last of them (The Elementary Education (School Attendance) Act, 1893 (56 & 57 Vict. c. 51), the whole of the preceding Acts are styled "The Elementary Education Acts, 1870 to 1891." In 1873 an Act was passed (36 & 37 Vict. c. 86) under which a school board was enabled, with certain exceptions not material, to accept and administer any educational trust or endowment. It was provided (section 13 (2)) that any school connected with such a trust or endowment shall be deemed to be a school provided by the school board—in other words, a board school. But then follows the significant qualification that nothing in that section shall authorize the school board to expend any money out of the school rate for any purpose other than elementary education. That is to say, no additional burden was to be thrown on the rates in order to carry out the objects of the trust or endowment. The same Act, in section 22, refers to "registers and other books and documents containing information with respect to the attendance of children" at the board school, and sections 24 and 25 contain various other provisions with regard to the attendance of children. The Act of 1876 enacts that it shall be the duty of the parent of every child to cause such child to receive elementary instruction in reading, writing, and arithmetic, and is full of provisions about "children" attending the school. Further control in respect to the degree of instruction and efficiency required to obtain certificates of exemption from attendance at school is given to the Education Department by section 24, thus enabling them to raise the standard from time to time. A child is defined to mean in this Act a person between five and fourteen (section 48). The only place in which the word "scholars" and not "children" is used is in a section which refers to schools that are not board schools (the third paragraph of section 48).

The next important Act was that of 1891, which abolished school fees for children between three and fifteen. It appears, I think, to assume that there may be children over fifteen years of age attending the board schools, but I can find no phrase or expression indicating that anything but children were contemplated. Stress has been laid upon the use of the word "scholars" (not "children") in section 8, which provides that nothing in section 17 of the Act of 1870 shall prevent a school board from admitting scholars to any school provided by the board without requiring a fee, as if it indicated that the Acts referred to scholars who are not children. But inasmuch as section 17 applies to children, and children only, there is absolutely nothing in this argument. The two passages just referred to are the only ones in the whole series of Acts in which the pupils are referred to otherwise than as children. The Act of 1893 (56 & 57 Vict. c. 51) simply raises the age under which a child cannot be employed except under a certificate of exemption from ten to eleven. Reference has been made in the course of the argument to the Technical Instruction Act, 1889 (52 & 53 Vict. c. 76), but, as it relates entirely to schools to be established and maintained by various local authorities, the remuneration of which excludes school boards, and the only Parliamentary grant contemplated by it is one by the Science and Art Department, its bearing upon the present question is so extremely remote that it is not worth serious consideration. Section 1 (*a*) says in effect that the local authority shall not supply or aid the supply of technical or manual instruction to scholars receiving instruction at an elementary school in the obligatory or standard subjects prescribed by the minutes of the the Education Department. Another clause—section 1 (3)—says that nothing in the Act shall be construed so as to interfere with any existing powers of school boards with respect to the provision of technical and manual instruction. But in the first place I suppose that it never would have entered into any one's head to doubt that some technical and manual instruction may properly fall within elementary education, and, further, such instruction had by that time found its way into to the Code.

In my opinion, therefore, the board schools can provide instruction more than elementary so long as it is for children, but are placed expressly under the Whitehall Department and in so far as they teach either elementary or advanced subjects must conform to the Whitehall Code. It follows that they have no statutory authority to do more, and, therefore, if they do go substantially beyond it, must not spend the ratepayers' money upon the excess. In so far as, while following the Whitehall Code, they may be able to earn the South Kensington grants, I see nothing in the Acts to prevent them from doing so, but, as far as I can gather the facts from the very obscure case in which they are stated, the money expended upon science schools and science classes in respect of which the disallowances were made by the auditor were those which were incurred by teaching the South Kensington subjects in accordance with the South Kensington Directory. So far, what I have said applies equally to day schools and evening schools. Before I proceed to deal specially with the evening schools I think it may be useful to trace succinctly the course of action which has been followed by the Education Department. By the courtesy of the Education Department

I have been able to see the whole of the Codes from 1870 to 1898, and the following summary may be relied upon as accurate, though it does not profess to be absolutely exhaustive. Down to and including 1891 there was one Code embracing both day schools and evening schools, though the regulations applying to each have long been on somewhat different lines. From 1870 to 1874 the only education contemplated or spoken of was in reading, writing, and arithmetic. Various modifications had taken place between 1870 and 1875, always in the direction of what I may call natural development, but always confined to these three subjects. But in 1875 a change of the most far-reaching kind was made. To the three elementary subjects were added grammar, geography, and history; a long list was also given of subjects called "specific," for proficiency in which a grant could be made. They included mathematics, Latin, French, German, mechanics, animal physiology, physical geography, botany, and domestic economy (this for girls only). This alteration was coincident with no fresh legislation, but was solely a departmental act. It was, in my opinion, entirely within the competence of the department, and it could have no operation unless the Legislature granted the necessary supplies. What is its effect upon the limits of education to be observed in board schools is a totally different matter which I will deal with in its proper place. The successive Codes for some years made no further change, except in the shape of a continual increase in the extent to which the teaching was to be carried. But in 1882 there was a further change of an important character. In this Code, as in all the subsequent ones, the subjects for which grants could be made are divided into two classes, obligatory and optional, and for the first time it is stated with regard to evening schools that no attendance of a person over twenty-one or under fourteen will be recognized for a grant. The optional subjects are again subdivided into class subjects (to be taken by classes) and specific subjects (to be taken by individuals). It is a curious fact that, though the specific subjects would naturally be selected by the more advanced scholars, who may be between twenty and twenty-one, a note is appended to the schedule of specific subjects that the science subjects are to be taught chiefly by experiment and illustration, inasmuch as if they are taught to children by definition and verbal description they will be worthless as means of education. This note did not drop out till 1893, when I suppose it struck someone as absurd under the existing conditions. The Code for a long time coquetted with drawing. It was introduced in 1885 as an optional class subject; in 1886 it was made obligatory; in 1887 it was dropped altogether; in 1890 it was restored as an optional subject for boys in infant schools or classes; in 1893 it was promoted to be an obligatory subject for boys in schools for older scholars, but always with a notice that the grant would be made by the Science and Art Department and upon examinations conducted by that department. It was at length finally taken to itself by the Education Department in 1898, the grants thenceforth being made by the Education Department and the rules applicable being transferred from the South Kensington Directory to the Whitehall Code. No other department of art has *eo nomine* been introduced into the Whitehall Code, nor at all, except in so far as anything that may be called art may fall under the head of "manual instruction." In 1892 for the first time separate Codes were issued for day schools and evening schools still called by that name. In 1893 appears for the first time the phrase "evening continuation schools." I do not know, and the learned counsel could not tell us, who invented the expression. It is not to be found in any of the Elementary Education Acts nor in any Act which has been brought under our notice. I gather, however, from two extracts from speeches by Mr. Mundella, given in Murray's Dictionary under the word "continuation," and dated respectively 1887 and 1888, that it was introduced from the educational technology of Germany. They are defined in Murray as "schools in which the education of the elementary school is continued to a more advanced age." By the explanatory memorandum prefixed to the Code for each year after 1892 they are to include schools in which "the principal part of the work will be preparatory to the special studies directed by the Science and Art Department or other forms of secondary or higher education." Elsewhere they are spoken of as designed to provide the means for "those who are leaving the day schools to continue their education at evening schools" and as "one of the most important means for turning to better account than at present the money and time now spent in the day schools" (Code of 1893, arts. 6 and 7), which means, I suppose, the money now spent upon and time spent in the day schools. Thenceforth, it is announced, the attendance of persons over twenty-one years of age will be recognized; no limit of age is prescribed; no scholar will be compelled to take the elementary subjects. As to one of the subjects, "The Life and Duties of the Citizen," the Code contains the very reasonable statement that it will be found difficult to teach it except to those scholars who are in the habit of reading and thinking intelligently about public affairs. The case finds that a large number of the persons taught at the evening schools in respect of which disallowances have been made were adults. It appears to me, again, to have been perfectly within the competence of the department to lay down the conditions under which it would make grants, and I am not in the least surprised that where it found schools *de facto* fulfilling those conditions the grant followed as a matter of course. But to argue, as has been done, that such action on the part of the department sets the school board free to teach at the expense of the ratepayers to adults and to children indiscriminately the higher mathematics, advanced chemistry (both theoretical and practical), political economy, art of a kind wholly beyond anything that can be taught to children, French, German, history, I know not what, appears to me to be the *ne plus ultra* of extravagance. If the Acts of which the primary object was elementary education and the whole object was education for children are to be transformed into Acts for the higher education—education of a kind usual rather in a college of a university than in a school—of grown-up men and women it must be done by Act of Parliament and not by a stroke of the pen of a Government department. The department has never affected to do anything of the kind, or to do more than lay down the condition under which a grant of money may be earned. The extravagance is in the application that has been made by the school boards of the successive developments of the Code. The department is under no restrictions as to the conditions under which it shall grant public money, Parliament being at liberty to withhold or ratify the grant. But it is the strangest of arguments to say that, because the department is prepared to grant money for teaching adults to any school in a position to teach them, it follows that a board, created and existing to supply education for children and for no other purpose, has a right to spend money out of the rates for teaching those who are not children. London and the large towns in the country are full of working men's colleges, polytechnic institutions, and other similar establishments, which afford teaching for adults, and

to whose legitimate work the provisions of the Code for instruction to adults apply. An equally extravagant argument has been founded upon the Education Code (1890) Act, 1890. The Code of 1890 had made some new provisions as to special grants to schools in relation to population and some other local circumstances which it was obviously apprehended might be *ultra vires*. These are confined by this Act. The Code made no provision that I have been able to find altering the definition of an "elementary school," and in so far as the Act effects that alteration I do not see that it has anything to do with the Code of 1890. It is styled "an Act to make operative certain articles in the Education Code, 1890." This description may well perhaps apply to the provision in question, since there would not be more scope for the work of an evening school than for that of a day school without the removal of the restriction in section 3 of the Act of 1870. Be that as it may, it provides specifically that it shall not be required as a condition of a Parliamentary grant to an evening school that a principal part of the education there given shall be elementary, and it is a significant fact that it is silent as to any alteration of the Elementary Education Acts in the way of providing education for adults. This provision is not an alteration of any regulation of the Code, and it does not touch the question of whether or not a school is conducted in accordance with the conditions required by the minutes of the Education Department to be fulfilled in order to get a grant. The section means just what it says and no more—namely, that in order to get the grant the school need no longer be confined to teaching principally elementary matter. It is again a general section, not applicable merely to board schools, but to voluntary evening schools and all others which are in other respects public elementary schools. It does not, in my opinion, alter in the least the powers or duties of school boards, and certainly does not confer an entirely new power to teach adults by the aid of the rates. Another matter has been argued as being also a statutory recognition of the practice in question. The Local Government Board has directed board schools to show in their accounts what grants they receive from South Kensington. The Local Government Board has statutory powers to direct in what form accounts shall be kept and returns made, and their orders have to be laid before both Houses of Parliament. Therefore it is said there is a Parliamentary recognition of the fact that school boards are earning Science and Art Department grants. Such an argument only serves so show the straits in which the case for the appellants is found. The Local Government Board, like the Education Department, deals with schools as they find them. *De facto* they teach this and that which earn grants from South Kensington. Parliament votes the money and the department pays it. It is, therefore, natural that orders should be made that the school board should show how much it receives and what is done with it. It is not the business of either department to inquire whether any particular school, voluntary or board, is exceeding its rights with regard either to the public or to individuals by giving the education which has satisfied the conditions and earned the grant. It is, I think, equally futile to say that because subsidies in respect of the schools and classes objected to in this case have been annually voted by the House of Commons and sanctioned by the Appropriation Acts, the school board must have a right to contribute to the cost of such schools and classes out of the rates. The Appropriation Acts legalize the expenditure of public money in the way proposed. They have absolutely nothing to do with the question whether the school board has exceeded its powers in levying rates to pay for the excess of cost over and above the grants; and, again, I have to say that if the case of the appellants depends upon such an argument it must be in a bad way.

In my opinion, therefore, in so far as the expenses in question were incurred for science and art schools and classes or for teaching adults, they are indefensible, and the auditor was right in dealing with them. We have been asked by both sides to treat the case as if the question of adult instruction had not arisen. I do not know why the respondents joined in the invitation, but it is one which I cannot accept. The question is directly raised by the last clause of paragraph 15 of the case, and it is impossible to ignore it. It is immaterial that it is not one of the reasons given by the auditor, but it is quite impossible to exclude it in dealing with the second question proposed to us. If, as stated in the case, it is really impossible to dissect the items and apportion them between the legitimate objects of the schools and those which are *ultra vires*, his disallowance of the items as a whole must stand. But he has power to reduce as well as to disallow items (order of Local Government Board, the 14th of July, 1880, art. 25), and it seems to me to be little short of absurd to say, as the case does, that the task of apportionment is impossible. Far more difficult tasks of the same nature are habitually performed by judges and juries, and I can see no insuperable obstacle. The question, however, is probably not important. I do not suppose that anyone will even wish that the gentlemen surcharged, who I do not doubt for a moment honestly did what they conceived to be their duty, should be mulcted in the amounts surcharged or in any other amounts. There can be no doubt that the importance of the subject demands that the questions raised should be decided by the House of Lords. Until that is done there can hardly be any disturbance of the existing order of things without the most enormous inconvenience. When the question is finally set at rest, if the views I have expressed be maintained, I can see nothing whatever to prevent the appellants from applying to the Local Government Board under the provisions of 11 & 12 Vict. c. 91, s. 36, to remit the surcharges. It will be only when it is finally decided that the surcharges were proper that the occasion will arise for resorting to that section.

Before giving my formal answers to the specific questions which the case presents, I wish to observe that, in respect to expenditure, whether for teaching adults or for maintaining science and art classes or schools or other teaching, which appears to me to be outside the range of what ought to fall upon the rates, I conceive that under the ample words of section 13 (1) of the Act of 1873 any school board which can get subscriptions or donations sufficient to enable them to give such instruction is at liberty to do so, provided that it *bonâ fide* conforms to sub-section 3 and expends no money out of the rates towards such education. It is true that in the Act of 1870 the school fund is to consist of all moneys received in any manner whatever by the school board, but the provisions of the Act of 1873, s. 13, could not be complied with unless the funds specially allocated, which that Act enabled the school board to accept and administer, were made the subjects of separate accounts, and to that extent the Act of 1873 clearly modifies the Act of 1870.

As to question (1), therefore, my answer is that it is not within the power of the board to provide at the expense of the ratepayers science and art schools or classes in day schools; that the question of providing science and art schools in evening schools cannot arise, inasmuch as by art. 56 of the Directory the work of such a school must be carried on in day

classes; that science and art classes in evening continuation schools are as much beyond the scope of rate-aided education as in day schools; but that in both such educational work may be carried on by the school board provided the whole of the funds required for it are furnished from sources other than contributions from the rates. (2). Assuming the impossibility of apportioning the items which have been disallowed between legitimate and illegitimate expenditure, the disallowances were properly made. (3). The rule *nisi* must be discharged.

KENNEDY, J., read the following judgment: In this case I have had the opportunity of reading the judgment which my brother Wills has just pronounced, and it deals so fully and thoroughly with the historical and general aspects of the very grave and important matters before us, that I may, without preface, approach the particular questions which the court has to decide. These questions, as stated in the special case, are three in number; but the real and substantial point of controversy is raised in the second of them, and I shall deal with it first. Is it lawful for the School Board to pay out of the rates levied under the Public Elementary Education Acts, as the London School Board has done in the circumstances stated in the special case, expenses incurred in providing and maintaining science and art schools or classes either in day schools or in evening continuation schools?

I will take first the case of day schools.

It appears to me that we must chiefly be guided by the enactment of the Elementary Education Act, 1870. It was by that Act that school boards were created. It prescribed their purpose, their powers, and their duties; and I have been unable to find that its provisions, so far as the present issues are concerned, are in any essential point affected either by the later statutes relating to elementary education or by the Technical Instruction Acts of 1889 and 1891 (52 & 53 Vict. c. 76; 53 & 54 Vict. c 60).

The central purpose of the Elementary Education Act, 1870, is plain and definite—to provide education for children in public elementary schools. The school board, which this Act brings into being, is a piece of administrative machinery whose primary work is to produce within a defined district a sufficiency of such educational provision. "Child" is not defined as, for the purposes of that Act, it is defined in the Elementary Education Act, 1876 (39 & 40 Vict. c. 79). "Elementary education" is not defined. I infer that Parliament intended both terms to be elastic. "Child" is not to be read as designating a person under fourteen years of age as it is (see section 48) in the Education Act, 1876. All that is clear is that it is for the education of persons in *statu pupillari* that the Act intends to provide. "Elementary education" may mean, and in my opinion it does mean, something more than the efficient elementary instruction in reading, writing, and arithmetic, which under section 4 of the Act of 1876 the parent of every child between the ages of five and fourteen is bound to cause that child to receive. This Act gives it neither description nor limit. Now let us examine the Act, in order to see what the school board is to do. According to section 5 there is to be provided for every school district a sufficient amount of accommodation in public elementary schools available for all children resident in such district for whose elementary education efficient and suitable provision (referred to in the Act as "public school accommodation") is not otherwise made. Where there is an insufficiency of that accommodation the school board is entitled (sections 18 and 19) and under section 10 may be required to provide and maintain schools. The funds for the attainment of this end are stated in sections 53 and 54, which give a right of recourse to the rates. These schools must be public elementary schools.

What, then, is meant by a "public elementary school"? We have the answer in sections 3, 7, and 97. It is, in the first place, a school or department of a school, at which elementary education is the principal part of the education there given; by which phrase I understand to be meant the principal part of the education of each of the children who attend the school. Secondly, it is a school whose scholars are free from any religious test and from compulsion to attend any religious teaching or religious service or Sunday-school and where any religious observance or instruction to those whose parents desire it is subject to certain conditions. Thirdly, it is to be open to inspection by her Majesty's inspectors of schools under the Education Department; and fourthly, we have the important stipulation in section 7 (4) that "the school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant." The term "Parliamentary grant" is explained by section 3 to mean a grant made in aid of an elementary school, either annual or otherwise, out of money provided by Parliament for the civil service intituled "for public education in Great Britain." The 97th section provides that the conditions required to be fulfilled by an elementary school in order to obtain an annual Parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being.

The crucial question in this case, in my view, is this: Does the phrase "public elementary school"—*i.e.*, school which the school board is to provide and maintain—as defined by the Elementary Education Act, 1870, involve or connote any, and if so what, limitation upon the character or extent of the secular instruction to be given, so far, at any rate, as regards instruction the cost of which may be defrayed out of the rates under section 54? Two things, I think, are clear. First, that the education is to be the education of children and not of adults; secondly, that only the principal part of the education and not the whole of it must be "elementary education." Is there any further limitation? In my opinion there is. I agree with my brother Wills in thinking that if the provisions of the Elementary Education Act, 1870, and especially section 7 (4), are duly considered, it was the clear intention of Parliament to place public elementary schools (and it is only such that the board may legally provide and maintain) under the sole administration of the Education Department at Whitehall. I think that the education which might be paid for out of the rates was intended to be education either prescribed or approved by that department as the responsible authority. The minutes of that department now in force are contained in the "Code" of 1898. It lays down certain conditions as necessary for the obtaining of the grant. Some subjects—reading, writing, and arithmetic, needlework (for girls), and drawing (for boys), and one "class" subject—the Code prescribes as obligatory subjects of instruction and denotes as "the elementary subjects"; others, less elementary, it authorizes as optional subjects, either "class" or "specific"; and, after giving a list of these, it adds in article 16 that a subject outside the list of "specific" subjects may be substituted for any of these optional subjects, "provided that a graduated scheme of teaching it be submitted to and be approved by the inspector." These, obligatory and optional alike, are grant-earning subjects. But, further, in article 17 the Code declares that instruction may be given in other

secular subjects, although they can earn no grant; but they must be subjects approved by the department. So that this Day School Code of 1898 contains a scheme of general secular education for children in a public elementary school, part of which is obligatory and part optional, but all of which is either prescribed by or requires the sanction of the Education Department at Whitehall, and is subjected annually to examination by the inspectors who belong to that department. It appears to me that the Elementary Education Act, 1870, when carefully considered and fairly construed, sufficiently shows that it is for the provision and maintenance of a school where the secular instruction does not pass beyond these limitations that it has given to the school board statutory authority to draw upon the rates. That which the school board here has done—that which has caused the making of these disallowances and surcharges by the auditor—has been the expenditure of money from this source upon an elaborate system of advanced instruction in science and art which is altogether outside the Day School Code, and in regard to which the Education Department at Whitehall—the director of public elementary education designated, as I read it, by the fundamental statute—has neither responsibility nor control, nor power of maintenance or of reward.

The science and art schools and classes are schools and classes organized, governed, and examined by the Science and Art Department at South Kensington. As my brother Wills has fully explained, that department although at its head, as they are also at the head of the Education Department at Whitehall, are the Lord President of the Council and the Vice-President of the Committee of Council on Education, is really distinct and different from the Education Department. It has a separate staff and organization, separate officers, separate registration of students, separate examinations, and separate inspectors. It administers moneys voted annually by Parliament and under a separate head of appropriation for instruction in science and art in the United Kingdom; it has no concern with general public education or any duty towards public elementary schools. Its Directory (revised in June, 1898) which corresponds to the Code of the Education Department contains, in a volume of some 428 pages, a statement of the organization of the schools and classes, the subjects of instruction, the admission of students, the methods of inspection and examination, the conditions upon which grants and rewards are given to teachers and students, and a quantity of important detailed information upon other branches of the organization and working of the Science and Art Department. A very short inspection of this volume and of a volume of the Science Examination Papers for 1898, which is also in evidence, suffices to show the vast difference between the scope, the method, and the character of the general education provided for children by the Code and those of the special education provided by the Directory for the Science and Art Students. Article 18 of the Directory, I may add, provides that no student may be registered for a grant for attendance under the Department of Science and Art whose name is on the register for day attendance under the English Education Department, subject to the exception that a scholar of an elementary school who has been placed altogether in Standard VII. of the Code may *on personal application* be registered in an *evening* class, with the approval of the Department.

I feel compelled to hold that the payment by the school board out of the rates for the provision and maintenance of science and art schools and classes in day schools is *ultra vires*.

The position of the school board in regard to evening continuation schools does not appear to me to be in any essential respect different from its position in regard to day schools. Whilst upon the whole I have come to the conclusion that I cannot hold, as we were asked by Lord Robert Cecil in his clear and able argument to hold, that a school board cannot legally expend rate-provided money upon instruction in evening continuation schools, I certainly do hold that in providing and maintaining such schools they must not in the matter of instruction go outside the system prescribed or sanctioned and controlled by the Education Department at Whitehall. The Education Department has a Code of Regulations for the Evening Continuation Schools which corresponds to the Code of Regulations for Day Schools. The Code in force is that of 1897. It embodies (Appendix 1) many of the Regulations of the Day School Code, and amongst others (see No. 77), the regulation that every school must be conducted as a public elementary school. Naturally, and as one would assume from the title, the curriculum of the Evening Continuation School Code is less elementary, more advanced and more extensive than that of the Day School Code. It recognizes (article 3) drawing for the purpose of the fixed grant; and seems in the same article to stipulate, as a condition of the grant, inspection in the subject by the Science and Art Department. But, as I understand the provisions of articles 3 and 13*a* and Appendix 3, and as I understand from an inspection of the drawings submitted to us, the scheme of drawing contemplated by the Code and seconded by grant from the Education Department is something of a far less advanced character than the scheme of the Science and Art Department in art schools and classes, and in article 3 it is provided expressly that "no scholar may be registered in an evening continuation school for drawing who is receiving instruction in a school of art or art classes under the Science and Art Department, or has been successful in an examination of the Science and Art Department in connection with a school of art or art class." In regard to science (p. 8) it is prescribed that "any scheme submitted for approval in a science subject which differs from that given for this subject in the schedule must be more elementary than the elementary stage of the subject as shown in the Directory of the Science and Art Department." It appears to me that the curriculum of education marked out for evening continuation schools as "public elementary schools" by the Education Department at Whitehall in the Code of 1897—and it certainly is not wanting in elasticity (see the explanatory note on page 7)—fixes the limits of the instruction in such schools for which the school board is authorized to make provision out of funds obtained from the rates; and that to go outside these limits and provide out of the rates science and art schools and classes not under the Education Department but under the Science and Art Department, and not included in the Code of the Education Department, is *ultra vires*.

In coming to this conclusion I have not lost sight of the Education Code (1890) Act, 1890 (53 & 54 Vict. c. 22), s. 1, which enacts, in substance, that for the Parliamentary grant to an evening school, it should not be necessary that elementary education should be the principal part of the education there given; and to that extent, and for the purpose of the Parliamentary grant, alters, in regard to evening schools, the definition of "elementary school" (and, therefore, of "public elementary school") in the Education Act, 1870. I am unable to see how this enactment entitles the school board to spend the money drawn from the rates on instruction authorized

and controlled by a different department, different from that to which section 4 (7) of the Elementary Education Act, 1870, refers, when it speaks of a Parliamentary grant. The restriction under the Act of 1890 of the *quantum* of the undefined thing called "elementary education" which was required by the Act of 1870 to constitute a school an "elementary school" does not touch the principle upon which, in my judgment, the propriety of the school board expenditure out of the rates is to be ascertained. As appears in the Evening Continuation School Code (Appendix 1, p. 57), the evening school must, like the day school, be conducted as a public elementary school. If it were not, it could not legally be provided and maintained by a school board. As it is a public elementary school, the system of instruction in it must, for the reasons which I have felt it my duty to give at length, so far as that instruction is provided by the school board out of the rates, be the system of instruction which is sanctioned and controlled by the Education Department, and not that which is administered by the Science and Art Department in South Kensington. I ought, I think, before leaving the subject of evening continuation schools, to advert to one matter relating to their administration, which was the topic of discussion in the course of the argument of this case. The Code of 1897 ("Explanatory memorandum," p. 7) declares that "the attendances of persons over twenty-one years of age will henceforth be recognized." In the special case, paragraph 15, it is stated that "there is no superior limit of age in evening continuation schools, and a great number of scholars are adults." The special case does not submit to us any question as to the provision and maintenance of science and art schools or classes for adults as distinguished from youthful scholars; and it is, of course, conceivable that all the scholars so instructed in an evening continuation school might be under age. Having regard, however, to the facts stated in the special case and the importance of the matter, I feel it my duty to say that in my judgment to educate adults in a public elementary school by means of funds, taken out of rates under section 54 of the Education Act, 1870, is certainly beyond the legal powers of a school board. However wide an interpretation be given to the terms "child" and "children" in that statute they plainly do not include "adults." The fact that the Education Department has deemed it right, for the purposes of a grant, to recognize the attendance of adults in an evening continuation school cannot, as it appears to me, legally justify the action of the school board in applying to the education of adults funds to which an Act of Parliament has given a right of recourse only for the purpose of the education of children.

I have now dealt with the second and the really important question. As to the first question, which asks our judgment as to the power of the school board, as a statutory authority, to provide science and art schools or classes, either in day schools or in evening continuation schools, I may, I think, deal with it briefly, for, as I understand the facts which are set forth in the special case, this is an academical and not really a practical question. It is stated in paragraph 29 of the special case that "the expenses incurred by the board in respect of science and art schools and classes under the Science and Art Department have always considerably exceeded the grants obtained from the Science and Art Department, and the deficiency has always been made good by the board out of the school fund and the rates levied under the Elementary Education Acts." By the first question, as I understand it, having regard to the terms of the second question, it is intended to ask us whether it is within the power of the school board, as a statutory corporation, to provide science and art schools and classes either in day schools or in evening continuation schools, in cases where there is no need, in order to defray the cost, to have recourse to the rates levied under the Elementary Education Act. I am upon the whole inclined to think that there might be circumstances under which a school board might act as suggested without legal objection. In so saying, I have in view the provisions of the Education Act, 1873, s. 13. It appears to me that there might be a gift to a school board for educational purposes under that section which would enable a school board legally to provide and maintain by means of it a science and art school or class. That is not the present case. In answer to the third question, I have only to say that in my judgment the rule *nisi* must be discharged. No distinction in principle between the three disallowances and surcharges was suggested by counsel at the bar, and I do not see how any such distinction could properly be drawn.

Rule discharged.

Solicitors for the auditor, *Sharp, Parker, & Co.*

Solicitor for the Camden Science and Art Corporation, *F. W. Harris.*

Solicitor for the Corporation of London, *The City Solicitor.*

Solicitor for the London School Board, *C. E. Mortimer.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, M.R., and Collins and Stirling, L.JJ.) — Dec. 19; Jan. 28.

GREAT NORTHERN RAILWAY CO. *v.* COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland revenue—Stamp duty—Conveyance on sale—Sale of right not before in existence—Railway company—Statutory right to prevent working of minerals under railway—Payment of compensation to mine-owner—Receipt and undertaking to leave minerals unworked—Railways Clauses Consolidation Act, 1845 (8 *&* 9 *Vict.* c. 20), *s.* 78—*Stamp Act,* 1891 (54 *&* 55 *Vict.* c. 39), *s.* 60.

The owners of coal lying under a railway, having been required by the railway company, under section 78 *of the Railways Clauses Act,* 1845, *to leave the coal unworked, and having received compensation therefor, signed a document acknowledging the receipt of the compensation money, and undertaking to leave the coal unworked and to do all things necessary for vesting the same in the railway company.*

Held, that the company was not chargeable with ad valorem *stamp duty under section* 60 *of the Stamp Act,* 1891, *as the transaction between the parties was not a sale of a "right not before in existence."*

Judgment of Darling *and* Phillimore, JJ. (48 *W. R.* 170, [1899] 2 *Q. B.* 652), *affirmed.*

This was an appeal from the judgment of a Divisional Court (Darling and Phillimore, JJ.) on a case stated by the Commissioners of Inland Revenue under section 13 of the Stamp Act, 1891: reported 48 W. R. 170, [1899] 2 Q. B 652.

On the 10th of December, 1898, the Great Northern Railway Co., under section 12 of the Stamp Act,

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

presented an instrument to the Commissioners of Inland Revenue for the expression of their opinion as to the stamp duty with which it was chargeable. The instrument was executed under the following circumstances:

The Middleton Estate and Colliery Co. (Limited) were the owners of certain coal and the lessees of certain other coal lying under land situate in the borough of Leeds and partly under a branch line of the Great Northern Railway.

The railway company served a notice on the colliery company under section 78 of the Railways Clauses Consolidation Act, 1845, requiring them to leave certain of the said coal unworked for the protection of the railway company, and stating that the railway company were willing to make compensation therefor.

The railway company and the colliery company not agreeing as to the amount of this compensation, the matter was referred to arbitration in pursuance of the Act.

The arbitrator fixed the compensation at £1,099.

The colliery company having received from the railway company the sum of £1,099, executed the instrument in question under their common seal.

The instrument was as follows: "We, the Middleton Estate and Colliery Co. (Limited), having our registered office at Middleton, in the parish of Rothwell and county of York, the owners in fee simple free from incumbrances of the coal hereinafter described, except the portion thereof comprised in the lease hereinafter referred to, of which portion we were at the date of the notice hereinafter referred to the lessees, hereby acknowledge to have received from the Great Northern Railway Co. (hereinafter called "the railway company"), with the consent of Marshall Nicholson, the lessor under the same lease, testified by his signature at the foot hereof, the sum of £1,099, being the compensation payable to us under the award of Maurice Deacon, dated the 7th of June, 1898, for the whole of the Middleton Little seam of coal under all that piece or parcel of land situate in the borough of Leeds, and under the Hunslet branch of the railway company, containing by admeasurement three acres or thereabouts . . . which said coal was required to be left unworked by a notice dated the 16th of July, 1897, under the hand of William Latta, the secretary of the railway company, and addressed to us, the leasehold portion whereof was demised to us for the term of ten years from the 1st of July, 1888, under an indenture of lease dated the 22nd of February, 1889, and made between Marshall Nicholson, of the one part, and us, the Middleton Estate and Colliery Co. (Limited), of the other part. And in consideration of the said payment of £1,099 we hereby undertake and agree to leave entirely unworked the whole of the said coal except such part thereof as may be necessary for the purpose of driving through the said coal three headways or roads of such a height and width as are usual in working the Middleton Little seam of coal for the purpose of working any other coal belonging to us, and further undertake at the cost of the railway company to do and execute, or procure to be done and executed, all deeds, matters, and things necessary for vesting the same in the railway company whenever thereunto by them required. And we further acknowledge and declare that the said sum includes satisfaction and compensation for all claims which but for these presents we might have maintained, either under the provisions of any statute, or at law or in equity, against the railway company in respect of the said coal. Dated this 6th day of December, 1898."

The Commissioners of Inland Revenue being of opinion that the instrument in question constituted a renunciation of a right or interest in property, assessed *ad valorem* stamp duty thereupon, as upon a conveyance on sale, at the rate of 5s. for every £50 of the sum of £1,099

By section 60 of the Stamp Act, 1891, "Where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale."

The schedule to the Stamp Act contains the following: "Release or renunciation of any property, or of any right or interest in any property—Upon a sale (see Conveyance on Sale); by way of security (see Mortgage, &c.); in any other case, 10s."

The Divisional Court held that the instrument was not a release or renunciation of property or of any right or interest in property upon a sale, and was therefore not chargeable with *ad valorem* duty, but that it was a release of an interest in property and should bear a 10s. stamp.

The Crown appealed.

Sir Robert Finlay, A.G., and *Danckwerts, Q.C.*, for the Crown.

C. A. Russell, Q.C., and *Stamford Hutton*, for the respondents.

Cur. adv. vult.

Jan. 28.—A. L. SMITH, M.R., read the following judgment: The questions argued in this case in the Divisional Court, and, apparently, before the Commissioners of Inland Revenue, have now come down to one, which is whether an instrument dated the 6th of December, 1898, is covered by section 60 of the Stamp Act, 1891, and thereby made liable to an *ad valorem* stamp duty, and this depends upon the true construction of this 60th section, which is one of the sections in the Stamp Act under the heading "Conveyances on Sale." The section enacts that "Where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument or some one of such instruments, if there be more than one, is to be charged with the same duty as an actual grant or conveyance, and is for the purposes of this Act to be deemed an instrument of conveyance on sale." The document sought to be charged with the stamp duty is as follows: [His lordship read the document.] It will be seen that to come within the section there must be a right not before in existence, and there must be a sale of such right which is secured by bond, contract, or otherwise. Now, assuming, as I will, in favour of the Crown that there was a sale of a right in the present case, was it a sale of a right not before in existence—*i.e.*, of a right not in existence before the date of the contract sought to be charged with stamp duty? Now, when did the right in the present case come into existence? The facts are these: Prior to the 16th of July, 1897, the Great Northern Railway Co. purchased the lands necessary for the construction of its Hunslet branch line of railway, the surface, as also the coal under the said lands, then being, so far as material, the property of a colliery company. By virtue of section 77 of the Railways Clauses Act, 1845, although the surface of these lands upon their purchase passed to the railway company, the coal lying thereunder did not pass, but remained the property of the colliery company. Some

time after this purchase by the railway company, the colliery company pursuant to section 78 of the Act of 1845, gave notice to the railway company that it was desirous of working the coal (which was still its property) in three acres delineated upon a plan. The railway company thereupon on the 16th of July, 1897, gave notice to the colliery company, pursuant to section 78 of the Act of 1845, that the working of the coal in the three acres would be likely to cause damage to the works of the railway company, and the notice required the colliery company to refrain from working the coal under the three acres, and stated that the railway company would make compensation to the colliery company for so much of the seam of coal as was within the three-acre area. By agreement between the parties the amount of compensation to be paid was referred to an arbitrator, who awarded that the full compensation payable by the railway company to the colliery company for leaving the coal unworked was the sum of £1,099. It will be seen that by section 78 of the Act of 1845, under which the proceedings above stated were taken, it is enacted that "if the company" (that is, the railway company) "be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same." So that upon compensation made, in this case the payment of the £1,099, a statutory right is brought into existence in favour of the railway company. I will assume in favour of the Crown that this statutory right so far is a right within section 60 of the Stamp Act, 1891; but the words "not before in existence" have to be dealt with. The point is, is this statutory right a right not before in existence—*i.e.*, before the date of the contract of sale? When did this statutory right first come into existence? In my opinion, when the mineral owner had worked up so near to the railway that in the opinion of the railway company further working might do damage to that company and the notices under section 78 of the Railways Clauses Act, 1845, had been given, then the right of the railway company to stop the further working for ever of the minerals, and the right of the mineral owner to be then paid for his minerals, came into existence; and this is before the date of the contract sought to be charged with stamp duty. This right does not therefore satisfy the requisites of section 60, for it was in existence before the date of the document sought to be charged. This appeal must therefore be dismissed.

COLLINS, L.J., read the following judgment: I am of opinion that the decision of the court below was right in this case. The argument in that court seems to have turned mainly on the point whether the instrument in question was a release or renunciation upon a sale. But before us the discussion was narrowed, and the Crown, as I understood, admitted that, unless the case could be brought within section 60 of the Stamp Act, they could not make good their claim to the duty which they sought to impose. Their contention was that there has been a sale of a right not before in existence secured by the instrument in question. In order to see whether this contention is well founded it is, of course, necessary to examine section 60, and to scrutinize the instrument itself. Section 60 is as follows: [His lordship read the section.] It seems to me that to bring an instrument within this section, which is one of a series dealing with conveyances on sale, there must be—(*a*) a sale of an annuity or other right; (*b*) that right must not be an already existing right, but must take its origin from the transaction of the sale itself; (*c*) the right must be one the sale of which is capable of being completed by grant or conveyance. If these conditions are fulfilled the instrument, or one of the instruments, which secures such right by bond, contract, covenant, or otherwise is to be charged with the same duty as an actual grant or conveyance, although there has been no actual grant or conveyance creating the right. If the instrument in question fails to meet any one of these conditions it is not within the section. Now the genesis of the instrument is this: Under section 78 of the Railways Clauses Act, 1845, if the owner, lessee, or occupier of mines under or within a certain distance of the railway be desirous of working the same he is bound to give the company thirty days' notice. The company may then inspect the mines, and, if they think the working is likely to damage the railway and are willing to make compensation for such mines or any part thereof to the owner, &c., he is debarred from working them, and if the amount of compensation is not agreed upon, it may be settled as in other disputed cases. By section 79, if the company do not before the expiration of the thirty days state their willingness to treat, the owner may proceed to work them in the usual way. Thus automatically, where the sections apply, a fetter is placed by statute, as soon as the railway comes into existence, on the mine owner, who is compelled to give notice and suspend action for thirty days, and if at the end of that time the company are willing to make compensation the fetter becomes absolute. In the present case notice was given. The company were willing to make compensation. The amount was ascertained by arbitration and paid, and thereupon the instrument in question was executed by the parties. It is in the following terms: [His lordship read it.] The Attorney-General admitted that under the above sections no property in the coals is passed to the company on paying compensation (see *Errington v. Metropolitan District Railway Co.*, 30 W. R. 663, 19 Ch. D. 559); and the Attorney-General declined to take the point that the instrument altered the effect of the statute in this respect. Does, then, this instrument come within section 60? I think not. In the first place the rights of the parties were fully ascertained by statute before the instrument came into existence, and the right which the Attorney-General contends was secured by the instrument existed apart from and before the transaction of sale, if any such transaction is suggested after the statute had thus ascertained the rights. Secondly, there was in point of fact no sale at all. No property and no estate or interest in any property was transferred to or vested in a purchaser: see section 54 of the Stamp Act. All that happened was that the mine owner came under a statutory obligation not to work or get a certain defined portion of coal, which continued to be his own property. Unless every restriction which does not amount to a grant (see *Rowbotham* v. *Wilson*, 8 H. L. Cas. 348, 8 W. R. H. L. Dig. 4), though given for consideration, is a sale to the covenantee, there is no sale here. Thirdly, the fetter so accepted by the owner could not be made the subject of a grant or conveyance so as to bind the land in the hands of successive owners. It is an arbitrary fetter debarring the owner from dealing with a given area of land in a particular way irrespective of whether it is more or less than is actually required for the support of the railway, and whether or not substituted support is supplied by shoring or other means. The right to enforce such a restriction could not, in my judgment, be the subject of a grant so as to bind the land in the hands of successive owners: see *Keppell* v. *Bailey*, 2 My. & K. 517, and the other cases collected in the notes to *Spencer's case*, 1 Smith's Leading Cases (10th ed.), p. 52. Nothing

but a statute could create such a right, and a statute has created it. It seems to me, therefore, that if I am right as to any of the conditions imposed by the section, the instrument fails to fulfil any of them, and therefore does not fall within it.

STIRLING, L.J., read the following judgment: This case was argued on the footing that the transaction between the railway company and the mine owners stated in the special case resulted in the acquisition by the railway company not of any property in the coal described in the instrument of the 6th of December, 1898, but simply of the statutory right arising under section 78 of the Railways Clauses Act, 1845. That section requires the owners, lessees, or occupiers of any mines or minerals lying under the railway or works connected therewith or within forty yards therefrom to give thirty days' notice to the company of an intention to work the same; and it is thereupon provided that "if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same." It imposes therefore on the mine owner, on certain conditions being satisfied (as they were in the case under consideration), a legal obligation not to work or get the mines or minerals; and it confers on the railway company a corresponding right—viz., to insist on the observance of that obligation, but not to make active use in any way of the mine owner's property. Such a right differs from a right of support, being more extensive in some respects and less so in others. In particular it differs in this, that the obligation under it is purely negative, whereas according to the opinion expressed by Lord Selborne, L.C., and Lords Blackburn and Watson, in advising the House of Lords in *Dalton* v. *Angus*, 30 W. R. 191, 6 App. Cas. 740, a right of support to buildings is an easement not purely negative and is capable of being created by grant. There is no authority that a right or obligation such as that which arises under section 78 of the Railways Clauses Act, 1845, is capable of being created by grant; and upon the principles laid down in *Keppell* v. *Bailey*, and acted upon in *Ackroyd* v. *Smith*, 10 C. B. 164, and other cases, I am of opinion that it is not. A right and obligation of this kind could only be created, apart from statute, by covenant, and if so created would have different incidents from a legal right created by grant. This is pointed out by Mellish, L.J., in *Leech* v. *Schweder*, 22 W. R. 633, L. R. 9 Ch. App. 463.

Now the claim of the Crown to *ad valorem* duty is based on the contention that the transaction referred to was a sale within the meaning of the Stamp Act. That transaction was one by which the mine owner, in consideration of a sum of money paid to him, became subject to a statutory obligation of a purely negative character; it closely resembles a transaction by which for the like consideration a mine owner has entered into a covenant not to work or get his mines or minerals. If one is a sale, so, in my opinion, is the other. In my judgment a covenant entered into for value to abstain from doing a particular act or class of acts is not a sale within the meaning of the Stamp Act. I think that in order that there may be a sale within the meaning of that Act there must be a transaction as the result of which, in the language of section 54 of the Stamp Act, some "property or estate or interest in property is transferred to or vested in a purchaser or some other person on his behalf or by his direction"; and in the present case I am unable to see that any property or any estate or interest in property was so transferred or vested. I also think, as regards section 60 of the Stamp Act, that the statutory right came into existence, at the latest, when the railway company gave notice of their willingness to treat, and consequently was in existence before the alleged sale. For those reasons I am of opinion that the instrument of the 6th of December, 1898, is not liable to *ad valorem* stamp duty, and that the appeal ought to be dismissed.

Appeal dismissed.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitor for the respondents, *R. Hill Dawe.*

From Q. B. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — Jan. 18.

In re SHAW.

Ex parte GILL AND SUTCLIFFE. (*a.*)

Bankruptcy — Petition — Receiving order — Fraud — "Sufficient cause"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.

In July, 1899, *the debtor proposed to pay his creditors a composition of* 10*s. in the pound. Gill, one of the creditors, refused to accept the composition unless the debtor gave him a promissory note for the balance of his debt. The composition fell through, and in August,* 1900, *Gill and Sutcliffe presented a joint petition against the debtor.*

Held, that the conduct of Gill with reference to the proposed composition constituted "sufficient cause" why no order ought to be made, and dismissed the petition.

Decision of the Divisional Court (Wright *and* Phillimore JJ.), ante, *p.* 141, *reversed.*

Appeal from the decision of the Divisional Court (Wright and Phillimore JJ.), reported *ante*, p. 141.

On the 19th of July, 1899, the debtor Shaw issued a circular convening a meeting of his creditors, which was held on the 23rd of July following. Creditors to the amount of about £2,500 attended and carried a resolution that the creditors should accept a composition of 10s. in the pound.

On the 24th of July notices of this resolution were sent to all the creditors.

On the 25th of July Gill, one of the petitioning creditors who had not been present at the meeting, called upon the debtor and verbally assented to the resolution.

On the 27th of July he again called on the debtor and then stated that he would not accept the composition unless the debtor would give him a promissory note for the balance of his debt, which the debtor declined to do.

Upon the 2nd of August Gill sent a letter to the debtor referring to the arrangement proposed at the interview of the 27th of July, and enclosing a promissory note which he requested the debtor to sign and return, but the debtor refused to do so.

The composition resolved upon at the meeting of the 23rd of July, 1899, fell through owing to the opposition of Gill and certain other creditors.

Upon the 4th of August, 1900, the debtor executed a deed assigning the whole of his property to trustees for the benefit of the general body of his creditors.

On the 29th of August, 1900, Gill and another creditor named Sutcliffe, neither of whom had assented to the deed of assignment presented a joint

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

petition against the debtor setting up that deed as an act of bankruptcy.

Sutcliffe had been in no way connected with the arrangement proposed by Gill to the debtor in July, 1899.

Upon the hearing of the petition the registrar held that the petition had been presented in consequence of the refusal of the debtor to accept Gill's proposal, and that therefore there was sufficient cause why no receiving order should be made, and dismissed the petition.

On appeal from this decision to the Divisional Court, Wright and Phillimore, JJ., held that inasmuch as it had not been shown that the antecedent conduct of Gill had any connection with the petition, or that the petition had been used for the purpose of extortion, there was no sufficient cause for dismissing the petition, and that a receiving order must be made.

From this decision the debtor now appealed.

Scott Fox, Q.C., and *J. J. Wright*, for the debtor, supported the decision of the registrar, and relied upon *In re Otway, Ex parte Otway*, [1895] 1 Q. B. 812, 43 W. R. Dig. 17.

Reed, Q.C., and *H. T. Atkinson*, for the petitioning creditors, contended that a receiving order could only be refused where the petition was an abuse of the process of the court, which was not the case here, and relied upon *King* v. *Henderson*, 47 W. R. 157, [1898] A. C. 720.

RIGBY, L.J., said: This is a petition presented by two creditors, Gill and Sutcliffe. There is no suggestion of misconduct against Sutcliffe, but he has no independent right to a receiving order. The sole question is whether Gill has so misconducted himself that the petitioning creditors have no right to avail themselves of the act of bankruptcy in July, 1899, and whether they have according to the decided cases precluded themselves from obtaining a receiving order It is agreed on all hands that if a creditor goes to the debtor and says: "Pay me something beyond what you owe me or I shall file a petition," that petition cannot be the basis of a receiving order. Such conduct makes it plain that the creditor is using the process of the court to extort money. But that is not quite the case here. In July, 1899, there was a declaration of insolvency which was an act of bankruptcy, and shortly afterwards Gill proposed to the debtor that he should be paid the full amount of his debt, which was a distinct fraud. Indeed, fraud is not denied, but the suggestion has been made, which I repudiate, that if a person merely attempts to commit a fraud he is not to be deprived of his rights. There is, however, no question of putting a person in the position of an outlaw. The simple question is whether the petitioning creditors have a right to avail themselves of the act of bankruptcy. What was in Gill's mind? He practically said to the debtor: "If I stand out you know what I can do against you; if you accept my proposal you will escape bankruptcy." The incapacity arising from the fraud lasted until the presentation of this petition, which was in fact founded on the act of bankruptcy of the 23rd of July, 1899. It is not going beyond the decided cases to hold that where a creditor obtains some unfair advantage in consideration of giving assistance to the debtor to avoid bankruptcy, he is precluded from availing himself of the act of bankruptcy. The Act says if there is sufficient cause why no order should be made, the petition may be dismissed. Here sufficient cause is shown. The attempt to extort is enough, and it is not necessary that the petition should be presented at the time when the fraud is attempted. The order of the Divisional Court must be reversed.

VAUGHAN WILLIAMS, L.J., said respondent's counsel took the only line possible—namely, in contending that this petition was unconnected with the attempted fraud, and that this was not a case where a creditor straightway filed a petition on the refusal of his proposal. It was urged that this petition was not the scourge, but an entirely independent proceeding, and that it was not presented because Gill's proposal was refused. But his lordship thought there was amply sufficient cause in this case for dismissing the petition.

STIRLING, L.J., agreed.

Appeal allowed.

Solicitors, *Firth & Co.*, for *J. W. Piercy*, Huddersfield; *Bower & Co.*, for *Longbotham & Co.*, Halifax.

High Court of Justice.

Chan. Div. Kekewich, J. — Dec. 5.

BAGOT PNEUMATIC TYRE CO. (LIMITED) v. CLIPPER PNEUMATIC TYRE CO. (LIMITED). (a.)

Company—Contract on behalf of intended company—Adoption—Inference—Privity of contract.

The plaintiff company entered into an agreement with A. B. to grant to him, or a company to be formed by him, an exclusive licence to use certain patents. A. B. then entered into an agreement with C. D. to sell the licence to him on behalf of the intended company, and this agreement was adopted by the intended company, the defendants, by another agreement, to which A. B., C. D., and the defendants were parties.

Held, that there was no privity of contract between the plaintiffs and defendants, and that no contract between them could be inferred from the facts of the case.

In re Northumberland Avenue Hotel Co., 33 *Ch. D.* 16, 35 *W. R. Dig.* 38, *followed.*

Howard v. Patent Ivory Manufacturing Co., 36 *W. R.* 801, 38 *Ch. D.* 156, *and* Werderman v. Société Générale d'Electricité, 30 *W. R.* 33, 19 *Ch. D.* 246, *discussed.*

Action.

This was an action brought to have it declared that the defendants were acting in breach of an agreement which they had adopted, and the plaintiffs claimed a trading account and various declarations as to the rights of the parties.

The plaintiff company was incorporated on the 14th of October, 1896, and on the 3rd of March, 1897, entered into an agreement with T. C. Phelps to grant to him or to a company in course of formation by him an exclusive licence to use certain patents belonging to the plaintiffs. The consideration for this grant was that, after setting aside each year a cumulative preferential dividend equal to 8 per cent. on the capital (£150,000) of the proposed company, that company should pay to the plaintiffs in each year out of their remaining profits available for dividend a sum equal to 8 per cent. upon a fixed capital of £150 000, and the plaintiffs were to receive a further sum equal to one half the balance (if any) of the net profits of such company available for dividend in each year.

(a.) Reported by J. S. RISLEY, Esq., Barrister-at-Law.

On the 5th of March, 1897, Phelps entered into an agreement with E. Piercy to sell to him on behalf of the intended company the said exclusive licence and also certain other licences and contracts therein specified for £120,000, of which £60,000 was to be paid in cash and the balance in cash or shares at the option of the directors of the intended company.

On the 8th of March, 1897, the intended company was incorporated with a capital of £150,000 in £1 shares under the title of the Clipper Pneumatic Tyre Co. (Limited), the defendant company, and by an agreement of the 8th of April, 1897, the agreement with Piercy was adopted by the company, with the modification that the purchase price of £120,000 was to be paid as to £40,000 in cash and as to the balance in fully paid-up shares.

Balance-sheets were issued by the defendants in 1898 showing a profit, but no amount was placed to reserve fund, and no dividend was declared.

In October, 1899, they issued a balance-sheet dated the 30th of September, 1899, showing large profits, out of which a sum was carried to reserve fund and a sum of £3,000 was written off as depreciation and towards the extinction of the cost of licences and contracts. About the same time the defendants wrote the plaintiffs a letter stating that their future policy would be to continue to provide out of profits for depreciation and for the ultimate extinction of the cost of such licences and contracts.

After some correspondence arising out of this letter the plaintiffs brought the present action.

Warrington, Q.C., and *E. F. Spence*, for the plaintiffs.—The nature of this agreement is that it is one to be performed by the intended company, and the defendant company by adopting the agreement between Piercy and Phelps after being incorporated became the equitable assignees of the licence. Further, the contract was always treated by the defendants as subsisting between the plaintiff company and themselves, as is shown by the correspondence and the minute books of the defendant company. Direct contractual obligation between the parties might consequently be arrived at in one of two ways. The defendants either adopted the plaintiff's original agreement with Phelps, who was a mere conduit pipe, and thereby became the other party to that agreement, or else by their conduct they adopted the plaintiffs as the persons to whom they should look for the performance of the obligations of the contract and treated themselves as the persons liable, on the other hand, to the plaintiffs. The case is not governed by *In re Northumberland Avenue Hotel Co.*, 33 Ch. D. 16, 35 W. R. Dig. 38, but by *Howard* v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 36 Ch. D. 156, in which a contract between the parties was inferred from the facts. Apart from express or inferred contract, the defendants became assignees of a licence with notice of the obligations attached thereto, and were therefore bound to perform the latter: *Werderman* v. *Société Générale d'Electricité*, 30 W. R. 33, 19 Ch. D. 246.

Neville, Q.C., and *C. H. Sargant* for the defendants.—There is no contract at all, express or inferred. There was no privity between the two companies through Phelps, who was neither an agent nor a trustee for the plaintiffs, but a purchaser from them. The case is within the principle of *In re Northumberland Avenue Hotel Co.*, and there is no contract to be inferred from the facts of this case, as was done in the peculiar circumstances of *Howard* v. *Patent Ivory Manufacturing Co.* That case constituted an exception, and the present case in no way resembles it. In *Werderman* v. *Société Générale d'Electricité* special property passed to the assignees with the burden of liability attached to the property itself. There was no personal obligation. The licence to Phelps did not contain terms attaching to the property itself, as was contended by the plaintiffs. The plaintiffs consequently had no right of action.

[As the case was decided upon this point the other questions argued need not be referred to.]

E. F. Spence replied.

KEKEWICH, J.—The first point made by the defendants goes to the root of the plaintiffs' title. The defendants, in short, say you cannot sue us here because you have no right of action. If that is decided in favour of the defendants it is not necessary to go into other questions, however interesting they may be, and however important they may be between the parties. The defendants have entered into no direct contract with the plaintiffs. It is not suggested that there is any direct privity of contract, but the plaintiffs say that they are entitled to sue by reason either of a contract inferred, which is a separate point, or by reason of some contract not inferred from the facts, but to be imported somehow or other into the documents, although not there expressed. I must deal with these two points separately. The first document is that of the 3rd of March, 1897, whereby the plaintiffs agreed to grant to one Phelps a licence, the terms of which are set out in the schedule, and he, on the other hand, entered into certain contracts with the plaintiffs. It appears on the face of it that Phelps was not buying for his own benefit, but that he intended to take the licence on behalf of a company intended to be formed. The consideration, therefore, as frequently happens in these cases, was not a consideration to be paid by Phelps personally, but one to be provided by the company, who, it was supposed, would put themselves into Phelps's position, and, somehow or other, by direct contract or otherwise, become bound to the plaintiffs. The next step is that Phelps enters into an agreement with one Ernest Piercy. That is the agreement of the 5th of March, 1897. Again, Piercy is not a person buying on his own account. He is really only the representative of the company. The company was not then formed, but it was near incorporation, and by an agreement of the 8th of April, a few weeks later, the present defendants, who were the company contemplated and intended to be formed, adopted the agreement, so that they became so far bound that the agreement by Piercy became an agreement entered into by them. There may be a question, of course, whether the company was incorporated at the time—whether they could ratify an agreement which was made when they were not in existence, but I pass that over, and I consider that by the agreement of the 8th of April they became bound to Phelps. But, assuming that, that carries us, it seems to me, a very little way on towards the position that the defendant company are bound to the plaintiffs, with whom they have entered into no contract whatever. It seems to me that the facts, as I have stated them, bring this case directly within the authority of *In re Northumberland Avenue Hotel Co.*, a case which has been of accepted authority for fourteen years, as expounding the doctrines which have been regarded by the courts as perfectly settled. I do not see myself upon the facts as stated that there is any distinction in substance between this case and *In re Northumberland Avenue Hotel Co.* That went before Chitty, J., and the Court of Appeal, and it was decided on the ground that there was no right of action except by privity of contract, and there was no privity of contract where an agreement was made by a trustee for an intended company—even though the company had been afterwards formed.

It is, however, said that the case of *Howard* v. *Patent Ivory Manufacturing Co.* establishes an exception to the general rule of *In re Northumberland Avenue Hotel Co.*, and that this case is within the exception. Now it is a little difficult, I confess, to me to understand all the facts and the conclusion in *Howard* v. *Patent Ivory Manufacturing Co.*, but with the assistance of counsel I think I have sufficiently mastered it for the present purpose. Kay, J., there came to the conclusion that there was a contract to be inferred between those who were suing and those who were sued. There was no express contract. That was not suggested there, but from the facts which he had stated the learned judge inferred a contract which he could not find expressed. It is not, of course, contended for a moment that a judge or jury might not in a proper case infer a contract which is not strictly proved, but I venture to think, without in any way impugning the authority of the case cited, that one must not be hasty to infer a contract, especially when you are dealing with a corporation which properly can only contract under seal. Still, far be it from me to say that Kay, J., was not right in inferring a contract in the case cited. Assuming Mr. Jordan to deny all his liability after enjoying all the benefit, the learned judge said, "Such a course of conduct would be, as I have characterized it during the argument, the most flagrant dishonesty." And it was this consideration, no doubt, which assisted the learned judge to come to the conclusion that a contract must be inferred. I am indebted to Mr. Neville for having pointed out to me why and how the learned judge came to that conclusion. I think it is tolerably plain from the report when you look into it. There were meetings of the directors and the question was whether Jordan was liable—not whether anybody else was liable, but whether Jordan was liable. There the liability of others was not in question. Jordan had been present at the meetings of the directors, and at those meetings there were not only minutes passed with, as I understand it, his assent, but a modification was introduced with his assent; the result being that everything went forward he being a party to it, and with the intention, to which he was a party, that he should be the performing party to the contract. It seems to me that after that it was not difficult for the learned judge to come to the conclusion, and he did come to that conclusion, that a contract by Jordan must be inferred from the facts, and that being so, there was no difficulty in giving the relief sought. Therefore in the first place that case is not like this one, and I cannot regard it as being any real exception, unless under similar circumstances or like circumstances, from the *Northumberland Avenue Hotel Co.'s case*. Then the plaintiffs relied on the case of *Werderman* v. *Société Générale d'Electricité*, 19 Ch. D. 246. Now that again is a very peculiar case, requiring a little investigation to understand it, but when one has looked into it I do not think it presents any difficulty at all. I do not think it has any real resemblance to the case now in hand. There was a question there about the right to demur under the Judicature Act. That occupied the attention of the court some time. It does not occupy very much room in the report, and there is no confusion of that part of the case with the rest. There was also another point which is very much dwelt on by Lush, L.J.—the question whether what had happened there was really a sale or was an assignment not by way of absolute sale so as to raise the liabilities which were in question there. The Court of Appeal came to the conclusion that it was not an absolute sale. If it had been an absolute sale the whole thing would have come to an end, and there would have been no further question. But they considered it was not an absolute sale. It is disposed of very plainly by the concluding words of Lush, L.J.'s, judgment on p. 255. Now, passing over that, what was the question in that case? Certain persons, who are referred to in the head-note as A. and B., had entered into a contract on the assignment of the letters patent, that they, or the survivors of them, or the executors or administrators of the survivor, their or his assigns, should make certain payments on account of the patent that was assigned, and the defendants were held by the Court of Appeal to be assigns of A. and B. within the meaning of that clause. Then the question was whether there was any liability. The point taken there, as taken here, under a different state of facts, was that there was no contract to pay. A. and B. had assigned, and the defendants there, as I have already mentioned, were the assigns. But they had entered into no contract to pay; they said they were not liable to pay. Now, the Master of the Rolls, Sir George Jessel, disposes of that main point in a very few words at the bottom of p. 251. "I think," he says, "it is tolerably plain that the parties intended certain liabilities to attach to the patent itself. Once you get to that, there was no further question about personal liability. The question was not whether the defendants had entered in a contract to pay, but whether they had taken property to which the liability was attached. If they had, they were bound to perform that as a condition of holding the contract." He put the same point a little differently on the next page, the only particular importance of that being that it compares well with what Lindley, L.J., says on p. 257, whose remarks I will now read. He says, "The case seems to me almost the same as the common case of persons on a dissolution of partnership assigning the assets charged with the payment of an annuity to the outgoing partner. In that case a purchaser of the assets with notice must take subject to the annuity." What the learned Lord Justice says and what the learned Master of the Rolls says agree exactly together. It is only an expression of the same thing in different language. The defendants were there the assigns of a patent to which certain liabilities attached. They could not take the patent and say that they were not liable to pay the sums which had been agreed to be paid. Then it is attempted to meet that here by saying that this licence is made in consideration of the agreement and in consideration of the payments therein agreed to be made by the licensee. It seems to me that that language tells against it. There you have a reference to the agreement, you have a reference to the payments, but it is an independent agreement altogether *de hors* the licence for this purpose. It is as if it had said: "In consideration of the licensee having entered into a covenant to make certain payments"—it is the covenant which is the consideration, and the covenant must be sued upon as a personal liability and not otherwise. Then it is said—and this perhaps would have come better before my criticism of the last case—that the defendants have adopted responsibility for this and put themselves into the position of a contracting party by their conduct. In order to show that, certain correspondence was read and references were made to the minutes of the defendant company, which come to this, that they thought they were liable. No doubt they did, and they wrote letters and passed resolutions on that footing over and over again. They made a mistake, but you cannot wrest that to mean that they were thereby bringing themselves under a contract under which they already supposed themselves to be, nor can you use it as an argument for saying that they have adopted the

contract and that they have brought themselves under a contract to which they were not parties. That is really disposed of by the *Northumberland Avenue Hotel Co.'s case*. That being so, I think there is no right of action, and the action fails.

Judgment for the defendants with costs.

Solicitors for the plaintiffs, *Capel-Cure & Ball.*

Solicitors for the defendants, *Beale & Co.*

Chan. Div. }
Farwell, J. } Dec. 7, 8.

In re DOWSETT.
DOWSETT *v.* MEAKIN. (*a.*)

Will—Exercise of special power of appointment—Ademption—Wills Act, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 23.

It is a question of construction whether there has been a failure of an appointment under a power by reason of ademption.

The same principle applies whether the power is general or special.

This was an adjourned summons to determine certain questions under the will of John Dowsett, which was dated the 10th of July, 1869. He devised, among other properties, three named houses, 149, 151, and 153, Cable-street, to trustees on certain trusts.

The ultimate trusts in the events that happened, were for the brothers or sisters, nephews or nieces, of a lady called Maria Dowsett as she should by will or codicil appoint. Maria Dowsett took one undivided third share of this property and her power of appointment extended over that one undivided third share.

In 1880 Maria Dowsett made her will in exercise of that power, expressing it to be in exercise of the power, and she appointed: "All that my one undivided third part or share of and in 149 and 151, Cable-street, with the appurtenances" to some persons, and she appointed "my undivided third part or share of and in 153, Cable-street," to other persons. The representatives of those persons were now before the court, and the question was as to whether in the events which had happened there had been an ademption or not, of that appointment.

In 1891 the Blackwall Railway Co. took the three houses compulsorily under the powers of the Lands Clauses Act, and paid the purchase-money into court. Then that purchase-money was invested under the order of the court from time to time under three different orders in 1891 in the purchase of various other properties.

In 1893 Maria Dowsett joined as plaintiff in a partition action in respect of the properties so purchased, and the properties were divided, and the entirety of certain property was attributed to Maria Dowsett, and held by the trustees upon the trusts declared of the property devised by the will describing it by reference to the numbers in Cable-street. Maria Dowsett died in 1899.

The Wills Act, 1837, s. 23, provides: "No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death."

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

J. M. Stone, for the plaintiffs.

R. J. Parker, for two of the defendants.

F. Stallard, for the remaining defendants.

FARWELL, J., after stating the facts, continued: It is now argued on the one side, by the plaintiffs, that there has been a failure by ademption, and, therefore, there is no property on which the appointment can now operate. In my opinion that is the true view. On questions of this sort it appears to me to be a question of construction. Has the testator executing the power of appointment intended to give, and expressed his intention in words to give, the particular property, or the property which may from time to time represent the particular property under the trusts under which it is held? In this case, so far as the words go, I have absolutely nothing but the bare description of the house. Subject to what I will say about special powers, it appears to me that there should be no difference in principle between a gift of "Blackacre" or of moneys specifically described by virtue of property in "Blackacre" or in such moneys, and an appointment of "Blackacre" or of such moneys under a general power. If the testator, having made the will in those terms, parts with the property the gift fails for the very excellent reason that there is nothing on which it can operate when the testator dies. A testator, whether he has property of his own, or whether he has power over it, can, if he pleases, use a form of words which will give effect to his intention, if he so desires it, that the property, or any money, or other property into which it may be changed, shall pass at his death to the object of his bounty. In the simple case of a gift or appointment of property, describing it as such, no such question can arise. That, I am of opinion, is the explanation of all the cases which have been referred to, of *Gale* v. *Gale*, 4 W. R. 277, 21 Beav. 349; *Blake* v. *Blake*, 28 W. R. 647, 15 Ch. D. 481; and *Collinson* v. *Collinson*, 24 Beav. 269, 6 W. R. Ch. Dig. 75. They happen to be decisions of different Masters of the Rolls in those cases, and the learned Master of the Rolls in each case held there was not enough to show that more than the property described by the particular description passed. In *In re Johnstone*, 28 W. R. 593, 14 Ch. D. 162, on the other hand, Malins, V.C., thought that there was enough to show that the intention was to give the funds representing the particular property into whatsoever shape they might have been altered at the date of the death. Then Mr. Parker argues that there is a difference to be derived from the consideration that this is a special power. In my opinion that distinction is unsound. In the first place, to some extent the point depends upon the construction of the 23rd section of the Wills Act, 1837. There is no suggestion in that section that I can see that would in any way exclude a special power or prevent the application of the section to a special power, nor, in common sense, can I see why there should be any such reason. If the real meaning of failure by ademption is that there is no subject-matter on which the instrument purporting to dispose of such subject-matter can operate, that reason is equally forcible, whether the original intention to dispose arise from property or arise from general or from special power of appointment. Mr. Parker argued that you should read the instrument executing the power into the original instrument creating the power, and he urged upon me that you did that, only in special powers and not in general powers. I do not altogether accede to that statement as a statement of law to begin with,

because, for some purposes, you do read the instrument executing the power into the instrument creating the power in the case of a general power. Before the Conveyancing Act a wife could not convey real estate to her husband by virtue of her estate, but she could appoint real estate to her husband because the estate was fed out of the seisin of the original person creating the power. Nor is it true to say universally, for all purposes, you read the instrument executing the power into the instrument creating the power. For example, and here is the fallacy of Mr. Parker's argument, you do not read it in so as to relate back to the time of the period of the instrument creating the power. If it were not so, there would be no question of lapse in instruments executing powers.

Take the case of the will of a person having testamentary power of appointment amongst children, and that such person appoints by will to a child who dies in the testator's lifetime; the result is the testator makes a gift which fails by reason of the death of the object. The same principle applies to the failure of the subject. I see no difference in principle between the failure of the object and the failure of the subject. The reason is the same in both cases. You do not read back the appointment into the original instrument creating the power so as to disregard all subsequent circumstances. You have to read the power with the instrument creating it, and then you perhaps find that at the date when the instrument comes into operation either there was no person to take, or there was no property on which the power could operate. To my mind there is no distinction, therefore, between general and special powers. The only possible distinction I can see that might be suggested would be that, inasmuch as it is more easy to trace the property held under a special power, in most cases because it is held by trustees, who could probably point out where it has gone, there might be a greater facility in the court seeing that the testator did intend, if he used ambiguous expressions, by the execution of his power to give the property into whatever shape it might have passed at the date of his death. There is nothing of the sort here, there is simply an appointment of "Blackacre," and under that I can only say it has been adeemed, and there has been a failure. The appointment made by the will of Miss Dowsett did not take effect, and the property goes as in default of appointment.

Solicitors, *Stone, Morris, & Stone; Aldous & Welfare.*

Chan. Div. Buckley, J. — Jan. 11.

MONTEFIORE *v.* GUEDALLA. (*a.*)

Bankruptcy—Will—Determinable life interest—Would become vested in some other person—Vesting of bankrupt's property in trustee in bankruptcy—Relation back to act of bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44 (1), 54 (2).

By his will J. G., who died in 1858, *gave a share of his residue upon trust to permit H. G. to receive the income until he should do, or omit to do, or should suffer to be done, any act whereby the same, if payable to himself, would become vested in some other person, and, on the determination of the interest so given to H. G., upon other trusts. A bankruptcy notice which was served on H. G. expired on the* 8th *of July,* 1900, *without his having complied with it. On the* 17th *of August a receiving order was made, and on the* 1st *of October H. G. was adjudicated bankrupt. A dividend was payable on the* 5th *of October for the quarter—*5th *of July to* 5th *of October; and the question was, Who was entitled to the apportioned part from the* 8th *of July, the date of the act of bankruptcy, to the* 1st *of October, the date of the adjudication. It was admitted that the Apportionment Act applied.*

Held, that, inasmuch as the dividend, if it had been payable before the adjudication, would have vested in the applicant the trustee of the will, to be dealt with according to the will by reason of H. G.—on the 8th *of July—omitting to comply with the bankruptcy notice, and the same was true of all daily apportioned parts of the dividend, therefore the applicant was entitled to an apportioned part of the dividend as from the* 8th *of July.*

Summons.

By his will dated the 21st of December, 1839, Judah Guedalla, who died on the 8th of June, 1858, gave one equal third part of his residue to trustees upon trust to permit and suffer and authorize and empower his son Haim Guedalla to receive the dividends, interest, and income thereof as the same should from time to time become payable until his said son should assign, charge, or otherwise dispose of the said dividends, interest, and income, or assign part thereof by way of anticipation, or should do or omit to do or should suffer to be done any act whereby the same, if payable to himself, would become vested in some other person or persons. And the testator directed that on the determination of the interest so given to his said son, the trustees should during the remainder of the life of the said H. Guedalla pay and apply the said dividends, interest, and income for the benefit of all, any one, or more of the said H. Guedalla and others as therein mentioned.

On the 8th of July, 1900, Haim Guedalla committed an act of bankruptcy by noncompliance with a bankruptcy notice. The notice was not in evidence, but it was agreed between the parties that a bankruptcy notice was served under section 4 (*g*) of the Bankruptcy Act, 1883, which expired on the 8th of July.

On the 17th of August a receiving order was made, and on the 1st of October Haim Guedalla was adjudicated bankrupt. The fund in question was invested in stock, the dividend on which was payable on the 5th of July, the 5th of October, and certain other days. The dividend paid on the 5th of July was handed to Haim Guedalla. The dividend payable on the 5th of October was not paid over, and the question which the court now had to decide was how this dividend should be apportioned as between the bankrupt and the applicant, who was the present trustee of the testator's will.

The applicant claimed to be entitled as from the 8th of July, the date of the act of bankruptcy. The official receiver as trustee in the bankruptcy contended that the bankrupt was entitled to the dividend in respect of the whole period from the 8th of July to the 1st of October, the date of the adjudication.

It was admitted that the Apportionment Act applied, and that the dividend in respect of the 5th to the 8th of July was payable to the bankrupt.

E. Ford, for the applicant, referred to the Bankruptcy Act, ss. 54 and 43, and argued that the bankrupt forfeited his interest on committing the act of bankruptcy, and that the dividend should be apportioned and paid as on forfeiture from that time—*i.e.*, the 8th of July.

He cited *Ex parte Eyston, In re Throckmorton*, 26 W. R. 181, 7 Ch. D. 145.

(*a.*) Reported by J. F. WALEY, Esq., Barrister-at-Law.

Elgood, for other parties in the same interest.

Jessel, for the official receiver, trustee in bankruptcy.—The shifting clause only comes into operation when something happens which necessarily deprives the bankrupt of the enjoyment of his interest. *Non constat* because an act of bankruptcy has been committed that adjudication will follow. An act of bankruptcy alone is not an act by which property would become vested in another, and it is not enough that the act should render it liable to become vested in another. The doctrine of relation back has never been applied in cases like this.

He cited *Ex parte Dawes, In re Moon*, 34 W. R. 752; 17 Q. B. D. 275; *In re Loftus Otway*, 43 W. R. 501, [1895] 2 Ch. 235; *In re Sartoris*, 40 W. R. 82, [1892] 1 Ch. 11; *In re James*, 62 L. T. Rep. 454, 38 W. R Dig. 214; and *In re Daintrey*, [1900] 1 Q. B. 546; 48 W. R. Dig. 20.

BUCKLEY, J., stated the facts, and continued: The question is, who is entitled to the dividend which became payable on the 5th of October? Neither party disputes that the income is to be treated as accruing *de die in diem*, and that the Apportionment Act applies. It was admitted that the income from the 5th to the 8th of July was payable to Haim Guedalla, but it was contended with regard to the income from the 8th of July during the remainder of the life of Haim Guedalla that it must be dealt with according to the will, and I am of opinion that the contention of the applicant is well founded. Has Haim Guedalla, and when, done or omitted to do or suffered to be done any act whereby these dividends if payable to himself would become vested in some other person or persons? Under the Bankruptcy Act when the adjudication was made the property vested in the trustee by section 54. By section 43 the bankruptcy must be deemed to have relation back to and to have commenced at the time of the Act of Bankruptcy, and by section 44 (1) the divisible property of the bankrupt comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy. What would the result have been if the act of bankruptcy had occurred on the 8th of July, the dividend been payable on the 5th of October, and the adjudication been on the 10th of October? There would then have vested in the trustee of the will all dividends from the 8th of July onwards, including the dividend of the 5th of October. By virtue of what act or omission would the dividend have vested in the trustee? By reason of this act or omission—viz., that on the 8th of July the debtor omitted to comply with the bankruptcy notice. The omission whereby the dividend vested was the omission on the 8th of July to comply with the bankruptcy notice. The same is true of all daily apportioned parts of the dividend. On the part of the official receiver it was not disputed that as from the date of the adjudication the clause would take effect. But on the 8th of July there had happened that, in the event of which the testator provided that the trustees should, during so much of the life of Haim Guedalla as then remained pay and apply the dividends for the benefit of the persons mentioned in the will. Therefore, subject to the payment of the apportioned part for three days to the official receiver, the remainder of the dividends for the 5th of October and future dividends must be paid to the applicant.

Judgment for the applicant.

Solicitors for applicant, *Emanuel & Simmonds.*

Solicitor for official receiver, *Edward Lee.*

Solicitors for other parties, *Guedalla & Cross.*

Chan. Div. } Nov. 21, 24.
Wright, J. }

In re RADFORD & BRIGHT (LIMITED). (*a.*)

Company — Winding up — Committee of inspection— Foreign creditor—Power of court to order fresh meetings of creditors and contributories—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9, 23, 24.

If it is shown that there is reason to believe that the committee of inspection of a company in liquidation is not constituted in accordance with the wishes of the majority of the creditors, the court may order the liquidator to summon a fresh meeting of creditors in order to determine whether any alterations should be made in the constitution of the committee.

Summons by the Société Anonyme Russo-Belge, a company constituted under the law of a foreign state, for an order that the liquidator of Radford & Bright (Limited) should summon a general meeting of the creditors of the latter company in order to ascertain whether they desired that a representative of the foreign company should be appointed a member of the committee of inspection, or, alternatively, that directions should be given to summon a fresh first meeting of creditors.

A compulsory order for the winding up of the English company was made on the 28th of March, 1900, and the first meeting of its creditors was held on the 23rd of April following. At this meeting five persons were appointed to form a committee of inspection; their names were approved by the meeting of contributories, and the registrar duly made an order giving effect to these appointments.

At the time when the winding-up order was made the foreign company was suing the English company for breach of a contract to supply coal, but as judgment had not been given, no notice of the meeting was sent to the foreign company, and it was unable to be represented at the meeting of creditors.

An order was subsequently made for the action to be continued notwithstanding the liquidation, and judgment was given for the foreign company for £45,000 and costs. The foreign company then brought in a proof in the liquidation for £45 000, which was duly admitted, and at the same time asked the liquidator to consent to the appointment of some person to represent it on the committee of inspection.

This request was laid before the committee of inspection and refused by them, and the liquidator also refused to summon a meeting of creditors for the appointment of an additional member of the committee, on the ground that he had been advised that no additional member could be appointed.

It appeared that the amount of the debts due to the creditors present at the meeting was about £43,000, and it was stated that there were two other debts due to foreign creditors, each of which amounted to about £20,000 and proofs of which had not yet been admitted.

Buckmaster, for the foreign company.—Although there is no special section in the Companies (Winding-up) Act, 1890, which gives power to the court to make the order asked for, it has power under its general jurisdiction. Section 23 (2) gives power to summon a meeting, and the foreign company is a person aggrieved within section 24 (1). At any rate an order to call a meeting of the creditors can at any time be made under section 91 of the Companies Act,

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

1862, and such a meeting could remove one or more of the existing members of the committee and fill up the vacancy or vacancies; Companies (Winding-up) Act, 1890, s. 9 (6) (7).

Kenyon Parker, for the liquidator.—The court has no jurisdiction to make the order asked, and no power to do so can be found within the four corners of the Act of 1890. The power of appointing the committee rests exclusively with the creditors and contributories, by section 6 of the Act. The only alternatives that the court has are to accept or refuse the selection which they make; it cannot make any change in the constitution of the committee. Section 91 of the Act of 1862 cannot affect committees of inspection, which were not in existence when it was passed.

Buckmaster replied.

WRIGHT, J.—This is a very peculiar case, in which a question of very considerable importance is involved. The first meetings of creditors and contributories of the company were duly summoned under the Companies (Winding-up) Act, 1890, and the meeting of creditors resolved upon and nominated a committee of inspection. The meeting of contributories recommended that application should be made to the court to appoint the persons nominated as members of the committee at the meeting of creditors. At the latter meeting creditors whose debts amounted to about £43,000 were represented, but a foreign company which has now proved against the company in the winding up in respect of a debt of £45,000 —that is to say, a larger amount than the aggregate amount of the debts of all the creditors who existed at the time of the meeting—was not in a position to be and was not in fact present or represented at the meeting. The foreign company now complains that it is not represented upon the committee as now constituted, and asks for an an opportunity to be represented on the committee. I entirely agree with the counsel for the liquidator that there is within what are called the four corners of the Act of 1890 no power enabling the court to deal directly with this matter. Any power that the court may have must be derived from the general provisions of section 23 of the Act of 1890 or section 91 of the Act of 1862. It is highly desirable that foreign creditors who have not been able to be represented at the meeting of creditors should be able to allow their voices to be heard on the committee of inspection, mainly because at the time when the meeting was held their debts had not been admitted to proof. It seems to me that under section 23, and perhaps under section 91, of the Act of 1862, there is power in the court to call a general meeting of the creditors to consider any question arising in the winding up, and, among others, to consider whether the creditors should exercise the power which they have, under section 9 of the Act of 1890, of removing one or more members of the committee of inspection, and, if this is done, of putting others in their place. If I have that power I consider that this is a case in which I ought to exercise it, and I therefore direct a general meeting of the creditors to be summoned to consider these questions.

In my judgment the court probably has jurisdiction, instead of ordering a meeting of creditors to be summoned for the purposes I have indicated, to order fresh first meetings or for meetings to be summoned for the purposes of section 6 of the Act of 1890; but that would necessitate the summoning of creditors and contributories, and I do not think it right at present to incumber the proceedings by directing that any meeting should be summoned in such a way as would make it a fresh first meeting. I incline to think, however, that there is jurisdiction to summon a fresh first meeting if it turns out, as it has turned out in this case, that the committee is not fairly representative of the creditors. I do not see that anything is to be gained by calling a meeting of both classes of persons interested—that is, the creditors and contributories. I think it better to act under section 23 and section 91, although it seems to me that *In re Charles Reynolds & Co.*, [1895] W. N. 31 is some authority that the court has power to follow the other course; for in that case Vaughan Williams, J., seems to have thought that in a proper case there might be power either to resummon a first meeting or to summon a fresh meeting.

The point is a very important one, but, happily, I can be set right if I am wrong without any damage being caused to anybody. The meeting is not to be held until after ten days. It will be summoned by the liquidator, and the official receiver had better be chairman. If the meeting of creditors which is to be summoned should resolve that it is desirable, instead of removing any member of the committee, to add another member to that body, I think that anything technically wrong in so doing might be put right by then resummoning the first meetings of creditors and contributories as a matter of arrangement; and if the creditors then choose to vote for a committee of inspection consisting of seven members, including one representative of the foreign company, and if contributories approve that, all will be well. If the two meetings do not come to the same conclusion, then the court must decide the difference under section 6 of the Act of 1890.

Solicitors, *Church, Rendell, Todd, & Co.; Downing, Bolam, & Co.*, for *Bolam & Co.*, Sunderland.

Prob. Div. & Adm. Div. Admiralty. } May 11, 1900.

"THE DORA FORSTER." (a.)

Ship—Admiralty—Insurance—Partial average—Total loss—Insured not entitled to more than indemnity—Money paid under a mistake of fact.

A chartered ship, having received damage on the way to her loading port, was repaired there, and the cost of the repairs were paid for by the charterers, who were fully insured in that behalf under an arrangement with the shipowners, whose master drew a bill on them for the amount so paid, pledging the ship for the repayment of the amount of the bill "three days after the safe arrival of the ship at her port of discharge." The ship never did arrive at her port of discharge, being lost before she arrived there; and her underwriters, who had also insured her on the outward voyage on which the previous partial damage had occurred, and paid an instalment towards the costs of the repairs, settled with the shipowners as for a total loss. Afterwards the shipowners brought an action against the underwriters to recover the balance of the costs of the repairs, claiming such balance as a particular average under the policy.

Held, that the underwriters had never been liable for the cost of the repairs, the plaintiffs never having sustained any partial average loss against which they could ask to be indemnified.

This was an action *in personam* instituted by Charles Samuel Hunting on behalf of himself and the other co-owners of the late steamship *Dora Forster*

(a.) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

against the Union Marine Insurance Co. to recover £24 16s. 9d., the balance of the defendants' proportion—£76 16s. 9d.—of a particular average loss of £1,536 14s. 3d., alleged to be due and owing to the plaintiffs under a twelve months' policy of insurance dated the 13th of July, 1898, upon the said steamship.

The defendants, as regards £1,250 13s., the only amount material to this report, pleaded that the plaintiffs had sustained no loss, that the particular average expenses to that amount had not been paid by the plaintiffs, nor had the plaintiffs become liable therefor; further, that such expenses were incurred and paid by the Georgia Export and Import Co. upon the terms that in the event of the *Dora Forster's* non-arrival at Liverpool—which event happened—they would not look to the plaintiffs for repayment, but to insurances effected on their own behalf with the Firemen's Fund Insurance Co. as their agents and on their behalf. The defendants further pleaded that if the plaintiffs were ever liable for the said sum or had sustained any loss in respect thereof, they had already been fully indemnified by the said Firemen's Fund Insurance Co. upon the said insurances which were effected by, and payment of which was received by, the Georgia Export and Import Co. as their agents and on their behalf.

The defendants, by way of counterclaim, alleged that they had paid £52 on account without prejudice, and subject to final adjustment. The said sum was paid in ignorance of the matter stated in the defence as above, and the defendants claimed repayment of a proportionate amount as money paid under a mistake of fact.

May 8.—The action was heard before the judge in court, Barnes, J.

Carver, Q.C., and *Roche*, for the plaintiffs.—Whilst the policy under which the plaintiffs claimed the amount of the particular average loss at Savannah was still unexpired *The Dora Forster* was lost, having never more been heard of after she left Savannah, and the defendant company paid on her as a total loss, but that fact in nowise absolves the company from having to pay the amount of the particular average expenses which were previously incurred at Savannah. The fact that the expenses were borne by the charterers, the Georgia Export and Import Co., in the way mentioned in the defence can make no difference as to the liability of the plaintiffs for their expenses under the policy.

They referred to *Lidgett* v. *Secretan*, 19 W. R. 1088, L. R. 6 C. P. 616; Arnould on Insurance, p. 417; Abbott on Shipping, p. 139.

Joseph Walton, Q.C., J. A. Hamilton, and *Balloch*, for the defendants.—The contract of insurance is a contract of indemnity, and in this case the plaintiffs sustained no particular average loss at Savannah against which they could have been indemnified. The master of *The Dora Forster* arranged that the particular average expenses at that port was to be paid for by the charterers against a draft on the plaintiffs, which was only to become payable if the ship arrived safely at her destination. She never did arrive, but was lost on the voyage, and the plaintiffs consequently never paid or became liable for these expenses. They are therefore not entitled to recover in this action: Phillips on Insurance, paragraphs 1266, 1267.

Cur. adv. vult.

May 11.—BARNES, J.—If the defendants are liable for the cost of the repairs at Savannah, then the claims against the underwriters on the policy are two-fold—namely, a claim for a particular average loss in respect of the admitted damage on the outward voyage caused by perils insured against, and a claim for a subsequent total loss. The latter claim has been paid by the underwriters, and the dispute is whether in the circumstances which have happened there is any liability on the part of the underwriters for the partial loss. The point arises in this way, the plaintiffs have not and will not sustain any loss in fact in connection with this particular average accident, but it is nevertheless contended that the defendants are liable to pay for it. I am aware that occasionally what I may call excessive indemnity is obtained, so that it cannot be said that a contract of insurance is a contract of perfect indemnity; but usually speaking a contract of insurance is considered to be a contract of indemnity. Counsel for the plaintiffs, however, maintain that although they, the plaintiffs, have not sustained any loss, still the defendants are liable to indemnify them against the loss which has happened. Against what are the defendants to indemnify the plaintiffs? That is the point of the case. The plaintiffs admit that they have not lost, and will not lose, anything, yet they want from the underwriters something like £1,250, of which the amount given in the statement of claim—£76 16s. 9d.—represents the defendants' claim.

It may be that it is "a claim" legally justifiable, but I cannot think it can be justified from a business point of view. However, I have to decide the legal rights of the parties, and these give rise to a somewhat difficult point. In order to appreciate the point it is necessary to state how it comes to be made.

The ship was chartered to the Georgia Export and Import Co., and the charter-party contained this clause: "All ordinary disbursements at port of lading—that is, Savannah—to be paid by the charterers, who are to be reimbursed for the amount thereof with 2½ per cent. commission thereon and cost of insurance added at the current rate of exchange by the master giving the usual draft payable three days after arrival at the port of discharge to the order of the charterers or any other parties advancing the said money, and the agents, with the consent of the owners, do hereby authorize the captain to sign such draft; and said disbursements and said draft shall be a lien against the vessel and freight, taking precedence of all other claims except the one for difference of freight." When the master arrived at Savannah he communicated to his owners the fact that his ship was damaged and required repairs, and he proceeded to obtain tenders for the repairs. A tender was sent in by one firm for 5,740 dols., and was accepted. In the tender there is no provision as to how the money is to be paid, which seems to me important, but documents have been put in as to what took place at Savannah, leaving me to infer from these documents what in fact took place. On the 1st of January, 1899, the master wrote to his owners: "All expenses after loading, such as wharfage, towage, I will keep separate, as I presume that can be claimed from the underwriters. The Georgia Export Co. are willing to pay the repair account the same as usual disbursements. Unless I receive instructions from you I will do that." From that letter and the charter-party I have to infer what was really taking place. Mr. Hunting stated in the witness box that the clause in the charter-party which I have read was a very usual clause in the trade, and it seems to me that when the master had to arrange for his ship being repaired he had to consider how he was going to pay for it. The meaning of the letter is, I think, clear—to pay for the repairs to the ship in the same way as that in which the charter-party provided the master should pay the ordinary disbursements of the ship, though this would be an extraordinary

disbursement, and would not, therefore, *primâ facie* be within that clause. The master, knowing the course of business, meant to say "I am going to arrange this business in the same way that I should arrange the ordinary disbursements of the ship," and it is remarkable on looking at the correspondence to find that the owners of the ship tried afterwards to arrange with the repairers that they should accept a draft upon the owners of the ship for the cost of the repairs, but the repairers refused to do so.

The inference I draw as to what took place between the different parties at Savannah, and the conclusion to which I have come as a matter of fact from the documents put in, is that there was an arrangement between the master and the Georgia Export Co. and the repairers of the ship that the master should act in the discharge of the cost of the repairs in the same way as that in which he was bound under the charter-party to act in connection with the ordinary disbursements of the ship.

The repairs were completed, and I infer that the Georgia Export Co. then paid the repairers of the ship the amount of their bill, for which a receipt has been put in. They then proceeded to prepare a draft which is headed "Disbursements, Savannah, the 20th of January, 1899," and purports to be for "value received for necessary disbursements owed by my vessel at this port." There is a similar draft, practically in the same terms, for £546 for the ordinary disbursements of the ship. The draft was drawn by the master of the ship in favour of the Georgia Export Co. and the Georgia Export Co. insured the draft with the Firemen's Fund Insurance Co. I understand that when the vessel was totally lost on her voyage home the Georgia Export Co. claimed from the Firemen's Fund Insurance Co. the amount insured on the draft, which included the amount of the repairs, the commission, and the insurance upon them, and that they were paid the amount thus insured. They therefore never made any claim, nor could they have made any claim upon the owners of the ship to reimburse them the cost of the repairs to the ship which they had discharged. The plaintiffs, however, in effect say "Our ship was damaged and our ship was repaired, and we became liable to pay the cost of the repairs; and although we have not paid anything we have a claim upon the underwriters for which we ought to be"—I cannot say indemnified—"paid."

The question is whether these facts give rise to any claim against the underwriters on the original policy on the ship. In my opinion they do not, and my reason is this: I have found as a fact that the master at the port of shipment when he was arranging for these repairs to be done arranged with the parties that they should be liquidated in the same way as the ordinary disbursements were going to be liquidated, and I think he carried out the transaction in such a way that the owners of the ship never became liable to pay for the cost of these repairs. That brings the case within the principle stated in paragraph 1267 of the 5th edition of Phillips on Insurance, as follows: "In England and the United States the underwriters are unquestionably liable for a subsequent total loss in addition to the expense of previous repairs which have been previously paid for by the assured in distinction from those made by means of funds raised on bottomry." The meaning of that passage is, that where a particular average damage has been incurred, and the master arranges for the repairs which are thus necessitated being discharged by means of moneys raised on bottomry, he never imposes any personal obligation to pay those moneys upon the owners of the ship or any obligation upon them to pay if the ship is lost on the voyage home; and that, therefore, if the vessel is lost on the voyage home, and the underwriters pay a total loss, the assured does not in fact sustain a partial loss, because he never has to pay for it, and is adequately and properly indemnified by being paid by his underwriters for the subsequent total loss. There is no doubt that in the case of bottomry that meets the necessity and the justice of the case.

The decision I have come to in this case is that there is, legally speaking, no substantial distinction that I can detect between the case of bottomry and the present case. I am much assisted in arriving at the conclusion of law and fact to which I have come by the view taken by Sir Robert Phillimore in the case of *The Karnak*, 17 W. R. 58, L. R. 2 A. & E. 289, with regard to the presumption, or perhaps I ought to say inference, which ought to be drawn in a case of this class. He says that he is "of the opinion that, in the absence of all evidence, the presumption must be that the foreign lender made the advances in contemplation of a bottomry security, and this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand." I think I am quite justified on the materials laid before me in presuming and inferring that the repairer of this ship meant to have the repairs paid for in the way I have suggested, and meant to have them paid before the ship left the port, and that in doing so he was looking to have his advances paid, not by bottomry exactly, but in a way which this course of business, when properly understood, shows is substantially of the same nature—that is to say, making the liability of the owner of the ship dependent upon the arrival of the ship at her port of discharge, in which case the draft was to be paid three days after arrival. I have also no doubt, though no evidence has been given about it, that the repairer of the ship did not let this ship go without being secured in the way I have suggested. This particular case raises a stronger presumption than that which Sir Robert Phillimore suggested should be drawn in the case with which he was dealing, because there is actual evidence here from which I think I may, and ought to, infer that what took place was what I have in substance stated. There is no doubt that it is the way in which the parties treated this case; though when the claim was put forward in this country the assumption was that the owners of the ship were liable at the outset to discharge this claim, and that what took place between other underwriters was immaterial. If, however, I am correct, that point is entirely disposed of, and therefore this case is of quite a different class to *Lidgett* v. *Secretan*, upon which counsel for the plaintiffs relied, because there never was a loss for which the owners of this ship could make any claim. The conclusion of fact to which I have come is that the law is in accordance with the business view of the matter—namely, that the plaintiffs have not sustained any loss against which they can ask to be indemnified; and my judgment, therefore, is for the defendants.

One other point remains, and that is that the defendants have already paid £52 on account, and this they seek to recover. The money was paid in this way. As soon as it was known that the ship had been damaged and sufficient information as to the extent of the damage was received in this country, the average adjuster sent round a letter stating the position up to that date, and in substance advising that the underwriters might safely settle on account towards the costs of repairs, and accordingly in January this settlement on account was made. Later on, in April, a total loss was settled.

The plaintiffs now say that the defendants cannot have this money back because they have paid it in

discharge of liability. The defendants say they paid it on account of any liability which they should ultimately be found liable for. I think the money was paid without prejudice on account of the ultimate liability if it turned out that there was any ultimate liability. For instance, when the money was paid the repairs were in progress, and they might never have been completed. The ship might have been destroyed by fire in the meantime, and the expense of repairs never incurred, and it cannot be that where there is no liability the owners are entitled to retain money which has been paid in such a way. It was paid under a mistake of fact, and in the way in which the witnesses for the defendants have said—that is, on account of what they might ultimately be found liable for. There being no liability, the money should be returned.

For these reasons I am of opinion that the judgment of the court ought to be for the defendants on both the claim and counterclaim, with costs.

Solicitors for the plaintiffs, *Stokes & Stokes.*

Solicitors for the defendants, *Waltons, Johnson, Bubb, & Whatton.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Feb. 11.

MOUTRIE *v.* MITCHELL AND ANOTHER. (*a.*)

Practice—Pauper—Suing in formâ pauperis—*Assigning official solicitor to assist pauper—Ord.* 16, *r*, 26.

The official solicitor of the court ought not, except in special circumstances, to be assigned to assist a litigant suing or defending in formâ pauperis.

Appeal from an order of Day, J., at chambers, discharging an order of the master.

The plaintiff was admitted to sue *in formâ pauperis*, and the master, under ord. 16, r. 26, assigned the official solicitor to the court to assist him in the action. It appeared that the plaintiff had not employed a solicitor in the matter, nor had he brought before the master the name of any solicitor to be appointed to act for him in the action.

Upon appeal by the official solicitor, Day, J., discharged the order of the master.

The plaintiff appealed.

The plaintiff in person.

H. Sutton, for the official solicitor.—It is not suggested that the plaintiff has not a *primâ facie* cause of action. The official solicitor objects to be assigned to a pauper litigant unless there are special circumstances requiring that this should be done. Ord. 16, r. 26, is wide enough to give the court jurisdiction to assign the official solicitor, but the court ought only to do so in special circumstances. This view is borne out by a long-continued course of practice. Ord. 16, r. 26, goes back to the year 1661, for an order in somewhat similar terms appears in Beames's Orders in Chancery, p. 216. The official solicitor is the successor to the solicitor to the Suitors' Fund, and since the Judicature Acts he has been known as the official solicitor of the Supreme Court. By 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, one of the masters of the Court of Chancery was directed to visit the Fleet Prison four times a year and to examine the prisoners confined there for contempt of the Court of Chancery in not putting in an answer to a bill in equity, and report to the court; and the court might order the costs of a prisoner's contempt to be paid out of the Suitors' Fund, and to assign him a solicitor and counsel to put in an answer and defend him *in formâ pauperis.*

By 23 & 24 Vict. c. 149, s. 2, this duty was transferred to the solicitor to the Suitors' Fund, and by section 6 the expenses incurred by the solicitor were to be allowed out of that fund.

In 1869, by 32 & 33 Vict. c. 91, the Suitors' Fund was transferred to the Treasury. Besides acting for defendants in contempt of the Court of Chancery, the official solicitor acts for infants and lunatics in proper cases (see 1 Daniell's Chancery Practice (6th ed.), pp. 175, 184), and in such cases he gets his costs out of the estate. Except in the above cases the official solicitor never acts for litigants suing or defending *in formâ pauperis*, and it has never been the practice to assign him. There is no provision indemnifying him against any expenses he may incur in such a case if the pauper for whom he acts is unsuccessful. Formerly this burden of looking after paupers was imposed on the six clerks, but this was probably done in consideration of the large income they derived from their office. The official solicitor has only a salary of £500 a year, and this covers his ordinary work. If the official solicitor is always to be assigned to assist a pauper litigant where the latter has no solicitor of his own, pauper litigants will never have solicitors, and the position of the official solicitor will become a very difficult one. Even if the pauper litigant is successful, the solicitor can only recover out-of-pocket expenses and a reasonable sum to defray office expenses: *Carson* v. *Pickersgill*, 33 W. R. 589, 14 Q. B. D. 859; *Johnson* v. *Lindsay & Co.*, [1892] A. C. 110, 40 W. R. Dig. 180.

A. L. SMITH, M.R.—The plaintiff in this case obtained leave to sue *in formâ pauperis*, and the master assigned the official solicitor of the court to assist him in the conduct of the action. The official solicitor objected to being assigned, and upon appeal Day, J., discharged the master's order. Thereupon the plaintiff appeals to this court. The first question is whether the court has any jurisdiction to assign the official solicitor to assist a person who is suing or defending *in formâ pauperis*. That depends upon ord. 16, r. 26. In my opinion there is clearly jurisdiction to assign the official solicitor. The rule is perfectly general in its terms. The next question is whether the official solicitor ought to be appointed. The official solicitor has certain duties to perform, and he is paid to perform those duties. I do not think that it is any part of his duty to take up the case of a pauper litigant who has not got a solicitor of his own. If he were compelled to take up such cases, his position would be an impossible one. There are certain cases provided for by statute, to which we have been referred, where the official solicitor acts for pauper defendants, and there are also the cases of infants and lunatics, where he gets his costs out of the estate. But if he were liable to be called upon to act for every pauper plaintiff or defendant who had no solicitor, his position would be an intolerable one, because if the pauper was unsuccessful the solicitor would not recover his out-of-pocket expenses, and sometimes, indeed, he might not recover them if the pauper for whom he acted was successful. Such a burden is not intolerable when spread over all the members of the profession. Therefore I think that the official solicitor ought not to be assigned unless there are special circumstances

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

which require it. In the present case there are no special circumstances. The pauper litigant, when he obtains leave to sue or defend *in formâ pauperis*, should bring before the master the name of some solicitor who will conduct his case for him, and the master will then say whether the person suggested is a proper person to assign. For these reasons I think that the order of the learned judge is right. The plaintiff, however, is to be at liberty to bring before the master the name of some solicitor to assist him in the action.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitor, *The Official Solicitor.*

From Chan. Div. (Rigby, Vaughan Williams, and Romer, L.JJ.) — Dec. 10.

MARLBOROUGH (LILY, DUCHESS OF) *v.* DUKE OF MARLBOROUGH. (*a.*)

Settlement—Construction—Power to jointure wives in succession—Divorce—Power to jointure second wife during lifetime of first wife.

A settlement empowered a person to appoint to "any woman whom he might marry" yearly rent-charges by way of jointure, but provided that the settled estates should not be liable to the payment of jointures exceeding on the whole a given sum.

Held, on the construction of the deed, that the exercise of such power in favour of a second wife after the dissolution of the first marriage by divorce was valid, and that there was nothing on the face of the clause which was contrary to public policy, being distinct from those cases which bargained for the event of future separation between husband and wife.

Appeal from a decision of Byrne, J.

By the action the plaintiff, Lily, Duchess of Marlborough, the second wife, now the widow of the eighth duke, claimed a declaration that she was entitled to a charge of £2,500 on the Marlborough estates appointed to her by her late husband.

By a resettlement of the Marlborough estates, dated the 14th of July, 1866, the eighth duke, who was then the Marquis of Blandford, was empowered, subject to a jointure rent-charge in favour of the wife of the seventh duke, to appoint to "any woman whom he might marry" yearly rent-charges by way of jointure not exceeding in the whole the following yearly sums—viz., if the Marquis of Blandford should die in the lifetime of the seventh duke, then during the lifetime of the seventh duke £1,500 a year, and after his death £2,000 a year; if the Marquis of Blandford should survive the seventh duke, £2,500 a year. The settlement provided that the power of jointuring might be exercised as often as the Marquis of Blandford should marry, and also that the settled estates should not be liable to the payment of jointures exceeding in the whole the sum of £4,000.

In 1869 the Marquis of Blandford, on his marriage with Lady A. Hamilton, his first wife, appointed to her the following rent-charges by way of jointure: If he should die in the lifetime of the seventh duke £1 500 a year, and after his death £2,000 a year; but if he should survive the seventh duke £2,500 a year, in accordance with the terms of the resettlement.

In 1883, the Marchioness of Blandford, who is still living, obtained a divorce from the Marquis of Blandford, and subsequently, in the same year, the seventh Duke of Marlborough died.

Lord Blandford, who thus became the eighth Duke of Marlborough, married the plaintiff in 1888, and by a settlement made on this marriage he appointed to her a jointure rent-charge of £2,500 a year.

In 1892 he died, and in 1899 the dowager duchess, the widow of the seventh duke, also died.

In 1895 the plaintiff had married Lord William Beresford.

Byrne, J., held that the eighth duke had the power, under the resettlement of 1866, to create the jointure in favour of the plaintiff after the dissolution of his first marriage.

From this decision the defendant, the present duke, now appealed.

Haldane, Q.C., and *Ashworth James*, for the appellant, contended that the power to jointure was limited to £2,500 a year, which was exhausted after the appointment to the eighth duke's first wife. Whether a power of jointuring can be exercised more than once was discussed in *Zouch* v. *Woolston*, 2 Burr. 1136. The power could, moreover, be construed as providing for the event of a future separation between husband and wife, and was, therefore, contrary to public policy and illegal.

The following cases were referred to: *Egerton* v. *Earl Brownlow*, 4 H. L. Cas 1. at p. 197; *Cartwright* v. *Cartwright*, 3 De G. M. & G. 982; *H.* v. *W.*, 3 K. & J. 382, 6 W. R. Ch. Dig. 29; *Cocksedge* v. *Cocksedge*, 14 Sim. 244.

Levett, Q.C., and *Brinton*, for the respondent, the plaintiff, were not called upon.

W. H. Cozens-Hardy, for the trustees.

RIGBY, L.J.—This is an appeal from Byrne, J., and the questions raised are two. Dealing with them in the order in which they were argued before us by Mr. Haldane, I will describe them thus: First, whether upon the true construction of the resettlement of 1866 there was any power enabling the late Marquis of Blandford—who afterwards became the eighth Duke of Marlborough—who had already in exercise of a power contained in that deed appointed to his first wife a jointure rent-charge of £2,500, to appoint, upon his second marriage during the lifetime of his first wife, who had obtained a divorce from him, a jointure rent-charge of £2,500 for the second wife, now known as Lily, Dowager Duchess of Marlborough. That is the first question. The second question is whether (if the first question were answered in the affirmative) it was within the competence of the parties to the deed of 1866, which we have to construe, to bargain for a power which might in its exercise have such a result as I have mentioned. Now, it appears to me that the case is by no means open to the difficulties that have been suggested.

First of all, upon the point of construction, I will read as shortly as is consistent with clearness the clauses of the deed which have to be dealt with. It is not a marriage settlement or anything of that kind, but a resettlement on a family arrangement, and it provides as follows: [His lordship read the material clauses, and continued:] We get there a clear power to appoint a jointure to "any woman he may marry," exerciseable by the express terms of the deed as often as he shall marry; and as a safeguard to the estate that it might not be overburdened, there is a provision that any sum or sums by way of jointure should not altogether exceed the sum of £4,000. Now, it is argued upon the question of construction, that it does not include the case of a second marriage when the first wife, having obtained

(*a.*) Reported by A. GLYNNE-JONES, Esq., Barrister-at-Law.

a divorce, might be living at the date of the second marriage. Really I must confess that I have been unable to grasp the argument. I can see that if I were considering the propriety of the terms of the settlement, and such an idea ever occurred as to what was to take place in the case of the marriage of a future Duke of Marlborough during the lifetime of the lady who had been his wife, and by whom he had been divorced, then there would be reasons for making a different provision from what is here made. But I cannot find that there is anything here pointing to that. We are told that that provision about exercising the powers as often as he shall marry was intended solely for the purpose of doing away with a doubt which once existed whether, having been exercised once, a power of jointuring could be exercised again. It may be the reason, or one of the reasons at all events, for which the clause was introduced. But I do not see any authority for supposing or entitling the court to hold that it was limited to that purpose. We are bound to take the words as we find them, and they are words absolutely without any doubt or difficulty. And it appears to me to be as clear that the eighth duke was entitled to make an appointment on the second marriage as he was on the first marriage, notwithstanding that his first wife was then living. It is always to be noticed that he had not charged more than £2,500 That may be sufficient or insufficient as a limit, but it has been chosen by the parties, and the court has no power or authority to alter it. So much for the construction of the deed.

Then as to the question of the parties being limited so that they were not competent to provide that there should be such a dealing with the property on the ground that it was against public policy. Of course we do not find a syllable in the deed which is against public policy. But it is said that, if we construe it so as to let in the second wife for a jointure, we are doing something which is contrary to public policy. I have rather a difficulty to make it out in what way, but I suppose it is that we are rendering a divorce more beneficial or less injurious to the husband than it otherwise would be. It is acknowledged that you must extend that argument to the child, which is a startling thing—that you cannot really appoint in favour of the children of the second marriage in the same way as you could if the marriage had taken place after the death of the first wife. Indeed, I do not see that it is possible for the argument not to go to that extent. Cases were cited—three, I think, altogether—one being a case of *Cartwright* v. *Cartwright* in the Court of Appeal—which, of course, we should follow if we thought it was binding upon us in this case—and the cases of *H.* v. *W.*, and *Cocksedge* v. *Cocksedge*, before Wood, V.C. and Stuart, V.C., respectively. They are all alike in one respect. The parties to a marriage settlement, or what was equivalent to it, meeting together, chose to bargain about what should take place in the event of a separation of the spouses. One has never had any doubt that such a bargain as to what should be the effect of a future separation of people who are living together as man and wife is absolutely bad All that was there held was that, if you will bargain about an event which you are not entitled to look forward to, or to anticipate, your bargain will be bad. And it was carried so far in the case of *Cartwright* v. *Cartwright*, in the Court of Appeal, that where a father was settling his property and he stipulated as regarded a future separation, the court held that an advantage could not be gained by the son, an advantage which depended upon the separation which in fact afterwards took place. It was said that he had no right to claim through the fraud of the father, and that it was a fraud on the law to stipulate as he did. I do not see the resemblance at all, and I do not think that there is any, between the present case and any of the three cases which have been cited to us. They are perfectly easy to understand, and they are perfectly intelligible in principle. But it is equally clear, I think, that that principle does not apply to the present case. So I think, on both points that have been argued, the decision of Byrne, J., must be affirmed, and the appeal dismissed.

VAUGHAN WILLIAMS, L.J.—I entirely agree. I will first say one word about the second point of public policy. So far as the three cases cited by Mr. Haldane are concerned, they are all cases in which you find on the face of the instruments a matter expressly bargained for which was contrary to public policy. In the present case it is not and cannot be suggested that there is anything on the face of this clause in the settlement which is contrary to public policy. It is only said that, in what I may call the accidental application of it, such a clause might operate as an inducement to a husband to look forward to a divorce because he knew he might be able to marry some other woman, and to provide for her out of the family estates. Speaking for myself, I very much doubt whether, even if this clause had been written out at large, as Mr Haldane suggested, it would have been against public policy. After all, public policy, like other things, must depend on a balance of what is politic, a balance of what is right. In this very matter of public policy one finds that principle sometimes applied, to take a different sort of case, to a covenant in restraint of trade deliberately entered into by somebody who presently wishes to avoid the enforcement against him of the covenant he has entered into because he says that restraint of trade is against public policy. In old days that used to be strictly so held. But in modern days you look at the whole subject-matter, and bear in mind that though on the one hand it may be contrary to public policy to have trade restrained, yet on the other hand it is contrary to public policy that a man should be allowed successfully to evade engagements he has entered into. So here you have got a clause which generally is free from any objection. It is found that in the case of a second marriage after a divorce obtained against a husband that this might possibly be an inducement to the husband to seek for a divorce, and as such is against public policy. But, on the other hand, if he does marry again, and the law allows him to marry again after a divorce, he has a duty to provide for his wife and children It seems to me very doubtful whether on the balance of consideration it would be against public policy to say that if a divorced husband, exercising the right that the Legislature has given him, and marrying again, were to make provision out of his property—because for this purpose questions about the family and the people interested in remainder do not come into consideration—the making of such provision is against public policy. So much on the point of public policy.

With reference to the conveyancing point, I only wish to say one word about it in order that I may express what I understand to be the argument which has been addressed to us. We are invited to read the power which it is expressly said the husband, Lord Blandford, may exercise as often as he shall marry—"the said power of jointuring" it is called—as being a general power, and to read the words "appoint to any woman" in the same sense as if the words had been "appoint on marriage." And then it is said that the intention is that there should be a power of jointuring limited to the £2,500, and that it is that power, and that power only, which may be exercised, not upon one marriage, but as often as Lord Blandford

shall marry. Although that is a construction which one would perhaps not be sorry to give to these words, the words are too strong for us, and we can only construe them as the Lord Justice has construed them.

ROMER, L.J.—I agree. With regard to the so-called public policy point, all I need say is that there is nothing whatever in that point. The simple truth is that here there is nothing whatever contrary to public policy in a settlement providing or contemplating that a tenant for life may validly marry more than once, nor in a settlement providing that, if he does, he may exercise certain powers over the settled property in order to provide for the wife and children of the subsequent marriages. The simple fact is that a provision of that kind in such a settlement is perfectly valid, and there is nothing contrary to public policy in it. The cases cited have nothing whatever to do with such a case as that I have indicated, and that case is the one before us. There was a point that might possibly have been argued upon the construction of this settlement, and that was that the power of jointuring was limited in this way, that the power could not be exercised in favour of any woman who did not become the tenant for life's wife—that is to say, who was not the wife of the tenant for life at the time of his death. That point has not been argued before us. We start on the assumption which the appellants have taken before us, that in this case the power was not limited in the way I have indicated, that the lady who divorced the eighth duke was entitled to the jointure which was appointed or purported to be appointed in her favour by the eighth duke. That being so, and that point not being taken, it appears to me clear that upon this settlement nothing can be said against the claim of the second wife. She was clearly within the words of this settlement, a woman whom the eighth duke married, and it is clear upon this settlement that the eighth duke had power to appoint to her by way of jointure a yearly rent-charge or charges not exceeding in the whole the sum he has appointed. The words "not exceeding in the whole" clearly point to this, that each woman who was entitled to have exercised in her favour the power of jointure might have limited to her a sum not exceeding in the whole the sums mentioned in the settlement. For these reasons it appears to me there is nothing whatever in the first point that was argued, and I agree in thinking that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors, *Nicholl, Manisty, & Co.; Whitehead, Marshall, & Co.*

High Court of Justice.

Chan. Div.
Farwell, J. } Jan. 18, 24.

BRITISH MUTOSCOPE AND BIOGRAPH CO. (LIMITED) AND ANOTHER v. HOMER. (a.)

Landlord and tenant—Distraint of patented article—Sale—2 & 3 Will. & Mary, c. 5, s. 1—Patents, Designs, and Trade-Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 16—*Infringement of patent—Injunction.*

A patentee's right is distinct from the right of property in a chattel.

On a sale by a landlord under a distress, a purchaser only acquires such a chattel interest as the landlord could and did seize.

It is essential to a distress that the property distrained should be capable of physical possession.

A patent right is not a chose in possession. *A* chose in action *is incapable of manual seizure*

This was a motion by the plaintiffs, the British Mutoscope and Biograph Co. (Limited) and the London and District Mutoscope Co (Limited), for an injunction to restrain the defendant from using, selling, letting, exhibiting, or dealing with a certain mutoscope coin-operating machine during the continuance of the letters patent. It was agreed that the motion should be treated as the trial of the action.

The facts are fully set out in the judgment of Farwell, J.

E. E. H. Brydges, for the plaintiffs.

The defendant appeared in person.

FARWELL, J., in giving judgment, said: The plaintiffs the British Mutoscope and Biograph Co. are the owners of letters patent for an invention relating to mutoscopes. The plaintiffs the London and District Mutoscope Co. are the licensees, with the exclusive right to use and licence others to use coin-operated mutoscopes for exhibition purposes within the City of London.

In October, 1900, the last-named company delivered to one Maynard certain mutoscopes, to which their licence applied, for exhibition purposes, on certain conditions contained in an agreement of the 23rd of October, 1900. These conditions were: "To the manager of the London and District Mutoscope Co. (Limited). Please send me ten mutoscopes on the following conditions: (1) The money to be collected fortnightly by your own man, and checked by me or someone in my employ; (2) I am to receive 25 per cent of the gross takings by way of rent, payable when the collection is made; (3) you are at liberty to move the machines at any time, giving seven days' notice in writing; (4) the machines are to remain the sole property of yourselves; (5) in the event of any machine ceasing to work I will give you notice at once, and the same is to be rectified by you and at your expense; (6) if at any time these premises change hands, I agree to give you due notice, in order that you may remove machines or arrange with new tenants; (7) I undertake to protect machines from wilful damage so far as I am able; (8) all coins found in the machines to be the property of yourselves, subject to the percentage above mentioned. (Signed) H. J. Maynard." These mutoscopes were placed in a shop, 99, Whitecross-street, within the City of London, held by Maynard as tenant.

On the 23rd of December, 1900, Maynard made default in payment of the rent of the premises, and the landlord distrained and seized the ten mutoscopes.

On the 5th of January the mutoscopes were put up for sale by auction and the defendant purchased one of them. It was admitted that the notice required by the Act of William and Mary, hereinafter referred to, was given, and that the defendant knew before he purchased of the terms and conditions on which Maynard held the mutoscopes.

The plaintiffs claim an injunction to restrain the defendant from "using, selling, letting, exhibiting, or dealing with the mutoscope coin-operating machine during the continuance of the letters patent." The defendant alleges that he has purchased from the landlord selling under the authority of 2 William and Mary, c. 5, and that he is entitled to use the machine as he pleases without regard to the conditions on which

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

Maynard held the same. Counsel for the plaintiffs, and the defendant in person appeared before me and asked me to accept the foregoing as an agreed statement of facts and to treat this as the trial of the action, and determine their rights under the said statute accordingly. No point was raised or argued on the question whether the machine, being on the premises for exhibition purposes, was within any of the common law exceptions to the general right of distress, and I accordingly express no opinion on this point.

A patentee is entitled to restrain any person in whose hands he finds an article which infringes his patent, from infringing such patent unless the defendant can show a title direct or derivative from the patentee to use the patent; and it has recently been held in *Incandescent Gas Co.* v. *Brogden*, 16 Rep. Pat. Cas. 179, that a purchaser who buys with the knowledge of the conditions under which his vendor is authorized to use the patented invention is bound by such conditions, and that such conditions are not contractual, but are incident to and a limitation of the grant of the licence to use, so that if the conditions are broken there is no grant at all.

The defendant, therefore, would be clearly liable in the present case unless the statute of William and Mary protects him; and he contends that the statute has this effect. At common law a landlord had no right to sell distresses, but only to detain them as pledges for enforcing payment. The right of sale, therefore, depends on the statute. Section 1 provides (I read it shortly) that, where any goods or chattels shall be distrained for any rent reserved and due upon any lease, and the tenant or owner of the goods, &c., distrained shall not within five days after such distress taken and notice thereof, left at the premises charged with the rent distrained for, replevy the same, the person distraining may in the manner pointed out by the Act appraise the goods and chattels seized, and after such appraisement sell them for the best price. The Act obviously extends to goods and chattels belonging to persons other than the owner of the demised premises, and it is therefore impossible for the plaintiffs to succeed on the short ground that the mutoscope and the right to use it free from conditions, were not the tenant's property. See *Lyons* v. *Elliott*, 24 W. R. 296, 1 Q. B. D. 210, at p. 213, where Lord Blackburn says: "The general rule at common law was that whatever was found on the demised premises, whether belonging to a stranger or not, might be seized by the landlord and held as a distress till the rent was paid." But it is equally clear that the Act does not extend the common law right to seize, but merely adds a power to sell that which the landlord could seize at common law. The landlord's right to distrain is founded on the principle that the rent reserved by his demise issues out of the land and he distrains by taking possession, in the nature of a pledge, of goods and chattels found upon such land. Thus Coke upon Littleton, vol. 1, p. 47*a*: "'Reserve to him a yearly rent, &c.' First, it appeareth here by Littleton that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distreine, as Littleton here also saith, and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodie, mulcture of a mill, tythes, fayres, markets, liberties priviledges, franchises, and the like." And with this accords Rolle's Abridgment, 446 (2) and (4): "(2) Un rent ne poet estre reserve hors d'ascun incorporeal inheritance come advowsons, commons, offices, corodies, multure d'un molyn, dismes, fairs, markets, liberties, priviledges, franchises et tiel semble. . . . (4) Un rent ne poet estre reserve hors d'un chose que gist solement en grant pur ceo que nul distresse poet estre." See also *Jewel's case*, 5 Rep. 3*a*. In distraining, therefore, the landlord looks to the land demised and to the goods and chattels found thereon. If the demise be of an incorporeal hereditament no entry can be made on it and no goods and chattels can be found on it, and in like manner, if the goods and chattels be of an incorporeal nature, they can have no local position upon the land demised and are incapable of seizure into the possession of the landlord. It is essential to a distress that the property distrained should be capable of physical possession. Now, a patent right is a privilege granted by the crown in the exercise of its prerogative to a first inventor, and is described in Stephen's Commentaries, vol. 2, p. 8, as an incorporeal chattel. I should be disposed to classify it myself as a *chose in action* which has been defined to be "a right to be asserted or property reducible into possession either by action at law or suit in equity": see *Fleet* v. *Perrins*, 17 W. R. 862, L. R. 4 Q. B. 500 I refer to the common form of a patent: "Know ye therefore, that we . . . do by these presents . . . give and grant unto the said patentee our especial licence, full power, sole privilege, and authority, that the said patentee by himself, his agents, or licensees, and no others, may . . . make, use, exercise, and vend the said invention . . . and that the said patentee shall have and enjoy the whole profit and advantage from time to time accruing by reason of the said invention. . . . And to the end that the said patentee may have and enjoy the sole use and exercise and the full benefit of the said invention, we do by these presents . . . strictly command all our subjects whatsoever . . . that they do not at any time during the continuance of the said term of fourteen years, either directly or indirectly, make use of or put in practice the said invention, or any part of the same, nor in anywise imitate the same nor make or cause to be made any addition thereto or subtraction therefrom . . . without the consent, licence, or agreement of the said patentee . . ." Now this confers necessarily a right to bring an action to restrain infringement and to recover damages—at any rate, it is not a *chose in possession*. But a *chose in action* cannot be found upon the demised premises; it has no locality and is incapable of manual seizure, and this is borne out by the fact that for this reason *choses in action* could not at common law be taken in execution under a writ of *fieri facias* (Stephen's Commentaries, vol. 3, 598) or of *levari facias* (*Dundas* v. *Dutens*, 1 Ves. jun. 196). The landlord has seized a chattel—viz., the mutoscope, and the plaintiffs raise no claim to any property in this; but the patentee's right is entirely distinct from the right of property in the chattel; it is a right of action to prevent any dealing with that chattel in contravention of the letters patent, and such right is no part of, or capable of seizure with the chattel, but is outside and antagonistic to the possessory title to the chattel. The plaintiffs' rights arise out of the grant under the royal prerogative, coupled with section 16 of the Patents Act, 1883, which enacts that "every patent when sealed shall have effect throughout the United Kingdom and the Isle of Man." The landlord has not taken and could not take possession of these rights, and the defendant had purchased only such a chattel as the landlord could and did seize. Having regard to the decision in *Incandescent Gas Co.* v. *Brogden*, referred to above, the defendant is in no better position than if Maynard had been a mere infringer. It is not a question of contract *inter partes* affecting a chattel seized and sold by a landlord, but of the absence of any licence, in the event that has happened,

to use the patented invention. If the defendant's contention were correct, an infringer might fill his room with infringing articles and pay his rent by allowing the landlord to seize and sell them free from any right of the patentee to complain of the infringement. The plaintiffs are, therefore, entitled to an injunction as asked, and to the costs of the action.

Solicitors, *Lloyd-George, Roberts, & Co.*

Chan. Div. } Jan. 31; Feb. 1.
Buckley, J. }

RIVINGTON v. GARDEN. (a.)

Practice — Costs on higher scale—Partition action—Special grounds arising out of the difficulty of the case —Ord. 65, r. 9.

The display by a solicitor of exceptional skill or ability in conducting a partition action and the proceedings incident thereto, involving great difficulty and labour, is not a "special ground" within the meaning of ord. 65, r. 9, so as to empower the court to order the taxation of the costs of the proceedings as between solicitor and client on the higher scale.

In such a case the court has no jurisdiction to order costs to be taxed on the higher scale.

In re Leeuw, 93 *Law Times* 333, *and* Marriott *v.* Cobbett, 38 SOLICITORS' JOURNAL 620, *not followed.*

This case arose out of a partition action on further consideration. The partition action had resulted in an order for sale and distribution of the proceeds in 180ths, and the point raised was whether, having regard to the immense amount of difficulty, labour, and skill involved in the conduct of the proceedings the solicitors engaged should be allowed costs on the higher scale as between solicitor and client under ord. 65, r. 9. Some of the persons entitled to give receipts for the shares were entitled absolutely, but others were entitled as trustees, the shares being settled. The former supported the application, but the latter, though they did not oppose, were unable to consent.

Terrell, K.C., in support of the application.—This is a clear case where the court should grant costs on the higher scale. The case has been one of extreme intricacy and difficulty and the estate has been saved much expense by reason of the ability and skill displayed by the solicitors. The difficulty of the case called for the skill of the solicitors. Hence the skill of the solicitors can be properly said to have arisen out of the difficulty of the case. It is therefore a special ground within the meaning of the order. The solicitors ought to be rewarded: *Marriott* v. *Cobbett*, 38 SOLICITORS' JOURNAL 620; *In re Leeuw*, 93 L. T. 333; *Ellington* v. *Clark*, 38 W. R. 873, 58 L. T. Rep. 818; *Davies* v. *Davies*, 36 W. R. 86, 56 L. J. Ch. 963; *Paine* v. *Chisholm*, 39 W. R. 353, [1891] 1 Q. B. 531.

Dibden, K.C., in similar interest.—We ask your lordship to give directions to the taxing-master to tax the costs as between solicitor and client on the higher scale in pursuance of the order.

Whinney, on behalf of the persons entitled to settled shares.—We do not oppose, but owing to the nature of our interest we are unable to consent.

Manning, K.C., Christopher James, Crossfield, and *H. W. Vaughan Williams*, for other parties interested.

BUCKLEY, J.—I will assume that the partition action and the proceedings connected therewith had been of very great difficulty and had been conducted with the greatest skill and ability by the solicitors engaged in it. Now, but for the rule the court has no power to give costs on the higher scale. It has been urged upon me that the special ground in this case is the skill and ability of the solicitors. In my opinion that cannot be said to have arisen out of the nature or difficulty of the case. The skill and ability of the solicitors arose from their natural capacity and education and existed quite apart from the difficulty of the case. The applicants relied upon the case of *In re Leeuw*. I may observe that in that case there was neither argument nor opposition. Then as to the report of the case of *Marriott* v. *Cobbett* it must be pointed out that that is not a regular report. It is a mere note, not contributed by the journal's authorized reporter. I decline to follow either of those cases. On the other hand I am guided by two decisions in the Court of Appeal—namely, *Williamson* v. *North Staffordshire Railway Co.*, 32 Ch. D. 399, 34 W. R. Dig. 44, and *Paine* v. *Chisholm*, and I may also refer to *Assets Development Co.* v. *Close*, 48 W. R. 699. I cannot find anything in the rule which says that solicitors should be rewarded for exceptional ability. I have no jurisdiction to order taxation on the higher scale.

Solicitors, *Clayton, Sons, & Fargus; Gresham, Davies, & Dallas; Hewitt & Urquhart; W. M. Lloyd; Thorold, Brodie, & Bonham-Carter.*

(a.) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

Chan. Div. } Jan. 19, 26.
Buckley, J. }

In re ST. HILDA'S INCORPORATED COLLEGE, CHELTENHAM. (a.)

Company—Association not for profit—Alteration of objects—Addition of "Limited"—Board of Trade—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 23 —*Companies* (*Memorandum of Association*) *Act*, 1890 (53 & 54 *Vict. c.* 62).

An association not for profit, registered under licence from the Board of Trade without the word "Limited," applied to the court for confirmation of alterations of its objects as stated in its memorandum of association.

By the direction of the court the sanction of the board to the alterations was applied for and obtained.

The court granted the application.

Held, also, that, if the sanction of the board had not been obtained, the court could only have allowed the alterations if the word "Limited" were added to the name of the association.

Petition.

This was a petition for the confirmation by the court of an alteration of the objects of the memorandum of association of an association not for profit, registered without the addition of the word "Limited" to its name, and raised the question of the necessity of obtaining a fresh licence from the Board of Trade.

The St. Hilda's Incorporated College, Cheltenham, was incorporated in November, 1895, under the Companies Acts, 1862 to 1890, as an association formed as a limited company, and authorized under a licence of the Board of Trade to be registered with a limited liability without the addition to its name of the word "Limited."

Its objects, as stated in the memorandum of association, were, shortly, (a) to take over a then

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

existing establishment called St. Hilda's College, Cheltenham, and carry it on as an educational establishment for gentlewomen and girls engaged in education, whether as students or teachers; (*b*) providing them with lodging and attendance and other necessaries; and (*d*) if thought desirable to affiliate that college with any university, college, or association.

The memorandum provided that the income and property of the association should be applied solely towards the promotion of its objects, and that no portion thereof should be paid directly or indirectly as dividends, or bonus, or otherwise, by way of profit to the members, except as payment for occasional services.

It was desired to take over another educational institution for gentlewomen and girls of a similar kind called "St. Hilda's Hall," established at Oxford by the same founders, and also registered without the word "Limited" under licence from the Board of Trade. A special resolution had accordingly been passed by the petitioning college that the name should be changed to "St. Hilda's Incorporated College," and that additions should be made to the objects enabling the amalgation to be effected.

Among other proposed additions it was proposed to add to object (*a*), after words enabling St. Hilda's Hall, Oxford, to be taken over, the words "To found and take over, or carry on, wherever from time to time it may be thought desirable, similar educational establishments, halls, hotels, and houses of residence, for gentlewomen and girls engaged or interested in education." And to add to object (*d*) words which extended the power of affiliation to "any hall or other similar establishment."

The petition was now presented on behalf of the association asking the court to confirm the special resolution.

P. B. Abrahams, for the petitioners.

R. J. Parker, for the Board of Trade, said the board had no objection to the proposed alteration except that they thought words ought to be inserted rendering the consent of the board necessary before any further extension of the college could be made.

BUCKLEY, J., directed a fresh application to be made to the Board of Trade under section 23 of the Act of 1867, for their sanction to the proposed alterations.

The words "subject to the consent of the Board of Trade" having been added to the proposed additions to objects (*a*) and (*d*) and the Board of Trade having approved of the alterations in that form, the matter again came before the court on the 26th of February.

BUCKLEY, J.—I directed the Board of Trade to be served, and I desire to say why I did so. Where the Board of Trade grants its licence under section 23 of the Companies Act, 1867, it does so upon seeing the memorandum of association and satisfying itself that the company to whom the licence is granted is such as satisfies the provisions of that section. Where a petition is presented for alterations in the memorandum under the Companies (Memorandum of Association) Act, 1890, it may be that the proposed alterations would so alter the scope of the objects of the company as that the board, if applications were made to it anew, would not licence it, because it would not fall within the section. It seemed to me, therefore, that before I dealt with the application the board should be served. The board have attended before me and intimated that the alterations are not such in their opinion as to necessitate any objection on their part, by reason of the company desiring to vary the licence. The orders under the Act of 1890 can be made by virtue of section 1, subsection 3, on such terms and subject to such conditions as the court sees fit. Unless the board had assented to the alterations as proper in the case of a company bearing their licence, I should have had to direct either that the petition should be dismissed, or that the proper alterations should be made, so that the company should no longer trade without the addition of the word "Limited" to its name. However the officers of the Board of Trade see no objection, and I make the order. The company must pay the costs of the Board of Trade.

Solicitors, *Waterhouse & Co*, for *Winterbotham & Gurney*, Cheltenham; *Solicitor to the Board of Trade.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Jan. 11, 28.

In re LAKE.
Ex parte DYER. (*a*.)

Bankruptcy—Deposit of securities to make good breaches of trust—Fraudulent preference—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 48.

The relation of debtor and creditor does exist between trustee and cestui que trust.

Sharp *v.* Jackson, [1899] *A. C.* 419 (per Halsbury, L.C., *at p.* 426), *and* In re Blackpool Motor Car Co. (Limited), ante, *p.* 124, [1901] 1 *Ch.* 77, *followed.*

If, therefore, it is established by evidence that a trustee, without any circumstances creating any special duty in favour of a particular trust estate, and within three months of his bankruptcy, has transferred any property to that trust estate with a view to prefer it, such transfer constitutes a fraudulent preference within section 48 *of the Bankruptcy Act*, 1883.

Motion by the trustees of the marriage settlement of Colonel and Mrs Dyer for a declaration that four mortgage debentures of the Didcot, Newbury, and Southampton Railway Co. were handed over by the bankrupt Benjamin Greene Lake, while one of the trustees of the said settlement, to his co-trustees to make good a breach of trust, and that such delivery or transfer did not constitute a fraudulent preference.

The marriage settlement in question was executed in 1869. Lake was appointed one of the trustees in 1898. He opened an account for the trust at Child's Bank and obtained an authority from his co-trustees enabling him to draw on it in his own name alone. He realized the trust estate and invested the proceeds in other than trust securities.

By the beginning of 1900 the books of the bankrupt showed that he was indebted to the trust to the extent of £1,250.

Upon the 7th of May, 1900, he deposited in the box containing the trust deeds and securities—four debentures of the Didcot, Newbury, and Southampton Railway Co.—together with a memorandum in the following words:

"I have just learnt that there is something like £1,000 of Dyer's Trust capital in the hands of the late firm. Had I known this I could not have permitted my daughter to have accepted their most generous help, without which our Streatham house could not have been secured. As I am a trustee the debt is a personal one, and one which I can properly

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

make good out of my own assets. I therefore deposit £2,000 Didcot, Newbury, and Southampton Railway 4 per cent. Debenture Stock as security for whatever may be found due. Its intrinsic value now is from 60 to 70 per cent., and I have quite recently been offered and have refused 40."

A judgment had been signed against Lake on the 1st of May, and a bankruptcy notice founded upon that judgment was served upon him on the 9th of May. He committed an act of bankruptcy by failure to comply with such notice, and a petition was presented against him upon the 2nd of June upon which he was ultimately adjudicated bankrupt.

After his bankruptcy the other trustees of the Dyer settlement requested the Didcot, Newbury, and Southampton Railway Co. to register the four debentures in their names. The company refused to register them without the consent of the trustee in bankruptcy. The trustee in bankruptcy refused his consent, whereupon the present motion was launched.

It was admitted for the purposes of the motion that there had been a number of breaches of trust committed by the bankrupt in respect of other estates, and that in some cases he had made restitution, but that in the majority he had not.

Vernon Smith, Q.C., and *Colt*, for the applicants.

Northcote, for the respondent.

The case was argued upon the 11th of January, when judgment was reserved. The arguments and authorities cited appear in the judgment.

Jan. 28.—WRIGHT, J. (after stating the facts).—It was argued for the trustees of the settlement upon the authority of *Ex parte Taylor, In re Goldsmid*, 35 W. R. 148, 18 Q. B. D. 295, and *Ex parte Stubbins, In re Wilkinson*, 29 W. R. 653, 17 Ch. D. 58, that section 48 of the Bankrupcy Act, 1883, is inapplicable on the ground that the trustee and the *cestui que trust* do not stand in the relation of debtor and creditor. This doctrine was questioned in *Ex parte Ball, In re Hutchinson*, 35 W. R. 264, and its soundness is denied by Lord Halsbury, L.C., in *Sharp v. Jackson*, [1899] A. C. 419, at p. 426; and I agree with Buckley, J., in *In re The Blackpool Motor Car Co. (Limited)*, *ante*, p. 124, [1901] 1 Ch. 77, that it must now be taken that this objection is untenable. At any rate in this case the debtor, who was both trustee and solicitor to the trust, was a debtor for the £1,250. It was further argued for the trustees of the settlement, on the same authorities, that a preferential payment by an insolvent trustee made by him in order to repair a breach of trust may be, and in this case ought to be, regarded as made by him not as a debtor, but as trustee, and not with a view to prefer the *cestui que trust* as creditor, but with a view to satisfy the trustee's own conscience. This doctrine does not appear to have commended itself to the Court of Appeal in *Ex parte Ball, In re Hutchinson*, but no further doubt is apparently thrown upon it in the House of Lords in *Sharp v. Jackson*, and the only question at present open is what is the exact scope and limit of this doctrine. Of course, if the fund or property which the debtor hands over is itself impressed with a trust the question does not arise: he is merely performing his legal or equitable obligation in handing it over. Next, if it is affirmatively proved that the debtor did not act with a view to prefer the trust estate, and acted merely to protect himself from penal or other consequences, that is settled to be no fraudulent preference. Again, if it is proved that he acted merely to satisfy his own conscience as a trustee, and not in the interest of the trust estate as a creditor, there is no fraudulent preference, if *Ex parte Taylor, In re Goldsmid* is good law. And possibly the doctrine is to be carried to this extent, that there may be a presumption that the trustee has acted for the satisfaction of his conscience as a trustee, and not with a view to prefer the trust estate as creditor. But I do not find any authority which necessarily gives any further extension to the doctrine so as to justify under all circumstances a preference by the trustee of the trust estate. If it is established by evidence that he acted not in his own interest nor from a sense of duty binding his conscience as a trustee to prefer a particular trust estate or to prefer trust estates over ordinary creditors, and still more if it is shown that, having committed several similar breaches of trust, he without circumstances creating any special duty in favour of a particular trust estate gives it a preference with a view to prefer it over the others, that must, as it seems to me, be sufficient to bring the case within the section.

In the present case the evidence, and in particular the memorandum which has been read, seems to me to establish that the debtor acted with a view to prefer this particular trust estate from a motive of gratitude. The motive may not be decisive, but it is a guide to what was the dominant or efficient view. Here there was evidently an intention to prefer the *cestui que trust* from a motive of gratitude, and not simply or merely from a sense of duty to repair this particular breach of trust as a breach of trust.

Application refused.

Solicitors for the applicants, *Peacock & Goddard.*

Solicitors for the respondent, *Lee & Pemberton.*

Q. B. Div. (Bigham, J.) — Dec. 8.

THURSBY *v.* ECCLES. (*a.*)

Landlord and tenant—Parol agreement to rent furnished flat—Payment of one week's rent in advance—Before entry defendant repudiates agreement—Part performance—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The defendant verbally agreed to hire the plaintiff's flat for thirteen weeks at £4 10s. a week, and paid the first week's rent in advance, but in fact never took possession.

Held, in an action to recover rent for the full period, that the payment of one week's rent in advance on a parol agreement was not such a part performance as would take the case out of the 4th section of the Statute of Frauds, and that the action could not be maintained.

Action set down for hearing under order 14.

The plaintiff sought to recover the rent of a furnished flat which the defendant had verbally agreed to rent for thirteen weeks from the 25th of June, 1900, at £4 10s. a week.

The defendant paid a week's rent in advance, but owing to a dispute arising between the parties, which is not material to this report, the defendant never took possession, and repudiated the agreement.

There was no memorandum of the agreement of any kind within the meaning of the Statute of Frauds.

Boydell Houghton, for the plaintiff.—The defendant having paid a week's rent in advance, section 4 of the Statute of Frauds does not apply: *Nunn v. Fabian*, L. R. 1 Ch. App. 35, 14 W. R. Dig. 119; *Truman v. Stamp*, 1 Stark. N. P. C. 12; *Edge v. Strafford*, 1 Cr. & J. 391.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Emile Cannot, for defendant.—The courts have never decreed specific performance of a parol agreement to lease a house on the ground that the mere payment of rent, apart from possession, took the agreement out of the statute. *Nunn* v. *Fabian* does not help the plaintiff; because in that case the tenant was in possession, and had paid rent under the new agreement, although the lease had not been executed.

BIGHAM, J.—The first point I have to decide in this case is whether the contract entered into between the parties comes within the 4th section of the Statute of Frauds so as to preclude the plaintiff from suing upon it. I am clearly of opinion that this agreement is one concerning an interest in land, and that being so it comes within the mischief of the section. Therefore, although the contract subsists, the right to sue upon is taken away. But the plaintiff says that the payment of the week's rent in advance by the defendant was such a part performance as to take the case out of the statute. That is clearly not so. It has been held over and over again that where the contract is for the sale of an interest in land, and not merely for a tenancy of land, the payment of part of the price does not take the case out of the statute, and indeed it seems that payment of the whole price would not take the case out of the statute The whole law on the subject is laid down in *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467. The law as there stated I think shows clearly that a payment of part of the purchase-money in a contract of sale of lands is not such a part performance of the contract as will take it out of the statute. I see no distinction in principle between the payment of part of the purchase-money and the payment of part of the rent. When the Court of Chancery gives relief from the operation of the statute it does so upon the equities which have arisen out of the acts of the parties. Payment of money in such a case as this raises no equity except possibly a right to recover it back. I have therefore come to the conclusion that this action fails, and that there must be judgment for the defendant with costs.

Solicitors for the plaintiff, *Booth & Smee.*

Solicitors for the defendant, *Cunningham & Co.*

Q. B. Div.
(Lord Alverstone, L.C.J., and Grantham, Bruce, Darling, and Phillimore, JJ.) — Jan. 11, 18.

TRACEY v. PRETTY & SON (LIMITED). (a.)

Factory—Public health—Sanitary conveniences—Default in relation to water-closet—Failure of sanitary authority to take proceedings—Proceedings by factory inspector—Evidence—Jurisdiction of justices—Appeal to quarter sessions—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s* 38—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59) *ss.* 7, 22—*Factory and Workshop Acts*, 1878 (41 *Vict c.* 16), *s.* 4; 1891 (54 & 55 *Vict. c.* 75), *s.* 2; 1895 (58 & 59 *Vict. c* 37), *ss.* 3, 35

Where a factory inspector, acting under section 4 *of the Factory and Workshop Act*, 1878, *section* 2 *of the Factory and Workshop Act*, 1891, *section* 3 *of the Factory and Workshop Act*, 1895, *and section* 22 *of the Public Health Acts Amendment Act*, 1890, *has given notice to the owner or occupier of a factory (in a district in which the last-mentioned section is in force) requiring him to make such alterations or additions in the factory as may be required to give sufficient sanitary accommodation, and the owner or occupier neglects or refuses to comply with the notice, the justices by whom a complaint of such neglect or refusal is heard have no jurisdiction to adjudicate upon the sufficiency of the accommodation existing in the factory.*

So held by Lord Alverstone, L.C.J., *and* Grantham, Bruce, *and* Darling, JJ. (Phillimore, J., *dissenting*).

Semble, *the notice must specify the alterations or additions required.*

Per Lord Alverstone, L.C.J., *and* Bruce *and* Darling, JJ.—*An appeal to quarter sessions from the requirement of the factory inspector lies under section* 7 *of the Public Health Acts Amendment Act*, 1890.

Case stated by justices for the borough of Ipswich, who had dismissed an information and complaint by Anna Tracey, one of her Majesty's Inspectors of Factories and Workshops, that the occupiers of a building used as a manufactory situate in the borough, at the said building, on the 16th of July, 1899, and on divers days between that date and the laying and making of the information and complaint had unlawfully neglected or refused to comply with the requirements of a certain notice in writing, dated the 15th of May, 1899, given pursuant to section 2 of the Factory and Workshop Act, 1891, and the Acts amending the same, and under section 22 (2) of the Public Health Acts Amendment Act, 1890, requiring the occupiers within two months from the date of such notice to provide the building with suitable and sufficient accommodation in the way of sanitary conveniences, having regard to the number of persons employed or in attendance at the building, and with proper separate accommodation for persons of each sex, and for that purpose to provide for the use of the females so employed or in attendance eighteen water-closets with proper fittings and appurtenances.

The following facts were proved or admitted:

The respondents were the occupiers of a building used as a corset factory.

The Public Health Acts Amendment Act, 1890, had been adopted in the borough of Ipswich.

The building in question was a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895, and was situate within the sanitary district of the Ipswich urban sanitary authority.

The appellant was an inspector under the Factory and Workshop Acts, 1878 to 1895.

The notice prescribed by section 4 of the Factory and Workshop Act, 1878, was given to the sanitary authority by means of a letter dated the 2nd of March, 1899, of which, so far as material, the following is a copy: "I beg to inform you that on visiting the corset factory occupied by Messrs. Pretty & Sons, and situated at Tower Ramparts, Ipswich, the undermentioned sanitary matters appear to require attention: Insufficient sanitary accommodation provided for women. . . . 730 women when visited; full number, 1,000; 14 sanitary conveniences provided."

It appeared to the appellant that the acts, neglects, and defaults alleged in the letter of the 2nd of March, 1899, were punishable or remediable under the laws relating to public health, but not under the Factory and Workshop Act.

Proceedings were not taken by the sanitary authority upon the notice, so far as it related to the alleged insufficiency of sanitary accommodation for women, against the owners or occupiers of the factory.

It appeared to the appellant that the provisions of section 22 (1) of the Public Health Acts Amendment Act, 1890, were not complied with on the 15th of May, 1899, in the case of the factory.

(a.) Reported by T. R. COLQUHOUN DILL, Esq., Barrister-at-Law.

The appellant gave a written notice to the respondents, the occupiers of the factory, of which the following is a copy:

"Factory Department, Home Office, London, S.W.

"I, the undersigned, one of her Majesty's inspectors of factories, acting in pursuance of section 4 of the Factory and Workshop Act, 1878, section 2 of the Factory and Workshop Act, 1891, and section 3 of the Factory and Workshop Act, 1895, hereby give you notice under section 22, sub-section 2, of the Public Health Acts Amendment Act, 1890, that the provisions of section 22, sub-section 1, of that Act are not complied with in the building of which you are occupier, used as a manufactory, and situate at Tower Ramparts, Ipswich, the same being a factory within the meaning of the Factory and Workshop Act, 1878; and I hereby require you, within two calendar months from the date of this notice, to provide the said building with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed or in attendance at the same building, and with proper separate accommodation for persons of each sex, and for that purpose to provide for the use of females so employed or in attendance eighteen additional water closets, with proper fittings and appurtenances. If you neglect or refuse to comply with this notice you will be liable for such default to a penalty not exceeding £20 and to a daily penalty not exceeding 40s., and proceedings will be taken in pursuance of the said section 22 of the Public Health Acts Amendment Act, 1890, to recover the same.

"ANNA TRACEY.

"To Messrs. Pretty, and Son (Limited), Tower Ramparts. May 15, 1899."

The respondents neglected or refused to comply with the last-mentioned notice.

On behalf of the appellant it was contended on the above facts that the Court of Summary Jurisdiction had no jurisdiction to hear evidence upon, or decide the question of the suitability or sufficiency of, the accommodation in the way of sanitary conveniences existing in the factory, or the necessity for the further accommodation required by the notice dated the 15th of May, 1899, and that these questions were by law left to the discretion of the appellant. In support of this contention *St. Luke's Vestry* v. *Lewis*, 1 B. & S. 865, 10 W. R. 249, 31 L. J. M. C. 73; *Hargreaves* v. *Taylor*, 11 W. R. 562, 3 B. & S. 613, 32 L. J. M. C. 111; *Bogle* v. *Sherborne Local Board*, 46 J. P. 675, were cited.

On behalf of the respondents it was contended that the matters were questions of fact which the justices had jurisdiction to decide upon evidence to be given before them.

The justices decided in favour of the contention of the respondents, and accordingly heard evidence on behalf of the appellant and the respondents; and upon that evidence dismissed the summons and ordered the appellant to pay £6 4s. costs. The justices found as facts: (1) That the existing sanitary accommodation in the factory was suitable and sufficient; (2) that the sanitary authority had made all due inquiry into the suitability and sufficiency of the sanitary accommodation existing in the factory, and had found the accommodation to be suitable and sufficient. The question for the opinion of the court was whether the justices had jurisdiction to hear evidence upon or decide the question of suitability or sufficiency of the accommodation existing in the factory, or required by the notice.

The enactments upon which the aguments turned are as follows:

Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 38: "Where it appears to any local authority by the report of their surveyor that any house is used or intended to be used as a factory or building in which persons of both sexes are employed or intended to be employed at one time in any manufacture, trade, or business, the local authority may, if they think fit, by written notice, require the owner or occupier of such house, within the time therein specified, to construct a sufficient number of water-closets, earth-closets, or privies and ashpits for the separate use of each sex. Any person who neglects or refuses to comply with such notice shall be liable for each default to a penalty not exceeding £20, and to a further penalty not exceeding 40s. for every day during which the default is continued."

Factory and Workshop Act, 1878 (41 Vict. c. 16) s. 4: "Where it appears to an inspector under this Act that any act, neglect, or default in relation to any drain, water-closet, earth-closet, privy, ashpit, water supply, nuisance, or other matter in a factory or workshop is punishable or remediable under the law relating to public health, but not under this Act, that inspector shall give notice in writing of such act, neglect, or default to the sanitary authority; and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice, and take such action thereon, as to that authority may seem proper for the purpose of enforcing the law. . . ."

Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 7: "(1) Any person aggrieved—(*a*) by any order, judgment, determination, or requirement of a local authority under this Act; (*b*) by the withholding of any order, certificate, licence, consent, or approval, which may be made, granted, or given by a local authority under this Act; (*c*) by any conviction or order of a court of summary jurisdiction under any provision of this Act—may appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions. (2) This section shall not apply in cases where there is an appeal to the Local Government Board under section 268 of the Public Health Act, 1875." Section 22: "(1) Every building used as a workshop or manufactory, or where persons are employed or intended to be employed in any trade or business, whether erected before or after the adoption of this part of the Act, in any district, shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed in, or in attendance at, such building, and also where persons of both sexes are employed or intended to be employed or in attendance, with proper separate accommodation for persons of each sex. (2) Where it appears to an urban authority on the report of their surveyor that the provisions of this section are not complied with in the case of any building the urban authority may, if they think fit, by written notice, require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation as aforesaid. (3) Any person who neglects or refuses to comply with any such notice shall be liable for such default to a penalty not exceeding £20, and to a daily penalty not exceeding 40s. (4) Where this section is in force section 38 of the Public Health Act, 1875, shall be repealed."

Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75), s. 2: "(1) Section 4 of the principal Act shall apply to workshops conducted on the system of not employing any child, young person, or woman therein, and to laundries. (2) Where notice of an act, neglect, or default is given by an inspector under the said section 4 as amended by this Act to a sanitary authority, and proceedings are not taken within a reasonable time for punishing or remedying the act,

neglect, or default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken, and shall be entitled to recover from the sanitary authority all such expenses in and about the proceedings as the inspector incurs and are not recoverable from any other person, and have not been incurred in any unsuccessful proceedings."

Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 3:—"(1) Where notice of an act, neglect, or default is given by an inspector under section 4 of the principal Act to a sanitary authority it shall be the duty of the sanitary authority to inform the inspector of the proceedings taken in consequence of the notice. (2) In section 2 of the Act of 1891, for the words 'within a reasonable time' shall be substituted the words 'within one month.'" Section 35: "(1) In every place where section 22 of the Public Health Acts Amendment Act, 1890, is not in force every factory or workshop shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed in or in attendance at the factory or workshop, and also where persons of both sexes are employed or intended to be employed, or in attendance, with proper separate accommodation for persons of each sex. (2) A factory or workshop in which there is a contravention of this section shall be deemed not to be kept in conformity with the principal Act."

The case was first argued before Grantham and Channell, JJ., and was subsequently argued before Lord Russell of Killowen, L.C.J., and Grantham, Bruce, Darling, and Phillimore, JJ., when judgment was reserved. Owing to the death of Lord Russell of Killowen before judgment was delivered, the case was now argued before the court constituted as appears at the head of this report.

Sir R. B. Finlay A.G. (*Henry Sutton* and *R. D. Muir* with him), for the appellant.—Failure to provide a sufficient number of water-closets is "a default in relation to a water-closet" within the meaning of section 4 of the Factory and Workshop Act, 1878. On such a default being notified by a factory inspector to the sanitary authority they may take proceedings under section 22 of the Public Health Acts Amendment Act, 1890, in places in which that section is in force, and has therefore superseded section 38 of the Public Health Act, 1875. If proceedings are so taken by the sanitary authority, there is no appeal to Local Government Board under section 268 of the Public Health Act, 1875, and consequently there is an appeal to quarter sessions under section 7 of the Act of 1890. But if the sanitary authority fails to take proceedings, then the factory inspector may, under section 2 of the Factory and Workshop Act 1891, take the like proceedings as the sanitary authority might have taken; such proceedings are "like" in all respects; on a complaint of the inspector the question of the sufficiency of the accommodation cannot be gone into before the justices any more than it can be gone into when the sanitary authority is the complainant; and like proceedings include the like right of appeal to quarter sessions, so that the decision of the inspector is not necessarily final. The scheme of the legislation is to put the inspector in the place of the sanitary authority where they have failed to take proceedings, the reason being that factory inspectors have more intimate knowledge of the requirements of the employees than the officers of sanitary authorities can have.

Macmorran, Q.C. (*E. E. Wild* with him), for the respondents.—The justices had power to go behind the requirement of the sanitary inspector, and to inquire into the sufficiency of the accommodation. There is no authority to show that the justices cannot go into the merits where proceedings are taken under section 38 of the Public Health Act, 1875, the section with which this legislation originated. The cases in which it has been decided that the justices cannot go into the merits arose under section 36 of that Act or the corresponding provisions of the Metropolis Management Acts, and the ground of the decisions was that another mode of questioning the reasonableness of the requirements of the local authority was provided. There is no appeal to the Local Government Board under section 38 of the Act of 1875, and therefore the justices can go into the merits in proceedings under that section, and the same is the case as to proceedings under section 22 of the Public Health Acts Amendment Act, 1890. Again, the defaults mentioned in section 4 of the Factory and Workshop Act, 1878, are defaults in existing closets, &c.; the section does not apply to omissions to provide such things. Further, where the sanitary authority have *bonâ fide* considered a complaint by the factory inspector, and have come to the conclusion that proceedings ought not to be taken, they are not in default, and the powers of the factory inspector under section 2 of the Factory and Workshop Act, 1891, do not arise; they arise only when the sanitary authority have failed to consider the complaint, or where, having decided that a default exists, they have taken no steps to remedy or punishit. It cannot have been intended that the mere opinion of the factory inspector as to whether proceedings are necessary should override the opinion of the representative sanitary authority and should be final, as it would be if the justices cannot go behind his requirement; for "like proceedings" in section 2 of the Factory and Workshop Act, 1891, are proceedings taken by the inspector, and cannot include an appeal under section 7 of the Public Health Acts Amendment Act, 1890, against his decision.

Finlay, in reply.—The factory inspector has to give notice to the sanitary authority because that authority has the means of seeing that any necessary work is carried out; but section 2 of the Act of 1891 would be nugatory if he cannot act except where *mala fides* on the part of the sanitary authority can be shown; this could never be proved. The inspector taking proceedings is in precisely the same position as the sanitary authority taking proceedings, and it is clear upon the authority of a series of cases decided upon similar sections that in the latter case the justices cannot go behind the requirement of the sanitary authority: *Reg.* v. *Wheatley*, 34 W. R. 257, 16 Q. B. D. 34; *St. Luke's Vestry* v. *Lewis*; *Hargreaves* v. *Taylor*; *Bogle* v. *Sherborne Local Board*, 46 J. P. 675; *Robinson* v. *Sunderland Corporation*, [1899] 1 Q. B. 751, 47 W. R. Dig. 110; *Stroud* v. *Wandsworth Board of Works*, 42 W. R. 355, [1894] 1 Q. B. 64, [1894] 2 Q. B. 1.

Macmorran, Q.C., referred to *Wood* v. *Widnes Corporation*, 46 W. R. 293, [1898] 1 Q. B. 463.

Cur. adv. vult.

Jan. 18.—Lord ALVERSTONE, L.C.J.—This case raises, in my opinion, questions of very considerable difficulty, and I express my judgment with great hesitation. After the best consideration I can give I have, however, come to the conclusion that the appellant is entitled to judgment. The substantial question which arises is whether upon a summons for penalties under sub-section 3 of section 22 of the Public Health Acts Amendment Act, 1890, for neglect to comply with a notice given by a factory inspector, it is competent for the magistrates to receive evidence upon the merits as to the necessity for the sanitary accommodation required by such

notice. The difficulty arises from the fact that the powers of the factory inspector in the matter are given by reference to the powers of the sanitary authority under the Public Health Act; and we have to determine to what extent the powers of the sanitary authority are transferred under the general words used. Certain other incidental points arise which I will consider in the course of my judgment. In dealing with cases of legislation by reference, I think that, as a rule, the primary consideration to be kept in view is the general scope and object of the amending legislation, as this affords some guide as to whether a wide or narrow interpretation is to be put upon general words or expressions capable of a wider or narrower meaning.

By the 4th section of the Factory and Workshop Act, 1878, it is provided that where it appears to an inspector under the Act that any neglect or default in relation to any water-closet, earth-closet, or other matter in the factory or workshop is punishable or remediable under the law relating to public health, and not under the Factory and Workshop Act, 1878, the inspector shall give notice in writing of such neglect or default to the sanitary authority of the district, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to the authority may seem proper for the purpose of enforcing the law. By the same section it is provided that an inspector under the Act may for the purposes of the section take with him to the factory a medical officer of health, inspector of nuisances, or other officer of the sanitary authority. The material provisions of the law relating to public health which were in force at that time—namely, at the passing of the Factory and Workshop Act, 1878, are to be found in sections 35, 36, and 38 of the Public Health Act, 1875. The most material section is the 38th, which provided that, where it appeared to any local authority by the report of their surveyor that any house was used or intended to be used as a factory in which persons of both sexes were employed, the local authority might, if they thought fit, by written notice require the owners within a time specified in the notice to construct a sufficient number of water-closets, earth-closets, or privies for the separate use of each sex. The section provided a penalty for neglect to comply with such notice. No appeal was provided against the requirements of the local authority under this Act.

By section 22 of the Public Health Acts Amendment Act, 1890, which is the section under which the question in this case arises, further powers were given to the sanitary authority. Sub-section 1 of that section provides that every building used as a workshop shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed, and also where persons of both sexes are employed with proper separate accommodation for persons of each sex. It further provides by sub-section 2 that where it appears to an urban authority on the report of their surveyor that the provisions of this section are not complied with they may by written notice require the owner or occupier of the factory to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation. Sub-section 3 prescribes a penalty for neglect or refusal to comply with such notice.

Pausing for a moment, it was contended on behalf of the respondents that under this section the urban authority could only give a general notice requiring the owner or occupier to provide sufficient and proper accommodation; on behalf of the appellant it was contended that the urban authority must by the notice specify the alterations and additions which they require to be made. I think the latter view is correct. The section provides a penalty for neglect or refusal to comply with the notice. It would, I think, be inconsistent with such an enactment that the notice should be in general terms only, as the person to whom it was given would in that case have no means of knowing how he could avoid the liability to a penalty.

But in addition, by section 7 of the same Act, an appeal to quarter sessions is given against any requirement of a local authority, and I think it was intended that on such an appeal not only the question of the necessity for some additional accommodation, but also the reasonableness or propriety of the amount of the accommodation required by the notice might be raised.

It was further contended before us on behalf of the respondents that section 4 of the Act of 1878 did not apply to this section, that section 4 enabled notice to be given only in the case of some neglect or default in relation to an existing water-closet, earth-closet, privy, or ash pit, and not in relation to alleged insufficiency of accommodation. In my opinion this contention is unsound. I think the factory inspector may give notice to the sanitary authority in respect of a neglect by the owner or occupier of a factory to comply with the provisions of sub-section 1 of section 22 of the Act of 1890. I may further point out that this seems to be placed beyond all doubt by the provisions of section 35 of the Factory and Workshop Act, 1895, which provides that in every place where section 22 of the Public Health Acts Amendment Act, 1890, is not in force every factory or workshop where persons of both sexes are employed shall have separate accommodation, and that a factory or workshop in which there is contravention of this section shall be deemed not to be occupied in conformity with the Factory and Workshop Act, 1878. If section 22 of the Act of 1890 is in force the rights and duties of the parties must be governed by that section.

Thus far I have only considered the powers which were given to the factory inspector to put the sanitary authority in motion; but by sub-section 2 of section 2 of the Act of 1891, under which the particular question in this case arises, it is provided that where notice of an act, neglect, or default is given by the factory inspector under section 4 of the Act of 1878 to a sanitary authority and proceedings are not taken within a reasonable time (fixed by sub-section 2 of section 3 of the Factory and Workshop Act, 1895, at one month) for punishing or remedying the neglect or default the inspector may take the like proceedings for punishing or remedying as the sanitary authority might have taken. The question which arises in this case is whether the words "like proceedings for punishing or remedying" are confined to legal proceedings in respect of the neglect of an owner or occupier to comply with the notice given by an urban authority under sub-section 2 of section 22 of the Public Health Act of 1890, or whether they give the factory inspector the right himself to give a notice under sub-section 2 of section 22 of the Act of 1890 requiring alterations and additions to be made. The question is, as I have said, one of very great difficulty. The word "proceedings" is not the word one would have expected to find as applicable to a notice or requirement. Moreover, unless a requirement given by a factory inspector is subject to the appeal to quarter sessions, under section 7 of the Act of 1890, as in the case of a requirement by a local authority, I should without hesitation have come to the conclusion that a factory inspector was not entitled to give such notice. It seems to me clear that the Legislature could not, without express words,

make the opinion of a factory inspector as to the amount of accommodation required final and conclusive upon the factory owner or occupier. But the words in sub-section 2 of section 2 of the Act of 1891 are "the like proceedings for punishing or remedying the same," and unless we hold that the factory inspector may give the notice provided by sub-section 2 of section 22 of the Act of 1890, it seems to me that we should be giving no effect to the words "proceedings for remedying" as distinguished from "punishing." It is here I think that we get assistance in considering what is the general tendency and scope of the legislation. By the Act of 1878 the factory inspector could only give notice to the sanitary authority. The sanitary authority could only give a general notice to the factory owner. By the Act of 1890 further powers are given to the sanitary authority and an appeal is provided against the requirement. Section 2 of the Act of 1891 appears to deal with the case where the sanitary authority for some reason or other does not take sufficient steps to exercise their powers, and I think we can gather from this course of legislation that it was intended to supplement the powers of the sanitary authority by giving the factory inspector an independent power of taking proceedings for remedying and punishing in cases in which the sanitary authority neglected to act. It was contended before us by the respondents that no appeal was given in the case of a notice of requirement served by the factory inspector. I have already said that if I had come to this conclusion I should not have decided in favour of the appellant; but if the view which I have taken is correct—namely, that the factory inspector stands in the place of the local authority for the purpose of giving a notice of requirement under sub-section 2 of section 22 of the Act of 1890—then in my opinion the words "like proceedings" would render any such notice the subject of appeal under section 7 of the same Act. If this view be correct, effect would be given to that which I gather to have been the intention of the Legislature without any injustice to the factory or workshop owner. The notice given by the factory inspector will be subject to appeal, and, if not appealed against, would have the same effect as a notice given by the sanitary authority.

There remains one other contention of the respondents which must be noticed. It was urged that upon the hearing of a summons under sub-section 3 of section 22 of the Act of 1890, founded upon the notice given by the urban sanitary authority or the factory inspector, the question of the necessity for, or reasonableness of, the requirements specified in such notice could be examined. That such question cannot be raised in the case of a notice of requirement given by a sanitary authority is in my opinion decided not only by the terms of the section itself, but by the long series of decisions referred to the Attorney-General in reply. Upon such a summons, in my opinion, the only question which could be raised is whether there has been a neglect or refusal to comply with such notice. Any question as to the validity of the requirements must be raised, if at all, by appeal to quarter sessions. I do not think, moreover, that the argument that there is a distinction in the case of a notice given by the factory inspector in this respect can be maintained. It was urged that because such a question would be open in the case of proceedings taken under section 81 of the Factory and Workshop Act, 1878, in respect of a breach of section 35 of the Factory and Workshop Act, 1895, it ought also to be open in the case of proceedings taken by a factory inspector under sub-section 3 of section 22 of the Act of 1890. For the reasons I have given in the earlier part of my judgment I do not think this contention can prevail. I think that if a notice can be given by a factory inspector under sub-section 2 of section 22, it has the same effect, if not appealed against, for all purposes as a notice given by the sanitary authority. For the above reasons I am of opinion that judgment should be given for the appellant, and the case remitted to the magistrates.

My brother Darling concurs in the judgment I have read.

GRANTHAM, J.—Having had the opportunity of reading my lord's judgment, I should have been ready to accept it and simply to agree with it, but as I wrote my judgment last June I think it is well I should read it, though it having been written then in the hope of convincing some of my brothers who had not been convinced in the argument of the case it goes more into detail than I should have thought it necessary to go at the present time.

The difficulty that has arisen in this case in determining the power of factory inspectors has been caused entirely by the system unfortunately so often adopted in the present day of legislating by reference to other Acts and by incorporation of sections of earlier Acts of Parliament.

The references backwards and forwards throughout the Acts and sections of Acts in dispute are most bewildering and perplexing and I am not surprised that the magistrates misunderstood, as I think they did, their powers in the proceedings when the matters came before them.

If the history of the factory legislation of the nineteenth century is considered, and particularly that of the past twenty or thirty years, it will, I think, be found that the Legislature has advisedly done what it intended to do—viz., gone on step by step in its endeavour to compel the owners of factories to put them in a healthy and sanitary condition. Finding its earlier efforts often frustrated and foiled by the supineness or self-interest of the sanitary authorities whose aid was first sought to carry out its views, the Legislature has at last adopted more drastic measures, and as the inspectors have been, in late years, at any rate, always selected for this work on account of their special qualifications for it, the Legislature, as a last resort, has placed the inspectors in the same position that the sanitary authorities previously occupied, and given them power to order the necessary work to be done, and if not done, of enforcing the fines leviable for breaches of the law in failing to obey the inspectors' orders. It should not be forgotten that the experience of factory inspectors is gained by their supervision of factories over the whole of England, whereas the surveyor of the local authority in many cases has no experience of this kind whatever, and as the Legislature has given to the sanitary authority (as many legal decisions show) the absolute discretion of determining whether work is to be done or not, subject to the overriding decision of the court of summary jurisdiction, it would be strange indeed if this same power should not be confided to the more experienced inspector.

Not only is the sanitary inspector often inexperienced in the special requirements of factories to make them properly healthy and sanitary, but he is sometimes liable to be influenced by the factory owner, who is not infrequently one of the leading magistrates of the borough in which the factory is situate.

Let us see, therefore, whether the sequence of legislation does or does not bear out the views that I have thus far expressed.

The first Factory Act was passed as long ago as 1802 (42 Geo. 3, c. 73). That Act dealt not only with the morals and religious teaching of those working in

factories, but also with the hours of labour and the ventilation and light of the factory. It was in fact the foundation of all subsequent factory legislation. It was amended by various subsequent Acts till we come to the Act of 19 & 20 Vict., which incorporated most of the preceding Acts and was called the Factory Act of 1856, but no sooner was that Act passed than amendments and extensions followed each other in rapid succession until after the passing of the Public Health Act of 1875 we come to the Act of 1878, which practically repealed all former Acts, and codifying as it did the existing legislation, also enlarged the powers of the sanitary authorities and brought more factories within the purview of the Act.

Unfortunately even in this comprehensive Act of 1878 the Legislature referred back to the Public Health Act of 1875, and incorporated some of its sections instead of making a complete Act.

The Acts now applying to this particular matter commence therefore with the Act of 1875 section 38 of which is in these words: "Where it appears to any local authority by the report of their surveyor that any house is used or intended to be used as a factory or building in which persons of both sexes are employed or intended to be employed at one time in any manufacture, trade, or business, the local authority may, if they think fit, by written notice, require the owner or occupier of such house within the time therein specified to construct a sufficient number of water-closets, earth-closets, or privies and ashpits for the separate use of each sex.

"Any person who neglects or refuses to comply with any such notice shall be liable for each default to a penalty not exceeding £20, and to a further penalty not exceeding 40s. for every day during which the default is continued."

That Act was extended by the Public Health Act of 1890, section 22 of which is in these words:

"Every building used as a workshop or manufactory, or where persons are employed or intended to be employed in any trade or business, whether erected before or after the adoption of this part of this Act, in any district shall be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed in or in attendance at such building and also where persons of both sexes are employed or intended to be employed or in attendance with proper separate accomodation for persons of each sex.

"(2) Where it appears that an urban authority on the report of their surveyor that the provisions of this section are not complied with in the case of any building the urban authority may, if they think fit, by written notice require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such sufficient, suitable, and proper accommodation as aforesaid.

"(3) Any person who neglects or refuses to comply with any such notice shall be liable for each default to a penalty not exceeding £20 and to a daily penalty not exceeding 40s."

By this 22nd section, therefore, suitable accommodation was to be provided by way of sanitary conveniences having regard to the number of persons employed in any factory; and the initiation of proceedings is to be "on the report of the surveyor of the urban authority," which authority by written notice could require such additions to be made as would provide sufficient accommodation in the factory, the enforcement of their notice being by application for penalties in the usual way.

By these Acts, therefore, the local authority (that is to say, the mayor, aldermen, and burgesses in a borough like Ipswich) had power in such a factory as this by written notice to compel the owner or occupier for the time being to provide a sufficient number of conveniences for each sex under the penalty of a heavy fine for failure to comply with the order. There was no appeal to the magistrates against this order, but under section 7 of the Public Health Acts Amendment Act, 1890, "Any person aggrieved by any order, determination, or requirement of a local authority under the Act may appeal in manner provided by the Summary Jurisdiction Acts to a court of quarter sessions."

To enforce the penalty, however, the local authority had to apply to the court of summary jurisdiction, which court had, however, as I have just said, no power to inquire into the merits of the order. By these Acts it will be noted that it was left to the surveyor to the sanitary authority to report to the local authority; and it can well be imagined that the surveyor, an official knowing much perhaps of bricks and mortar and of drainage, would know but little of factory requirements, and by the time that the Act of 1878 was passed it was evident that the Legislature had found the surveyor of the local authority was not sufficiently alive to the sanitary deficiencies and requirements of factories, for by the 4th section of the Factory and Workshop Act of 1878 it is expressly provided that it shall be the duty of the factory inspector to give notice to the sanitary authority of the neglect or default in the factory. The section reads as follows:

"Where it appears to an inspector under this Act that any act, neglect, or default in relation to any drain, water-closet, earth-closet, privy, ashpit, water supply, nuisance, or other matter in a factory or workshop is punishable or remediable under the law relating to public health, but not under this Act, that inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory or workshop is situate, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice and take such action thereon as to that authority may seem proper for the purpose of enforcing the law. An inspector under this Act may for the purposes of this section take with him into a factory or a workshop a medical officer of health, inspector of nuisances, or other officer of the sanitary authority."

It was evidently found, therefore, that the local surveyor was remiss in giving notice or in initiating these inquiries, so he was supplanted, or at any rate the factory inspector was given equal powers of initiating proceedings. But it being still hoped that the local sanitary authority would see that proper sanitary requirements were provided when attention was officially drawn by the inspector to the omission, the power to compel the owner to remedy the default was still left with the sanitary authority. It is common knowledge, however, that in many cases the local sanitary authority for various reasons declined to, or at any rate did not, act, sometimes, no doubt, because the influence of the factory owner was paramount in the borough in which his factory was situated, and sometimes from ignorance. Hence the Legislature had again to make the law more stringent and the Factory and Workshop Act of 1891 was passed. Section 2 reads as follows:

"(1) Section 4 of the principal Act shall apply to workshops conducted on the system of not employing any child, young person, or woman therein, and to laundries.

"(2) Where notice of an act, neglect, or default is given by an inspector under the said section 4 as amended by this Act to a sanitary authority, and proceedings are not taken within a reasonable time for punishing or remedying the act, neglect, or

default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken, and shall be entitled to recover from the sanitary authority all such expenses in and about the proceedings as the inspector incurs, and are not recovered from any other person, and have not been incurred in any unsuccessful proceedings."

In other words, it having been found that the local authority would not do its duty, the factory inspector was given an overriding authority to get the work done. Power is given, it will be noticed, to the factory inspector to take the like proceedings as the sanitary authority might have taken where the sanitary authority had not taken proceedings within a reasonable time to remedy the default previously notified to them.

To find out the powers, therefore, that the factory inspector now possesses, you have only to refer back to the previous Acts to see what powers the sanitary authority previously possessed. Now by the Public Health Act of 1875 and the Factory and Workshop Act, 1878, the local authority had power to order certain work to be done, and the order being made, the magistrates had no power of inquiring into the reasonableness or not of the order, though the court of quarter sessions had; yet it is said when the factory inspector gives the order the magistrates have power to inquire into its reasonableness. In other words it is said that the superior authority is to have less power than the inferior.

The increased powers of the inspector do not end here, however, for the sanitary authorities having evidently excused themselves from carrying out the requirements of the inspector on the ground that a reasonable time had not elapsed to enable them to do so, an Act was passed by which they were to take their proceedings within a month instead of within a reasonable time, and in order that they should not keep the inspectors in the dark as to their intentions they were also bound to give notice to the inspector of the proceedings they were taking; the section reads thus (Factory and Workshop Act, 1895, s. 3):

"(1) Where notice of an act, neglect, or default is given by an inspector under section 4 of the principal Act to a sanitary authority, it shall be the duty of the sanitary authority to inform the inspector of the proceedings taken in consequence of the notice.

"(2) In section 2 of the Act of 1891 for the words 'within a reasonable time' shall be substituted the words 'within one month.'"

What proceedings? How can it be said that proceedings meant or would include deliberations—deliberations perhaps resulting in determination not to proceed. The proceedings referred to seem to me clearly to be proceedings to remedy the neglect or default; in fact, the notice to provide the required accommodation.

What better language could the Legislature have adopted if it intended to give the factory inspectors the power it purports to give them, and I think it did give them? Whether rightly gave them or not is no question for us, as we have only to determine whether the power was given or not, but as the learned counsel ventured to suggest that the Legislature could not have intended to give equal powers to the female factory inspectors as it had given to local surveyors and sanitary authorities. I may add that as their experience is gained like that of male inspectors from a much wider area (namely, all the factories of England) than that of the local authority, whose experience is very likely limited to the one factory in his town, their knowledge is, in my judgment, likely to be much more valuable and reliable than that of any local authority or of the local surveyor of any borough of England.

When the case was first argued before my brother Channell and me I stated that I was of opinion that the order of the factory inspector was subject to the appeal to quarter sessions given to any person aggrieved by an order of a local authority, because the factory inspector has to take like proceedings as the local authority. I am of the same opinion now, but that is not the question we have to determine, which is whether or not the court of summary jurisdiction has power to inquire into the reasonableness of the order of the factory inspector, but as the question of whether "like proceedings" included like "liability to appeal to quarter sessions" was not argued out as if it had been the question in dispute I do not wish to be bound as if I had given judgment on that question.

If it was necessary to show the reasonableness of the requirement of the inspector and the ignorance of the magistrates of the usual accommodation provided in factories, I might add that by a report I have before me I find that whereas one water-closet for every seventy persons was considered by the magistrates sufficient in this case, yet in London and all the principal towns in England one in twenty to one in thirty is the minimum number provided.

With regard to the last part of the sub-section 2 of section 2 of the Factory and Workshop Act, 1891, as to the right of recovering expenses incurred by factory inspectors in taking proceedings being limited to expenses not incurred in any unsuccessful proceeding. I do not feel the same difficulty that some of my brothers have felt. The word "proceedings" is not limited to legal or magisterial proceedings, but includes proceedings taken to remedy defaults (the same that the sanitary authority might have taken)—namely, it may include the carrying out of structural alterations or methods adopted to remedy defects under other sections of the Acts

These alterations or methods may be unsuccessful to remedy the particular defect complained of, and therefore it would be unfair to make the owner of the factory pay for them, and to avoid that unfairness these words have been, it seems to me, inserted, but as I said as to the appeal to quarter sessions, that is not the question we have to determine. I give no opinion upon it.'

For these reasons in my judgment the case must go back to the magistrates and their decision quashed on the ground that they had no power to decide as to the suitableness or sufficiency of the accommodation.

BRUCE, J.—I am of opinion that the judgment of the court should be for the appellant.

I think that the justices had no jurisdiction to hear evidence upon or to decide the question of the suitability or sufficiency of the accommodation existing in the factory.

The offence charged is an offence against the provisions of the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 22.

One difficulty in the case arises from the circumstance that the alleged offence is an offence against the provisions contained in one of the Public Health Acts, while in order to ascertain the method of procedure to be adopted reference must be made to the provisions of the Factory Acts.

It is a little difficult to fit together the two series of enactments. But the best way of arriving at a right conclusion is to consider the various provisions one by one.

The section I have already mentioned—section 22 of the Public Health Acts Amendment Act, 1890—is the first to be considered, and I think that the ultimate decision in the case must depend to a large extent upon the construction of that section. The section

requires by its first sub-section that every building used as a workshop shall be provided with sufficient accommodation in the way of sanitary conveniences. The second sub-section enacts that where it appears to an urban authority on the report of their surveyor that the provisions of the section are not complied with in the case of any building, the urban authority may, if they think fit, by written notice require the owner or occupier of any such building to make such alterations and additions therein as may be required to give such suitable accommodation as aforesaid.

The third sub-section enacts that any person who neglects or refuses to comply with any such notice shall be liable for each default to a penalty not exceeding £20 and to a daily penalty not exceeding 40s.

This section is similar in terms to section 38 of the Public Health Act, 1875, and accordingly it is enacted by the fourth sub-section of the section we have been considering that where that section is in force—and it is in force in the urban district in which the factory in question is situated—section 38 of the Public Health Act, 1875, shall be repealed.

The construction of section 22 demands consideration. I think that the written notice mentioned in the section means a notice to make such alterations and additions as may be required by the notice.

The section does not, I think, point to a notice in general terms stating that the provisions of the section are not complied with, but it points to a specific notice stating the particular alterations and additions which the urban authority on the report of their surveyor require.

If the notice were not a specific notice it would be unreasonable to make a person neglecting to comply with it subject to a daily penalty because, if the notice were only a general notice, the person to whom it was given might not know what were the requirements of the urban authority.

I think that this view of section 22 is supported by the decision of this court in *Bogle* v. *Sherborne Local Board*. That was a decision upon section 36 of the Public Health Act, 1875. The words of that section are not the same as the words of the section now under consideration, but the general scheme of the two sections is the same. The court held that the requirements of a written notice given under section 36 of the Public Health Act, 1875, were conclusive upon the justices, and could only be inquired into on appeal to the Local Government Board under section 268 of the Public Health Act, 1875.

The remedy of a person who is aggrieved by any "requirement" of a local authority under the Public Health Acts Amendment Act, 1890, is given by section 7 of that Act by way of appeal to a court of quarter sessions in cases where there is no appeal to the Local Government Board under section 268 of the Public Health Act, 1875.

As a breach of a "requirement" under section 22 of the Public Health Acts Amendment Act, 1890, involves penalties only, and does not involve the recovery of expenses incurred by the local authority, such as are mentioned in section 268 above referred to, the appeal is, I think, to quarter sessions, and not to the Local Government Board.

I may observe that the very circumstance that an appeal is given to a person aggrieved by a "requirement" of a local authority seems to me to imply that such requirement is treated by the Legislature as an act in the nature of a judgment order or determination which can only be called in question before the appellate tribunal.

I have not overlooked the circumstance that the 22nd section, which I have been considering, contemplates proceedings instituted by the urban authority on the report of their own surveyor, and not on the report of a factory inspector; and section 38 of the Public Health Act, 1875, which was in force prior to its qualified repeal above-mentioned by section 22 of the Public Health Acts Amendment Act, 1890, was to the same effect.

In the year 1878 the Legislature, I suppose because it found the surveyors of local authorities slow to act under the powers conferred upon them by section 38 of the Public Health Act, 1875, thought fit to confer upon an inspector of factories a power similar to that which had been conferred upon the surveyor of a local authority; and by section 4 of the Factory and Workshop Act, 1878 (41 Vict. c. 16), it is provided that where it appears to an inspector under that Act that any act, neglect, or default in relation to any drain, water-closet . . . nuisance, or other matter in a factory is punishable or remediable under the law relating to public health, but not under that Act, the inspector shall give notice in writing of such act, neglect, or default to the sanitary authority in whose district the factory or workshop is situate, and it shall be the duty of the sanitary authority to make such inquiry into the subject of the notice, and take such action thereon as to that authority may seem proper for the purpose of enforcing the law.

Under this section the sanitary authority is authorized to take proceedings under the Public Health Act on the report of a factory inspector.

What proceedings are they to take? I think section 4 of the Act of 1878 points to a proceeding in the nature of a written notice requiring the owner to construct such number of water-closets, earth-closets, or privies for the separate use of each sex as might be required in the notice to be given under section 38 of the Public Health Act, 1875. That section, as I have already pointed out, is now repealed by section 22 of the Public Health Acts Amendment Act, 1890, and it is only necessary to refer to it in order to ascertain the character of the proceedings contemplated by section 4 of the Factory and Workshop Act, 1878.

I have not critically examined section 38, because so far as it relates to the present case it is repealed, and is superseded by the provisions of section 22 of the Public Health Acts Amendment Act, 1890.

But I may observe in passing that, so far as the construction of section 38 of the Act of 1875 is concerned, the observations that I made upon the construction of section 22 of the Public Health Acts Amendment Act, 1890, seem to me to apply. I think it is clear that the requirement contained in the written notice mentioned in section 38 of the Public Health Act, 1875, could not be inquired into by the justices at petty sessions. The person upon whom the requirement was made had, if ordered by the justices to pay a penalty, a right of appeal against the order of the justices under section 269 of the Public Health Act, 1875. But whether on such appeal the reasonableness of the requirement would be inquired into is, I think, exceedingly doubtful. Probably it could not; but it is not necessary to determine this question, because it is quite clear that the 7th section of the Public Health Acts Amendment Act, 1890, gives a direct appeal from the requirement of a local authority.

So far as I have proceeded in examining the Acts of the Legislature they amount to this: By the Public Health Act, 1875, s. 38, a local authority, including an urban authority, was enabled, upon the report of their surveyor, by written notice to require a specified number of water-closets to be constructed in a factory within their jurisdiction;

that requirement, if made, was conclusive upon the justices at petty sessions, who, in the case of a breach of the requirement, had jurisdiction only to adjudicate upon the penalties to be imposed.

By the Factory and Workshop Act, 1878, s. 4, the local authority might be set in motion by a factory inspector, in which case they were empowered to take the same proceedings as if they had been set in motion by their own surveyor. And by the Public Health Acts Amendment Act, 1890, the provisions of section 38 of the Public Health Act, 1875, are repealed in districts in which the Public Health Acts Amendment Act is in force, and its provisions are re-enacted in slightly different words.

Having regard to the difficulty that might arise as to whether an appeal would lie from the order of the justices enforcing a penalty for breach of a requirement made by the urban authority to quarter sessions under section 269 of the Public Health Act, 1875, an express provision was inserted in section 7 of the Public Health Acts Amendment Act, 1890, that an appeal should lie direct from a requirement of a local authority to a court of quarter sessions.

But it is to be observed that in all these cases the local authority or urban authority had a discretion as to whether they would take proceedings or not.

They were bound to make inquiry, but they might if they pleased have refused to act upon the report of their own surveyor or upon the report of the factory inspector.

Apparently in the opinion of the Legislature the local authorities had been reluctant to act upon the report of factory inspectors in cases where proceedings ought to have been taken for punishing or remedying acts, neglects, or defaults under the Public Health Acts. Accordingly by section 2 of the Factory and Workshop Act, 1891, it is enacted that where notice of an act, neglect, or default is given by an inspector under section 4 of the Factory and Workshop Act, 1878, to a sanitary authority, and proceedings are not taken within a reasonable time—*i.e.*, within one month (Factory and Workshop Act, 1895, s. 3), for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for punishing or remedying the same as the sanitary authority might have taken.

What steps could the sanitary authority have taken for punishing or remedying the act, neglect, or default mentioned in the notice given by the inspector? They could have proceeded only under section 22 of Public Health Acts Amendment Act, 1890, by serving a written requirement upon the owner or occupier, and in the event of the requirement not being complied with proceeding before the justices to enforce penalties.

If I am right in the conclusion which I have expressed, that the written requirement of the urban authority was, subject to an appeal to quarter sessions, conclusive as to the requirements contained in it, it seems to me to follow that when the Legislature conferred upon the inspector power to take like proceedings for punishing or remedying the act, neglect, or default that the written requirement of the inspector was intended to have, and has, the same force or effect as if the written requirement had been made by the urban authority.

I can give no other meaning to the words "like proceedings." If the urban authority do not act within one month after notice of an act, neglect, or default is given by the inspector, then the inspector shall be armed with their powers; he is put into their place and may take proceedings for punishing and remedying the act, neglect, or default the same in character as the sanitary authority might have taken.

Of course the act, neglect, or default must be a real act, neglect, or default, but the question is, who is to determine whether an act, neglect, or default exists, and if it exists, how is it to be remedied? I think this power is conferred upon the factory inspector, subject to the right of appeal to quarter sessions against his requirement.

I think the appeal must exist from the requirement of the inspector, just as an appeal might be brought from the requirement of the urban authority if they had by written notice made a requirement.

When section 2 of the Factory and Workshop Act, 1891, enables the inspector to take the like proceedings as the sanitary authority might have taken, I think that means proceedings subject to the same conditions and the same right of appeal as proceedings taken by the sanitary authority.

To hold otherwise would be to make the proceedings taken by the inspector different in character from proceedings taken by the urban authority and to confer upon the inspector more absolute powers than those conferred upon the urban authority.

The decision of the Court of Appeal in the case of *The Ganges*, 5 P. D. 247, 28 W. R. Dig. 67, is in point. By the County Courts Admiralty Jurisdiction Act, 1868, s. 25, it was enacted that the Court of Passage of Liverpool should, upon an Order in Council being made, have in admiralty matters the like jurisdiction, powers, and authorities as were conferred upon the county court.

No express provision was made for an appeal from the Passage Court. Yet it was held that the words "like jurisdiction" gave the same right of appeal from the Passage Court as existed from a county court in an admiralty matter—that is, an appeal not to the Court of Queen's Bench, but to the Court of Admiralty.

I see nothing unreasonable in the construction which I think ought to be put upon the statutes. A factory inspector ought to be competent to determine such a question as the number of water-closets required for the women employed in a particular factory; and having regard to the fact that in many urban districts owners of factories are largely represented on the borough bench, the Legislature may have had good reason for allowing the appeal to be made from the "requirement" of an inspector to the quarter sessions and not to petty sessions.

PHILLIMORE, J.—This case has stood for argument three times. On the first occasion it was heard by my brothers Grantham and Channell, and I believe they differed in opinion. The second hearing was before the late Lord Chief Justice and my brothers Grantham, Bruce, and Darling, and myself. At the close of this argument my opinion was in favour of the respondents. As to my colleagues, I will only say this, that if I had then stood alone there would have been no necessity for a third argument.

Now, however, after the third hearing I understand that my lord and my brothers who with me formed the third court are in favour of the appellant; and it is only necessary to state as briefly as I can why I still remain of opinion in favour of the respondents. I agree with some of the contentions put forward on behalf of the appellant. I think that an urban sanitary authority can, "when it appears" to such authority on the report of its surveyor that the sanitary accommodation is insufficient, make a requirement which is in substance a judgment, and which subject to appeal to quarter sessions is conclusive, compelling the factory owner to provide further specified accommodation under penalties; and, which is the same thing, that upon a summons for disobedience to a requirement the justices have no

power to inquire into the reasonableness of the requirement, but only whether it was in fact made and whether it has or has not been complied with (53 & 54 Vict. c. 59, s. 22).

I think, further, that a factory inspector, "when it appears" to him or her—the same phrase, "when it appears," being again used—may give a notice to the urban sanitary authority complaining of "any act, neglect, or default in relation to any . . . water-closet" (41 Vict. c. 16, s. 4), and that a deficiency of water-closets is "a neglect or default in relation to a water-closet," though the respondents contended otherwise, and that if the urban sanitary authority does not take, within a month, proceedings "for punishing or remedying the neglect or default," if neglect or default in fact there be, the factory inspector has power to make that formal requirement under a penalty which the urban sanitary authority ought to have made, and in due time to issue a summons to enforce it. In conceding this last point to the argument of the appellant I believe I am going further than a weighty authority * would go. But I think upon the whole it is right.

There, however, I stop. Primarily it is the function of the judicial tribunal upon a summons for an offence to determine upon all the elements which go to make up the alleged offence. Express words are needed to withdraw any part of the alleged offence from the determination of the tribunal.

In cases under the sanitary Acts it is often the fact that some part of the case is withdrawn from the justices and given to be decided by the sanitary authority. The Legislature has so provided, and has used apt words for the purpose, saying not "where so-and-so is the case," which would leave the point to the tribunal, but "where it appears to the authority that so-and-so is the case," which leaves the point to the authority.

There is, however, no rule of law that in all sanitary Acts the sanitary requirement must be left to the sanitary authority to determine upon. If the Legislature ceases to use apt words for the purpose the sanitary authority does not get the power.

In this very matter it is conceded that a rural sanitary authority would have no such power (58 & 59 Vict. c. 37, s. 35).

Now, "where it appears" to the urban sanitary authority it may make a requirement, "where it appears" to the inspector he may give a notice; but when he desires to issue a requirement, the condition precedent is that he shall have given notice, not of what appeared to him to be an act, neglect, or default, but of what really was an act, neglect, or default (54 & 55 Vict. c. 75, s. 2). Again, what passes to him? the power of punishing or remedying—what? an imaginary or constructive act, neglect, or default? No; a real act, neglect, or default. If there is no such real act, neglect, or default, there is nothing to punish or remedy.

There is no trace of any provision anywhere making the opinion of the inspector conclusive; and direct legislation is required to make it so. In other words, the factory inspector can in certain circumstances make a requirement which the factory owner will neglect at his peril; but just as the inspector cannot require till he has given notice to the urban sanitary authority and waited a month, so he cannot require unless in fact there is a real act, neglect, or default; and just as he must prove his notice and his month before the justices, so he must prove the act, neglect, or default. If he does the factory owner will be in peril, for the penalty will begin from the date fixed in the requirement, and not from the date of the conviction by the justices.

This is my view upon consideration of the language of the several Acts. I may add that I venture to think this conclusion gives considerable power to the inspector, and if open to some practical objections is not so objectionable as the other. In the first place, it would be monstrous to let a single factory inspector determine such a point without appeal, more especially as he is not apparently bound to hear the factory owner before making the requirement. I understand that the majority of my colleagues agree that that would be monstrous, but think that by implication there must be an appeal from the inspector to quarter sessions. I am glad that they think so, and I do not dissent. But, secondly, what is the use of bringing in the urban sanitary authority if it is merely to be given a chance to comply with the inspector's mandate, with the knowledge that if it does not it will be overruled and brought into contempt? And why interpose a month's delay—for pure form's sake—in what may be an urgent matter? If the inspector is really to determine let him do so at once. Thirdly, I can understand that if the urban sanitary authority should be supine it may be desirable to allow some other authority to do that which a member of the public could do—namely, prosecute, and thus submit the matter to the decision of a third body, the justices. But why let the single inspector overrule the whole sanitary committee and its surveyor? Again, there may be reasons for giving less power to a rural sanitary authority than to an urban sanitary authority; but the inspector is the same inspector in rural as in urban districts. In a rural district he, even if he acts with the rural sanitary authority, cannot decide; he can only prosecute. In urban sanitary districts he is to be allowed to decide, and to do this by overruling the apparently more important body. Upon the whole I should conclude in favour of the respondents, and say that the justices were right in admitting evidence to show that there was in fact no neglect or default on the part of the factory owners.

Case remitted to justices with direction to convict.

Solicitor for appellant, *The Treasury Solicitor.*

Solicitor for respondents, *Percy Gates*, for *G. C. Bantoft*, Ipswich.

* The learned judge was understood to refer to Lord Russell of Killowen, L.C.J.

Court of Appeal.

App. Bankruptcy.
(Rigby, Vaughan Williams, and Stirling, L.JJ.)

Feb. 22.

In re LAKE.
Ex parte DYER. (*a.*)

Bankruptcy—Deposit of securities to make good a breach of trust—Fraudulent preference—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *s.* 48.

A payment by a bankrupt trustee to his cestui que trust, *made with a view to make good his breach of trust, is not a fraudulent preference within section* 48 *of the Bankruptcy Act,* 1883.

Decision of Wright, J. (ante, *p.* 280), *reversed.*

This was an appeal from a decision of Wright, J. (reported *ante*, p. 280).

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

The motion in the court below was made by the trustees of the marriage settlement of Colonel and Mrs. Dyer for a declaration that four mortgage debentures of the Didcot, Newbury, and Southampton Railway Co. were handed over by the bankrupt Benjamin Greene Lake, while one of the trustees of the said settlement, to his co-trustees, to make good a breach of trust, and that such delivery or transfer did not constitute a fraudulent preference.

The marriage settlement in question was executed in 1869. Lake was appointed one of the trustees in 1898. He opened an account for the trust at Child's Bank and obtained an authority from his co-trustees enabling him to draw on it in his own name alone. He realised the trust estate and invested the proceeds in other than trust securities.

By the beginning of the year 1900 the books of the bankrupt showed that he was indebted to the trust estate to the extent of £1,200.

Upon the 7th of May, 1900, he deposited in the box containing the deeds and securities belonging to the trust estate four debentures of the Didcot, Newbury, and Southampton Railway Co., which were his own property, and were standing in his own name.

The deposit was accompanied by a memorandum which was signed by the bankrupt and ran as follows: "I have just learnt that there is something like £1,000 of Dyer's Trust capital in the hands of the late firm. Had I known this I could not have permitted my daughter to have accepted their most generous help without which our Streatham home could not have been secured. As I am a trustee the debt is a personal one, and one which I can properly make good out of my own assets. I therefore deposit £2,000 Didcot, Newbury, and Southampton Railway four per cent. debenture stock as security for whatever may be found due. Its intrinsic value now is from sixty to seventy per cent., and I have quite recently been offered and have refused forty."

A judgment had been signed against the debtor on the 1st of May, and a bankruptcy notice founded on that judgment was served upon him on the 9th of May. He committed an act of bankruptcy by failure to comply with such notice, and a petition was presented against him on the 2nd of June upon which he was ultimately adjudicated bankrupt.

After his bankruptcy the other trustees of the Dyer settlement requested the Didcot, Newbury, and Southampton Railway Co. to register the debenture stock in their names. The company refused to register them without the consent of the trustee in bankruptcy. The trustee in bankruptcy refused his consent, whereupon these proceedings were commenced.

It was admitted for the purposes of the motion that there had been a number of breaches of trust committed by the bankrupt in respect of other estates, and that in some cases he made restitution, but that in the majority of cases he had not done.

Wright, J., refused the application, holding that the relation of debtor and creditor existed between trustee and *cestui que trust* and that on the facts the debtor's view had been to prefer a particular trust estate from motives of gratitude and not to make good a breach of trust either from a sense of duty or from a fear of criminal proceedings.

The settlement trustees now appealed.

Vernon Smith, K.C., and *Everard Colt*, for the appellants, contended that the relation of debtor and creditor did not exist between trustee and *cestui que trust*, and that even if it did a trustee owed a higher duty to his *cestui que trust*.

They referred to *Ex parte Stubbins*, 29 W. R. 653, 17 Ch. D. 58; *Ex parte Taylor*, 35 W. R. 148, 18 Q. B. D. 295; *Sharp* v. *Jackson*, [1899] A. C. 419; *In re Blackpool Motor Car Co.*, *ante*, p. 124, [1901] 1 Ch. 77.

Rawlinson, K.C., and *Northcote*, for the trustee in bankruptcy.

RIGBY, L.J., said that it was necessary that the trustee in bankruptcy should make out that the dominant motive of the bankrupt was the desire to prefer the favoured creditor over less favoured ones. In his opinion the memorandum which had been referred to as proving that fact was not sufficient proof. It was admitted that the debtor must have been moved by mixed motives. His lordship did not doubt that he had a desire to make good his breach of duty as trustee, and that he had also a desire to stand on a better footing with the *cestui que trust* who had treated him with great kindness and whom he had so heartlessly defrauded. The appeal must therefore be allowed.

VAUGHAN WILLIAMS, L.J., took the same view. If on the eve of bankruptcy a debtor makes a voluntary payment, a presumption arises that it is made with a dominant view of preference. No express intention is necessary. But if there is proof that the payment is made in order to make good a breach of trust the presumption is negatived and the *primâ facie* inference of a view to prefer is dislodged. The inference is not conclusive, but you must look at all the circumstances. Looking at the circumstances of this case to see if there is anything to get rid of the *primâ facie* inference that the deposit was made with a view to make good the breach of trust, there was nothing in the memorandum to negative that inference. On the contrary the very fact of kindness might quicken a sense of duty to free himself from the shame of a breach of trust. His lordship, therefore, came to the conclusion that the deposit was made under a sense of obligation to make good the breach of trust.

STIRLING, L.J., agreed, and said that one of the elements to be taken into consideration was the state of mind of the debtor. As Lord Esher said in *Ex parte Taylor*, 18 Q. B. D., p. 299, he "may have been doing that which, if he had a scrap of conscience left, he ought to have done—repair his former evil deed. If you come to the conclusion that that was the dominant motive in his mind, you must hold that he made the payment, not with a view of preferring the person to whom he made it, but in order to satisfy his own conscience." In his lordship's opinion, the memorandum showed the dominant motive. The debtor had received benefits from the persons defrauded, and anyone with any conscience would feel the strongest shame and wish to repair the evil.

Appeal allowed.

Solicitors, *Peacock & Goddard*; *Lee & Pemberton*.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) — Jan. 14, 29.

YSTRADYFODWG AND PONTYPRIDD MAIN SEWERAGE BOARD *v.* ASSESSMENT COMMITTEE OF NEWPORT UNION. (*a.*)

Poor law—Rating—Exemption of underground sewers—Extent of exemption.

Where exemption from rateability is claimed for an underground sewer vested in a public body, it must be

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

shown, first, that the sewer is quite underground, so that the surface under which it runs is not occupied or in any way affected by it; and, secondly, that no payment is made to the owners of the sewer for the use of it by others.

Decision of the Queen's Bench Division (48 *W. R.* 382, [1900] 1 *Q. B.* 365) *affirmed.*

Appeal from the judgment of a Divisional Court (Channell and Bucknill, JJ.), on the hearing of a special case stated by the quarter sessions for the county of Monmouth on the hearing of a rating appeal: 48 W. R. 382, [1900] 1 Q. B. 365.

The Ystradyfodwg and Pontypridd Main Sewerage Board were the governing body of a united drainage district, constituted by virtue of a provisional order of the Local Government Board.

Pursuant to the powers vested in them by the said order they designed and constructed, and had since always maintained, a certain sewage carrier for the use of their district, and had erected, maintained, and worked such works, machinery, and plant as were required for conveying the sewage of the district to the sea.

The total length of the sewage carrier was about 17¼ miles, whereof nearly 2½ passed through or over land situate in the parish of Rumney, which land (excepting such part as forms part of the foreshore of the Bristol Channel) had been previously to the construction of the sewage carrier, and still was, rated and assessed for the relief of the poor. The construction of the sewage carrier within the said parish was as follows: One hundred and eighty-two yards of iron pipes carried on concrete arches above the surface of the ground, 1,021 yards of pipes laid below the surface and ordinary level of the ground, 1,890 yards carried below the surface of the ground, but covered by an artificial embankment of varying height which rose above the level of the adjacent land, and 1,246 yards of pipes (called in the special case the outfall) passing partly over and partly beneath the surface of the foreshore of the Bristol Channel. In connection with the outfall certain works had been erected by the board.

For the purpose of obtaining money for making and maintaining the sewage carrier and the necessary works appurtenant thereto, the board, in accordance with the provisions of the Public Health Act, 1875, borrowed the sum of £156,000 from the Public Works Loan Commissioners, to be repaid with interest at the rate of 3½ per cent. per annum by equal annual payments extending over thirty years. The proportion of the annual repayment payable in respect of the portion of the sewage carrier situate in the parish of Rumney amounted to the sum of £1,210. This sum was raised by means of rates.

Under the Local Government Board's Provisional Orders Confirmation (No. 8) Act, 1896, the sewerage board obtained powers enabling them with the consent of the Local Government Board to allow the sewers of the council of any county, borough, or district to communicate with the sewage carrier vested in them. In pursuance of these powers, and with the consent of the Local Government Board, agreements had previously to the date of the making of the assessment now appealed against been made with the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation, whereby the sewage of the districts under the control of the said local bodies was to be received and carried away by the sewage carrier of the board upon payment to the board by the said local bodies of sums levied upon the respective rateable values of the said districts at the rate of 3¾d., 4d., and 3½d. in the pound per annum respectively. In consequence of receiving these sums from the three said local bodies the board were enabled to raise sufficient money for the purpose of repaying the annual instalments of the money borrowed as aforesaid to make and maintain the sewage carrier and the works, machinery, and plant connected therewith in the parish of Rumney by two precepts at the rate of 2½d. in the pound in each year upon the Ystradyfodwg and Pontypridd area. The rate in the pound in the last-mentioned area would have had to be much increased in order to prevent the board from incurring loss owing to their yearly expenditure in connection with the sewage carrier if the money received by the rates levied outside the said area as aforesaid, being money paid for the use of the sewage carrier, had not been available for use by the board.

The sewerage board were assessed by the assessment committee for the Newport Union in respect of that portion of the sewage carrier, with the outfall and appurtenances thereof, which was situate in the parish of Rumney, in the sum of £800 gross estimated rental and £700 rateable value.

The board appealed against this assessment to the quarter sessions. It was proved before the quarter sessions that, as far as the parish of Rumney was concerned, the sewage carrier conveyed the sewage from distant towns, places, or houses through the parish, and there was no connection to or with the sewage carrier from any lands, houses, or buildings in the parish. It was also proved that the embankment varied in height from 18in. to 6ft. above the ground through which it passed; that it was covered throughout by a mound of earth which was grazed over except where a footpath ran over the top of the mound and where manholes were placed; that it was not separated by any fence from the adjoining land, and that cattle had full access upon and across it throughout its entire length. It was also proved that the land upon which the embankment lay was previously to its formation assessed and rated to the relief of the poor, and that the said land remained so rated and assessed, no change having been made by reason of the making of the embankment in the rating and assessment.

Upon these facts the quarter sessions found that the portions of the sewage carrier which lay under the surface of the ground or in the embankment were not liable to be rated at all, but that the gross estimated rental of the other portions of the sewage carrier in the parish of Rumney was £145 (whereof £40 was the gross estimated rental of the outfall and works in connection therewith), and that the rateable value thereof was £105, and they accordingly allowed the appeal to this extent, subject to a case for the opinion of the Queen's Bench Division.

The Divisional Court were of opinion that the portions of the sewage carrier which lay under the surface of the ground and in the embankment were liable to be rated as well as the portion which lay above the surface, and they reversed the decision of the quarter sessions.

The sewerage board appealed.

C. A. Cripps, Q.C., Boyle, Q.C., and *Ram, Q.C.,* for the appellants.

A. T. Lawrence, Q.C., Hugo Young, Q.C., and *Morton Brown,* for the respondents.

The following cases were cited: *London County Council* v. *Churchwardens of Erith,* and *Churchwardens of West Ham* v. *London County Council,* 42 W. R. 330, [1893] A. C. 562; *Reg.* v. *Metropolitan Board of Works,* 17 W. R. 527, L. R. 4 Q. B. 15; *Metropolitan Board of Works* v. *West Ham,* 19 W. R. 246, L. R. 6 Q. B. 193; *Mayor, &c., of Leicester* v. *Beaumont Leys,* 63

L. J. M. C. 176; *Holywell Union* v. *Halkyn Drainage Co.*, [1895] A. C. 117, 43 W. R. Dig. 131.

Cur. adv. vult.

Jan. 29.—ROMER, L.J., read the judgment of the court as follows: Since the decision by the House of Lords in the *Erith* and *West Ham cases*, relied on by the appellants, we think it must be taken that the authorities which decided that certain underground sewers of public bodies were not liable to be rated are not based on sound principle and must be regarded as anomalies in rating law. These authorities will certainly not be extended; and to enable new sewers, which would be *primâ facie* rateable according to ordinary principles, to escape from liability, it must be shown by their owners that they fall strictly within the narrow limits of the authorities we are referring to. On examination of the case of *Reg.* v. *Metropolitan Board of Works*, which is the leading one of the authorities in question, it will be found that the sewers there held not rateable had the following features: (1) They were quite underground, so that the surface under which they ran was not occupied or in any way affected by them, and (2) no payment was made to the owners of the sewers for the use of them by others. We think that all sewers which on general principles are *primâ facie* rateable, and which are not protected by prior decisions, should be held rateable, unless the two features above mentioned are found to exist in relation to them. With regard to the first feature, it is true that in the case of the *Metropolitan Board of Works* v. *West Ham* it was ruled that for rating purposes no distinction existed between a sewer carried underground and one carried upon an embankment; but after the decision of the House of Lords above mentioned, and the observations of Lord Herschell, L.C., at p. 600 of the report of that decision, we think it can no longer be considered that that ruling is law. With regard to the second feature, it appears to us from the judgment of the court in the case of *Reg.* v. *Metropolitan Board of Works* that that feature was treated as of great importance. In the judgment of the court delivered by Lush, J., he observes significantly that the sewers he was dealing with were "not at present the subject of a beneficial occupation," and he proceeds to say that "no payment is made to the board for the use of them." We gather that if any such payment had been made the decision would have been the other way. Is is true, judging from more recent authorities, that the judgment ought not to have been based on such a distinction as that pointed out; but the appellants here cannot take advantage of that error on the part of the judges who decided the case in order to extend in their favour the ambit of an anomalous case based on no sound principle. And further, we cannot find in any reported case where sewers have been held not rateable that it has been proved that payments were being made for the use of those sewers by others, and that this fact has been called to the attention of the court. It was suggested by the appellants that by the abovementioned decision of the House of Lords a principle was laid down that no sewers are rateable when the surface is rated both before and after the sewers are made, and the surface assessment remains unaltered. We cannot find that any such principle was there laid down. Lord Herschell, L.C., whose reasons for the judgment of the House were concurred in by all the members present, stated at p. 598 of the report why the older cases, which decided that underground sewers were not rateable, were allowed to stand. He, in substance, pointed out that those sewers had for a long period before the decisions in question been deemed free from rateability, and that it would not be just to make them rateable after they had been for so long a period deemed free from rateability. And he further observed that until the sewers in question (which in fact were wholly underground) were made no rateable subject-matter existed where the sewers were; so that if the sewers were abandoned the rateability of the places where they existed would cease. And we think it is with reference to these observations that he says, on p. 600, that he had already stated the only ground on which the exemption of the sewers generally could, in his judgment, be rested. We can find nothing in his address to justify the assertion that he formulated or stated the principle urged by the appellants. Having regard to what we have already said, it follows that the sewage carrier in the case now before us ought to be rated, and that the appeal should be dismissed. This carrier is new, and cannot claim an exemption from rateability for a long period. It is to a great extent above or on the surface, and even as to the part not immediately on the surface we cannot say that it is so far below the surface as in no way to affect it. Moreover, in this case we think that the sewage carrier in the parish of Rumney, being one continuous construction, should be dealt with as a whole, and that it would not be right, as to the part below the surface, to dissever the sewer, and to say as to that part that it is to be taken as an independent sewer, and be separately treated for the purpose of rating. In respect of the above matters this sewage carrier does not fall within the protection of the anomalous authorities we have referred to, and on principle it clearly ought to be rated. Moreover, in respect of another matter, it is not within the last-mentioned authorities, for it is stated in the case that the owners, the appellants, receive substantial yearly payments from other bodies—namely, from the Dinas Powis Urban District Council, the Caerphilly Urban District Council, and the Cardiff Corporation—for the use of the sewage carrier by those bodies, and the cost of constructing and maintaining the carrier is to a large extent defrayed out of these payments.

The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Wrentmore & Son*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

Solicitors for the respondents, *Warriner & Co.*, for *Davis, Lloyds, & Wilson*, Newport, Mon.

App. Bankruptcy. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — Jan. 18.

In re TOMKINS & CO.
Ex parte THE DEBTOR. (*a.*)

Bankruptcy—Petition by company—Officer of the company—Amendment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.

Any person bonâ fide *chosen by a company to be their agent for the presentation of a bankruptcy petition becomes an officer for that purpose.*

Where, therefore, the person so nominated is only a clerk, and not in any ordinary sense an officer of the company, he thereby becomes sufficiently for the purposes of section 148 *of the Bankruptcy Act*, 1883, *an officer of the company to present the petition, although his appointment under the seal of the company was only made subsequently to the presentation of the petition.*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

This was an appeal from an order made by Mr. Registrar Linklater giving liberty to the petitioning company to amend their petition, and the question raised was whether a clerk was an officer of the company for the purpose of presenting a petition in bankruptcy.

On the 22nd of September, 1900, Eastwood & Co. (Limited) presented a petition in bankruptcy against Tomkins & Co. in respect of a judgment debt for £76.

The acts of bankruptcy alleged in the petition were that executions had been levied by seizure and sale of the goods of the debtors under two writs of *fi. fa.* which goods were sold by the sheriff on the 11th and 20th of July, 1900.

The petition was signed as follows: "For Eastwood & Co. (Limited), Henry J. Byrne, duly authorized under the seal of the company."

It appeared that Byrne was a clerk in the employ of the company and that he did secretarial work for the company, and by a resolution of the directors passed on the 10th of November, 1892, he was authorized under the seal of the company to take all necessary steps in bankruptcy against debtors to the company on behalf of the company.

At the hearing of the petition on the 22nd of November, 1900, the objection was taken that Byrne was not an officer of the company within section 148 of the Bankruptcy Act, 1883, which provides that for all or any purposes of the Act a corporation may act by any of its officers authorized in that behalf under the seal of the corporation.

The learned registrar found as a fact that Byrne was not an officer of the company within the meaning of section 148, and ordered that the petitioning company should be at liberty to amend their petition by authorizing an officer of the company under seal to execute the petition notwithstanding that the acts of bankruptcy would not be available for a fresh petition.

From this order the debtors now appealed.

H. T. Kemp, for the debtors, referred to *Ex parte Culley*, 27 W. R. 78, 9 Ch. D. 307; *Ex parte Dearle*, 33 W. R. 440, 14 Q. B. D. 184; *Ex parte Dunhill*, [1894] 2 Q. B. 234; *In re Maund*, 43 W. R. 207, [1895] 1 Q. B. 194.

P. M. Francke (with him *A. H. Carrington*), for the petitioning creditors, referred to *In re Collier*, 8 Morr. 80; *In re Whitley*, 8 Morr. 149.

RIGBY, L.J., said that in this case the amendment to the petition made by the registrar had been objected to on the ground that according to the true construction of section 148 of the Bankruptcy Act, 1883, it was necessary that any person appointed to present a petition in bankruptcy on behalf of the company should be an officer of the company, and that, as there was no officer of the company at the time when the petition was originally presented, there ought not now to be any substitution of an officer of the company. In the view which he took of this case it was not important to go into the question of amendment. Section 148 merely said that a company may act by any of its officers, and did not mean that the person appointed to act on behalf of the company must be an officer. He did not think that the Legislature by section 148 intended to impose upon a company the task of appointing a person who within any definition of the term must be an officer. No doubt when they were dealing with other enactments, when they were dealing with applications to make an officer of a company liable, it was necessary to determine what was meant by an officer and who was an officer; but he considered that any person *bonâ fide* chosen by a company to be their agent for the presentation of a petition in bankruptcy became thereby an officer of the company for that purpose, and that the person who was originally nominated by the company in this case, though only a clerk of the company and not in any ordinary sense an officer of the company before he was appointed under the seal of the company, became thereby sufficiently for the purposes of this Act an officer of the company to present the petition. It followed that the petition was a good petition from the first and did not require amendment, and that the application to amend was misconceived and unnecessary. It followed also that the registrar was mistaken in considering himself bound to allow the amendment, and the amendment ought not to have been made. Under these circumstances the debtors complained of the amendment. Suppose the amendment was wrong, what good did they get by that? Nothing. The petitioners said that the amendment was good. They could get no good by that, because the petition was good before. He thought that the amendment was unnecessary, but with regard to costs both parties were wrong to a certain extent—the debtors in putting a strained construction on the Act, and the petitioning creditors in insisting upon the amendment. There would therefore be no costs of the appeal. The petition being good from the first, it would come before the registrar in the ordinary course, and he would have to proceed upon it as a good petition.

VAUGHAN WILLIAMS and STIRLING, L.JJ., agreed.

Appeal allowed.

Solicitors, *Charles Robinson & Co.; H. P. Davies.*

From Chan. Div. (Rigby and Romer, L.JJ.) — JAN. 11.

ASHTON VALE IRON CO. v. CORPORATION OF BRISTOL. (a.)

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 92, 123—*Notice to treat—Withdrawal of notice—Power to give fresh notice.*

Where notice to treat for the compulsory purchase of land is given under the Lands Clauses Act, and such notice is subsequently withdrawn, a second notice to treat may be given in respect of the same property, or a part thereof.

This was an appeal against a decision of Byrne, J., on the 11th of August last, the question being as to the validity of a notice to treat for the compulsory purchase of land belonging to the plaintiff company given by the defendant corporation under the powers conferred on them by the Bristol Dock Act, 1897, with which the Lands Clauses Consolidation Act, 1845, was incorporated.

The question was whether when a notice to treat has once been given and withdrawn, as it may be under section 92, when the landowner has given a counter-notice requiring the whole of his property to be taken, the company or corporation giving the first notice has power to give a second notice to treat for the same property or a smaller part of it.

On the 2nd of May, 1899, the corporation gave notice to the plaintiffs to treat for a part of their land.

On the 18th of May, 1899, the plaintiffs gave a

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

counter-notice requiring the corporation to take a larger portion of their land.

On the 8th of December, 1899, the plaintiffs issued a writ in an action for the determination of the question whether the defendants were entitled to take a part only of the plaintiffs' land.

On the 12th of December, 1899, the corporation served a notice withdrawing their original notice to treat, and on the 16th of December they served on the plaintiffs a second notice to treat in respect of the same land.

On the 4th of January, 1900, the plaintiffs served a second counter-notice under protest.

On the 10th of February, 1900, the defendants gave notice to summon a jury to assess the compensation.

On the 26th of February, 1900, a motion in the action was heard by Byrne, J.; but before he had pronounced his judgment the corporation on the 5th of March withdrew their second notice to treat, and on the next day they served a third notice to treat applying to the same property with some exceptions.

On the 26th of March, 1900, the plaintiffs served a third counter-notice under protest.

Byrne, J., held that the corporation had power to withdraw their notice to treat and that their third notice to treat was a valid notice.

The plaintiffs appealed.

A. T. Lawrence, Q.C., and *Leslie*, for the plaintiffs, contended that after the withdrawal of the first notice the compulsory powers of the corporation were at an end.

Cripps, Q.C., *Freeman, Q.C.*, *Lyttelton, Q.C.*, and *E. S. Ford*, for the corporation, argued that if the notice was not accepted by the landowner it was reduced to a nullity, and that the landowner was sufficiently protected by the restriction imposed by the Act (section 123) as to the time within which the compulsory powers might be exercised.

RIGBY, L.J., said that the first notice was met by a counter-notice requiring the corporation to take the whole of the property under section 92 of the Lands Clauses Consolidation Act. That entitled the corporation to withdraw their notice to treat. It was not necessary to consider what was the exact meaning of withdrawing a notice in every possible case, but at any rate after the counter-notice had been served the corporation were entitled to withdraw their notice, and did so. The effect of that was to relegate the corporation to the position they were in before the first notice was given. They had therefore a right to serve the second notice. The second notice was also met with a counter-notice, which entitled the corporation to withdraw. They did withdraw, and the result was the same as in the case of the first notice. Then the third notice was given, which was now the only notice in existence. The other notices had been swept away by the act of the persons who withdrew them. His lordship then examined the terms of the third notice, and held that it was valid.

ROMER, L.J., said that it was contended that after the corporation had given their first notice, and had withdrawn it, their powers were at an end. It was true that if promoters gave notice to treat to a landowner in respect of his land they could not go back from that notice if the landowner insisted upon holding them to it; but if the landowner, for any good reason, permitted the promoters to withdraw or said that the notice was bad in any way his lordship saw no reason why, if that notice was withdrawn, and the time allowed the promoters for the exercise of their compulsory powers was still running, they might not serve a fresh notice. It was admitted that in one case where promoters had given a notice to treat they could withdraw—viz., where the landowner required other lands to be taken as being part of the lands which the promoters were bound to take. The corporation, therefore, had power to withdraw the earlier notices in this case, and the effect of that was to put them in the same position as if no notice had ever been given. It could not be said that the promoters by withdrawing had elected never again to give a notice to treat in respect of the same piece of land. At the most it could only be said that the promoters had not elected at that time to go on with their notice at the risk of having to take the lands comprised in the counter-notice. It was conceivable that at a later time they might elect to run that risk. The appellants' contention must go to this length, that if a notice to treat was withdrawn because it was said by the landowner to be invalid the power of the promoters to take the land would be absolutely gone even though the original notice was shown to be valid. It was to be borne in mind that a notice to treat was a mere indication to the landowner that the promoters desired to take the land and wanted the landowner to have the money payable to him duly ascertained so that the purchase might be completed. The appeal would be dismissed.

Appeal dismissed.

Solicitors, *Robbins, Billing, & Co.*, for *Abbot, Pope, Brown, & Abbot*, Bristol; *Robins, Hay, Waters, & Hay*, for *Daniel Travers Burges*, Bristol.

High Court of Justice.

Chan. Div. } Dec. 12.
Byrne, J. }

In re HAYWARD.
TWEEDIE *v.* HAYWARD. (*a.*)

Executor — Right of retainer — Marriage settlement — Covenant to pay money after decease of testator — Insolvent estate—Right of trustee to sue.

The executor of an insolvent estate, being also tenant for life of a sum covenanted to be paid by the testator's executors or administrators in his marriage settlement, cannot retain such sum out of testator's assets where there are trustees of the settlement who have the legal right to sue for the said sum so covenanted to be paid.

In re Dunning, Hatherley *v.* Dunning, 33 *W. R.* 760, 54 *L. J. Ch.* 900, *followed.*

Loomes *v* Stotherd, 1 *Sim. & S.* 458, *discussed.*

Further consideration.

This was a point touching the right of retainer of an administratrix of the will annexed, which had been referred to the judge by the master on the further consideration of an administration action for the administration of the testator's estate, in which Messrs. Tweedie, suing on behalf of themselves and all other creditors, were plaintiffs, and the widow of the testator, who was also his executrix and devisee of his real estate, was defendant.

The facts of the case were as follow: By a settlement made on the marriage of testator and defendant the testator (Hayward) covenanted with the trustees thereof, who were the said plaintiffs, that his executors or administrators should pay to them the sum of £5,000 with interest for the same at the rate of £5 per cent. per annum from the day of his

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

death, on the trusts therein mentioned, under which trusts the defendant was, in the events that had happened, entitled to a life interest. And the deed empowered the executors or administrators of Hayward to pay the whole or part of the amount to the trustees immediately after Hayward's decease. There were no children of the marriage. Hayward died leaving an insolvent estate, having by his will made his wife his residuary legatee, but appointing no executor. After his death an order was made on the 27th of October, 1896, for the administration of his estate, and the usual accounts and inquiries were directed. Administration with the will annexed had been granted to the widow.

The defendant as widow, personal representative, and devisee of Hayward, claimed to retain the sum of £5,000 out of his real and personal estate on behalf of herself and the trustees of the settlement in preference to the other creditors. The debt had been proved for by the plaintiffs, and £500 had been allowed in respect thereof without prejudice to the defendant's claim.

The facts relating to the certificate are more fully set out in the judgment.

Norton, Q.C., and *Mark Romer*, for the creditors, having the conduct of the said proceedings.—The widow is not entitled to retain the sum as she has not the right to sue for it. The right to sue is in the trustees: *In re Dunning, Hatherley* v. *Dunning*, 33 W. R. 760, 54 L. J. Ch. 900.

Rowden, Q.C., and *J. G. Wood*, for the defendant.—When an executor is also a trustee of the debt he is bound to exercise his right of retainer. In any case an executor may retain out of assets as well a debt due in trust for himself, as a debt due to himself: *Cockcroft* v. *Black*, 2 P. Wms. 299; *Loomes* v. *Stotherd*, 1 Sim. & St. 458. In the case of *In re Dunning* the solicitor was not a trustee. It is not possible to treat a defaulting solicitor or a debtor as a trustee. In fact, Cotton, L.J., in his judgment states that no doubt existed as to the right of a trustee to retain.

Norton, Q.C., replied.

BYRNE, J.—In this case a question arises as to the right of the executrix to retain in respect of a life interest to which she is entitled. There was a covenant with trustees in a settlement that in case the intended marriage should take place the executors and administrators of the husband should, within six calendar months from his death, pay the trustee or trustees the sum of £5,000 with interest for the same at the rate of 5 per cent. per annum from the day of the death of the husband, with power for the executors and administrators to pay the trustee or trustees part or the whole of the said sum of £5,000 immediately after the decease of Hayward with interest thereon to the date of payment. Then there were trusts declared with reference to the £5,000 under which, in the events which have happened, the wife became entitled to a life interest in the fund. An administration action has been brought with reference to the husband's estate and the master has made a certificate in which he finds that claim No. 44 by "Richard Walter Tweedie and Michael Forbes Tweedie and the defendant Ada Mary Hayward is allowed without prejudice to the question whether the said defendant Ada Mary Hayward has a right to join in the said claim." Messrs. Tweedie are the trustees of the settlement. There is also a finding in the certificate in respect of this indenture of settlement stating the covenant and saying that "such last-mentioned sum"—that is, £5,000 with interest at 5 per cent. from the day of the testator's death—"has been proved by the trustees of the said settlement as a debt against the testator's estate and has been allowed"; and it also finds that "under and by virtue of the said indenture of settlement the reversionary interest in the said sum of £5,000, subject to the life interest therein of the defendant, belongs to the testator's estate." Now the reason of the form of the certificate as to claim 44 as it stands was that the question might be raised whether the defendant the administratrix has a right to retain in respect of her life interest in the £5,000.

Now I think myself that the case is covered by the authority in the Court of Appeal in *In re Dunning, Hatherley* v. *Dunning*. For the purpose of explaining that decision the facts are sufficiently stated in the commencement of Cotton, L.J.'s, judgment. "The testator acted as solicitor to the trustees of his marriage settlement, under which his wife took a life interest with remainder to his children. This fund got into the testator's hands and was not accounted for, and for it he is clearly liable. But the claim of his executrix to retain this debt out of his assets stands on a wholly different footing. The right to retain arises wholly from the fact that, as a creditor by suing at law and obtaining judgment could get priority for his debt, and an executor who was also a creditor could not sue himself, he was allowed the same advantage as he would have gained had he been able to sue, and was allowed to retain the amount of his debt in priority to other creditors. And he was allowed this right even in a case where he was trustee only of the amount due, or where he was himself beneficially entitled to the debt, though it was actually payable to another person as trustee for him." Then the learned judge proceeds to deal with the particular case, saying, "The retainer has been allowed on the footing of the widow's life interest being valued as if it were an annuity owing to her from the testator, besides being allowed in respect of his children's right in remainder. Now if the right to receive the debt and the liability to pay the same were centred in the same person, it would be right to allow the retainer. But here the executrix was not the person in whom the right to recover the debt was vested, as there existed at the testator's death trustees of the settlement who were competent and bound to sue for and obtain judgment against the executors for the amount, or to take proceedings for administration of the estate." I need not refer to the rest of that judgment. Lindley, L.J. (in his judgment in the same case), referring to the case of *Cockcroft* v. *Black*, speaks of it as reaching the farthest point in reference to the right of retainer, which, as he explains, is "a somewhat anomalous privilege, and it has often been laid down that it ought not to be extended, and it has never yet been extended to the degree asked for here." I think myself that every word of the decision of the late Lord Justice Cotton in that case applies to the present case. In the present case there are trustees who are competent to sue for, and might have sued for, the amount of the debt. I should have left the case there, simply saying it was covered by authority, except for the fact that the case of *Loomes* v. *Stotherd* has been dealt with and relied on as an exact authority in the books of long standing on this point. In reference to the report of that case, which is also reported with rather a fuller statement of facts in 1 Law Journal (O.S.) Ch., p. 220, I find that there were two points argued in that case. The first point—a very important point—decided was that a devisee has a right to retain a debt due to himself or to his trustee out of the produce of the estate devised to him; and the other point was as to the

costs of the administration—namely, in what order they should come with reference to the right of retainer. But the facts in that case—and here I have been assisted by Mr. Wood and Mr. Norton's junior by their having referred to the record of the case—appear to have been, as quite shortly stated in the report, that £1,674 was found due from the estate to the trustees of the testator's marriage settlement upon a bond for securing £2,500 for the benefit of the defendant and her children as it is expressed in the report. It appears that the trusts were in effect for the defendant for life with some special power of paying some debts and then with remainder to the children, so that in fact the defendant had only a limited interest in the fund. At the end of the argument for the defendant it was said (1 S. & S., at p. 461) "The circumstance that the defendant is not the trustee, but the *cestui que trust* of this debt, cannot make any difference in a court of equity." No doubt that is perfectly true in the case of a simple trustee for another person. The Vice-Chancellor says: "At common law an heir could retain for his own speciality debt; so a devisee under the statute must have the same right as an heir. An executor may retain his own debt or the debt of his trustee, and therefore a devisee may retain for his own speciality debt or the debt of his trustee, and if the devisee be also the executor of a deceased creditor he may first retain for his own debt and next for the debt of his testator." Then his lordship deals with the question of the costs of the suit, and says, "But the devisee cannot retain his debt in priority to the costs of the suit." So far as the report goes it appears, as I have said, simply to be a decision upon the points I have mentioned; but undoubtedly that was a case where a devisee, a defendant, was allowed to retain out of the proceeds of the estate, having only a limited interest in the fund. The case has not got into any of the text-books to which I have been referred as an authority for the proposition for which it is now invoked, nor have I been referred to any case, nor do I think that there is any case, in which it has been followed as being an authority for the purpose for which it is now sought to be used. Therefore I have not the same difficulty about an old standing case that I should otherwise have had from thinking that it has been followed or treated as being an authority for this, that the tenant for life or *cestui que trust* is entitled to retain, although there are trustees competent to sue for the *corpus* of the fund in which she has a life interest. In any case I should have felt bound to follow the decision of the Court of Appeal; but I thought it right, as this point was raised, and counsel were so good as to look into the matter fully in the Record Office, to say I do not think that this case of *Loomes* v. *Stotherd* is now to be regarded as an authority for the proposition for which it was invoked.

Solicitors, *Robbins, Billing, & Co.*, for *Forrester & Moir*, Malmesbury; *A. F. & R. W. Tweedie.*

Chan. Div.
Cozens-Hardy, J. } Nov. 28; Dec. 11.

In re GRAY AND OTHERS (SOLICITORS). (*a.*)

Solicitor—Costs—Taxation—Mining lease—Negotiations—Third-party order—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.

Where, under the usual third-party order for taxation of a lessor's solicitor's bill of costs in the preparation of a mining lease, the lessees objected that they were not liable for certain items for preliminary negotiations which were included in the bill, and in particular for fees paid to a mining expert and correspondence with him; and the question was whether their liability was altered by reason of a third-party order to tax having been obtained by them; and the taxing-master having decided that the lessees had rendered themselves liable for these fees by reason of their having obtained the third-party order to tax,

Held, that the third-party order did not alter or enlarge the scope of the liability upon the existence of which the order was based. The court was bound to look at the nature of the items, and to consider whether, apart from the order, the applicant was under any liability to pay them. Although the solicitor may put in one bill, as against his own client, a series of items, some of which may go beyond the liability of the third party, the third party does not, by obtaining an order to tax, render himself liable to the whole bill, unless there is a contract—express or implied—to this effect. The bill accordingly was referred back to the taxing-master to review his taxation.

In re Negus, 43 *W. R.* 68, [1895] 1 *Ch.* 73, *considered.*

This was a summons by lessees to review the taxation of a bill of costs of the lessor's solicitors, and the question was with reference to the liability of the lessees for certain items for preliminary negotiations which were included in the bill, and in particular for fees paid to a mining expert and correspondence with him, and whether this liability was altered by reason of a third-party order to tax having been obtained.

In 1895 the Delcoath Mine (Limited) were desirous of obtaining a mining lease of some property in Cornwall belonging to a Mr. Bassett, and in March of that year a correspondence and negotiations with a view to a lease being granted were commenced with Mr. Bassett and his advisers, and continued until August, 1899, when the lease and counterpart were executed.

In March, 1900, the usual third-party order to tax was obtained under section 38 of the Solicitors Act, 1843, on the petition of the Delcoath Mine (Limited), the lessees, in which it was alleged that the solicitors, Messrs. Bell, Brodrick, & Gray, were employed by Mr. Bassett, as lessor, to prepare the lease; that the said solicitors, on the 26th of October, 1899, delivered unto the petitioners their bill of fees and disbursements amounting to £301 12s. 4d., which the petitioners were liable to pay, but were advised ought to be taxed, and the petitioners submitted to pay what should be due thereon after taxation.

The taxing-master taxed the bill and made his certificate. He allowed certain items which the lessees objected to, and which consisted of charges for preliminary negotiations, and in particular for fees paid to a mining engineer, who was consulted on behalf of the lessor, and various correspondence with him.

The reasons alleged in support of the objections, and dated the 17th of July, 1900, were as follows:

(1) The Delcoath Mine (Limited), being lessees of certain mines, and Messrs. Bell, Brodrick, & Gray, being the solicitors for Mr. Bassett, the lessor thereof, the items complained of consist—(*a*) Of charges made in respect of advice obtained by the lessor, his solicitors or agent, for the purpose of enabling the said lessor to formulate the terms to be inserted in the demise of the mines in question, and of fees paid to mineral experts for giving such advice, such items being in part costs of "negotiations"; or (*b*) of charges for the counterpart of the lease.

(2) In the absence of special agreement, a lessee is

(*a.*) Reported by A. GLYNNE-JONES, Esq., Barrister-at-Law.

not under any liability to pay to a lessor any such costs, and no such special agreement exists in this case.

(3) Although the bill is being taxed at the instance of the lessees, as third parties under section 38 of the Solicitors' Act, 1843, the lessees have not by obtaining the order for taxation become under any greater liability to pay the costs, charges, and expenses of the lessor's solicitors in respect of "negotiations" or counterpart of the lease than they were under prior to obtaining such order.

Then followed a schedule, giving in detail the various items in the bill to which exception was taken.

The taxing-master's answers, dated the 23rd of July, 1900, were as follows:

"There are two points involved in this case—

(1) A lessee is by law liable to pay his lessor for the costs of the lease: see *Grissell* v. *Robinson*, 3 Scott 329, 3 Bing. N. C. 10.

These costs are limited to such as are properly incurred in the drawing, settling, and completing the lease, and do not include the costs of the counterpart thereof: see *In re Negus*, 43 W. R. 68, [1895], 1 Ch. 73.

(2) In this case the lessee obtains an order to tax the lessor's solicitors' bill under section 38 of the Solicitors Act, 1843, as a party liable to pay. What is he liable to pay? His liability covers all charges which the lessor is liable to pay his solicitors, in the matter of the lease, as between the solicitor and the party chargeable, and not as between the party liable to pay and the party chargeable.

I have taxed the bill on these lines, and the charges allowed are fair and proper, except that I have bowed to the decision of *In re Negus*, and taken off the costs of the counterpart, which, apart from this decision, I should have allowed as a charge properly payable by the lessor to his solicitors, and also by the third party: *In re Holliday and Godlee*, 58 L. T. Rep. 301, 36 W. R. Dig. 56."

On the 10th of August, 1900, the lessees took out the present summons asking that their objections might be allowed and the matter referred back to the taxing-master to vary his certificate accordingly. Being a mining lease, it was admitted that the scale fee did not apply.

Eve, Q.C, and *Romer*, for the lessees.—Though the lessee only obtains a third-party order to tax on the footing that he is bound to pay what is due to the solicitor from his own client (*In re Fyson*, 9 Beav. 117; *In re Massey*, 13 W. R. 797, 34 Beav. 463), which may be more than the client, had he paid it, could have recovered from the third party, still the third party is only liable to pay the proper costs for preparing, settling, and completing the lease, and the third-party rule does not prevent the taxing-master from considering the question of the liability of the third party: *In re Negus*. By obtaining a third-party order to tax the lessee does not thereby become liable to pay for the costs of proceedings or other matters which he would not have been liable for had no third-party order been obtained; the lessee's common law liability is not increased by reason of his having a third-party order. In *In re Holliday and Godlee* the question was solely whether or not costs of reference to arbitration were excessive. The lessor's solicitor may be entitled to costs for negotiations leading up to the lease *Savery* v. *Enfield Local Board*, 42 W. R. 33, [1893] A. C. 218, but this cannot include fees to mining experts.

Ex parte Prickett, 3 Swans. 130, was also referred to.

Vernon Smith, Q.C., and *MacSwinney*, for the lessor's solicitors.—The lessor would have been entitled to recover the fees from the lessees had he paid them, and the lessees are therefore liable for all that he is properly liable to pay. The lessor could not have safely granted the lease without the advice of a competent mining engineer, and the lessees are therefore liable for this.

They referred to the following cases: *Grissell* v. *Robinson*; *In re Martin*, 37 W. R. 497, 41 Ch. D. 381; *In re Carthew*, 32 W. R. 940, 27 Ch. D. 485; *In re Field*, 33 W. R. 553, 29 Ch. D. 608; *In re Emanuel and Simmonds*, 34 W. R. 613, 33 Ch. D. 40; *Savery* v. *Enfield Local Board*; *In re Negus*; *In re Holliday and Godlee*; *Humphreys* v. *Jones*, 34 W. R. 1, 31 Ch. D. 30.

Romer, in reply.

Cur. adv. vult.

Dec. 11.—COZENS-HARDY, J.—This is an application to review a taxation which raises a question of importance and difficulty. [His lordship then stated the facts, and having read the objections and taxing-master's answers, continued:] It is necessary to consider first what is the position of a lessee at common law with reference to the costs of a lease, and then how far, if at all, that position is altered by reason of an order to tax by a lessee under section 38 of the Solicitors Act, 1843.

Now it was decided in 1836, in *Grissell* v. *Robinson*, that a lessor who has paid his own attorney his charges for drawing a lease can recover the money from the lessee as money paid by the lessor to the use of the lessee. Evidence was there given that it is the custom for the lessor's attorney to prepare the lease at the expense of the lessee.

Jennings v. *Major*, 8 C. & P. 61, has been treated by text-writers as a decision that the lessor must pay for a counterpart of the lease, if he requires one, unless the lessee has expressly agreed to pay for it. And in *In re Negus*, Chitty, J., held that a lessee is under no liability to the lessor in respect of charges for the counterpart. In *Lock* v. *Furze*, 13 W. R. 971, 14 W. R. 403, 19 C. B. N. S. 96, it was asserted by counsel that fees to counsel and surveyors are never allowed. The reporter adds that the court intimated a doubt about it, and it was arranged that the £65 expenses should be reduced by £20, which appears to have been the exact amount of those fees. The question did not, therefore, arise for decision, but Erle, C.J., says: "Of this sum it is agreed that £20 shall be deducted, as the amount of counsel's and surveyor's fees, which are never allowed." I doubt whether this *dictum* is in accordance with existing usage so far as counsel's fees are concerned.

On principle the lessee must be held to have impliedly contracted to indemnify the lessor against expenses properly incurred in preparing the lease. In a case where the aid of a skilful conveyancer is reasonably required in settling the draft lease, I think the lessee ought to be liable to pay his fees: see *Helps* v. *Clayton*, 13 W. R. 161, 17 C. B. N. S. 553, at p. 568, where the liability of a husband to pay the costs of a marriage settlement is discussed, and *Nicholson* v. *Jeyes*, 1 W. R. 278, 22 L. J. Ch. 833.

I think, therefore, that if the lessor had paid his solicitors and sued the lessees, he could not have recovered anything antecedent to instructions for lease, and in particular could not have recovered the fees of the mining expert. This is in accordance with the law as between mortgagor and mortgagee, for in the absence of a special bargain the costs of a valuation of the property with a view to the loan are not allowed in taking the mortgage accounts: *Field* v. *Hopkins*, 44 Ch. D. 524, 38 W. R. Dig. 134.

It remains to consider what difference is made when the lessee elects to tax under the third-party

clause. Now it is well settled that the bill to be taxed is the bill between the solicitor and his own client; and that the third party can only tax it as the condition of paying what is due to the solicitor from his own client, which may be more than the client, if he had paid it, could have recovered over from the third party: see *In re Fyson; In re Massey.* If, for example, in a case to which the scale fee would be applicable, the client makes an agreement with the solicitor under section 8 of the Act of 1881 that an item bill shall be delivered, I think the third party cannot complain. He must tax on the footing of the agreement.

A strong illustration of this principle is found in the case of *In re Holliday and Godlee.* There a local board agreed to purchase a piece of land at a price to be determined by arbitration, and the agreement contained a clause that the board should pay to the vendors all the costs of the agreement and of the reference to arbitration, and of deducing and evidencing the title and the assurance to the board, such costs to be paid on the basis of Schedule II. to the general order, and not on the basis of Schedule I. The arbitration took place, the price was fixed, and the property conveyed. The vendors' solicitors sent their bill of costs to the local board, and the usual third-party order for taxation was made. Objections were taken to a number of payments made to surveyors and mining engineers who had been called as expert witnesses. The local board objected that the payments were excessive and unreasonable. The solicitors answered that the witnesses were called and the payments were made with the approval of the vendors. North, J., held that the taxing-master had taxed the bill properly, having regard to the order which had been made, on the ground that, as between the vendors and the solicitors, all the payments had been authorized. "It is urged," he said, "that it is a great hardship on the purchasers to be obliged to pay any costs which the vendors chooses to authorize. The answer to that is, that the 'costs of reference' mentioned in the agreement means costs properly incurred; the purchasers are not bound to pay more, but, if the vendors demanded more the proper course for the purchasers was either to refuse to pay and await an action by the vendors, or to have the bill of costs referred to an expert for arbitration." It follows, therefore, that with respect to any piece of business properly inserted in the bill which the third party is liable to pay, it is not open to the third party to object that payments sanctioned by the client are excessive.

In the present case it was conceded by counsel for the solicitors that certain charges inserted in the bill, though proper as between the solicitors and their client, ought to be excluded from the bill, and the master has taken this view. I refer to charges with reference to a writ for specific performance of the agreement for a lease. The master has also struck out from the bill the costs relating to the counterpart lease, although such costs were clearly proper as between the solicitors and their client.

How is the line to be drawn? There is great difficulty in arriving at a satisfactory answer. I think the true view is that the third-party order does not alter the nature or enlarge the scope of the liability upon the existence of which the order it based. This view is supported by Chitty, J.'s, judgment in *In re Negus.* In that case there was an agreement for a lease not containing any express agreement by the lessee to pay the costs. A bill was delivered by the lessor's solicitors, and an order for taxation was obtained under the third-party clause. Chitty, J., held that the scale fee should apply, but that, as the scale fee included the costs of a counterpart lease, which the lessee was not liable to pay, a deduction ought to be made from the scale fee. Chitty, J., deals with this point as follows: "The other point remains—viz., that this is a third-party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not prevent the taxing-master from considering the question of the liability of the third party. This has been decided, and by way of illustration I may refer to *In re Brown,* 15 W. R. 1030, L. R. 4 Eq. 464. The trustee in that case was liable, as between himself and the solicitor who was defending his bill as against the *cestuis que trust,* for the items impeached, but Lord Romilly held that those items were properly disallowed by the taxing-master because they could not have been charged as against the trust estate. The solicitor had pointed out to the trustee, as was his duty, that he would not be allowed to charge; but still the trustee insisted upon the work being done, and yet these items were struck out from the bill when it was taxed by a third party. Now it is part of the general law (though it is unnecessary to go into the authorities), that in the case of lessor and lessee, the lessee is not bound to pay for the counterpart, and the scale fee prescribed by Schedule I., Part II., includes the counterpart; the words in Schedule I. are, 'Lessor's solicitor for preparing, settling, and completing lease and the counterpart,' and the decisions upon these rules generally show that the business contemplated by the rules must be wholly performed by the solicitors in the transaction in order to make the scale remuneration apply. There was a counterpart in this case, and it is plain that the landlord was liable to his solicitors to pay for this counterpart; the taxing-master in applying the scale, as he did, according to the amount of the rent, has necessarily included the charge for the counterpart, in respect of which there is no liability on the part of the tenant to the landlord; consequently it was argued for the tenant that the scale fee could not apply on this third-party taxation. In my opinion that argument cannot be sustained, for these rules, having—as has been well explained by Lord Halsbury in the case of *Savery* v. *Enfield Local Board*—been made for the purpose of preventing disputes on taxation, and providing some guidance as to the mode in which charges should be made, prescribed and fixed a gross sum for each document prepared, which could be known beforehand to any person able to employ a solicitor; and I cannot conceive it to have been the intention of the framers of rules that whilst the landlord had to pay, say, a minimum £5 to his solicitor, still the solicitor might be entitled to charge £10 or £20 on the non-scale system as against the lessee. My opinion is that this contention cannot prevail, and I think the taxing-master was right in taxing this bill in the manner he has done, as being the bill that the landlord has to pay. There is a novelty in the point about the counterpart, and I think that the only solution of this supposed difficulty that is reasonable and right is this—that the taxing-master should tax, as he has done this bill, as he would have taxed it as between the solicitor and landlord, and then seeing that the tenant was only liable for the preparing, settling, and completing the lease, he should have made a reasonable deduction from the scale in respect of the counterpart. The parties here have been very reasonable, and they do not require me to send the bill back to the taxing-master upon this small point; they have agreed that 5s. for the stamp duty on the counterpart, and 18s. in respect of the proper costs in relation to the counterpart, as distinct from the lease itself, should

be deducted from the amount which the third-party taxing has on the present occasion to pay."

In re Negus has been followed by the taxing-master somewhat unwillingly, so far as the counterpart is concerned. But every word of the judgment seems to me to apply equally to the fees of the mining expert which he has allowed. The governing idea of Chitty, J.'s, judgment is that even on a third-party taxation the court is bound to look at the nature of the items, and to consider whether, apart from the order, the applicant is under any liability to pay them. In other words, although the solicitor may put in one bill as against his own client a series of items, some of which may go beyond the liability of the third party, the third party does not by obtaining an order to tax render himself liable to the whole bill. With respect to matters falling within his liability under a contract, express or implied, he cannot dispute the amount properly payable as between the solicitor and his own client, but in other respects his liability is not increased by obtaining a third-party order to tax. In the present case the petition only alleged that the solicitors were employed by Mr. Bassett, as lessor, "to prepare a lease," and the submission to pay contained in the order must be limited to what properly results from such employment.

I have carefully considered several cases which have arisen under express contracts by the lessee to pay the lessor's costs, and the application of the scale to such circumstances (*In re Field, In re Emanuel and Simmonds, Savery* v. *Enfield Local Board*, and *In re Horn and Francis*, 45 W. R. 72, [1896] 2 Ch. 797), but I have not derived much help from them. They only decided what business was covered by the scale fee. They did not raise the question which presents itself in the case with which I have to deal.

The result is that the bill must be referred back to the taxing-master to review his taxation in respect of the scheduled items. The respondents must pay the costs of the application.

Solicitors, *Robbins, Billing, & Co.*, for *Daniell & Thomas*, Camborne; *Bell, Brodrick, & Gray.*

Chan. Div. }
Buckley, J. } Feb. 12.

MACKELLAR v. HORNSEY. (*a.*)

Practice—Striking out defence—Frivolous and vexatious—Abuse of process of court—Admissions in correspondence—Judgment for plaintiff—R. S. C., 1883, *ord.* 25, *r.* 4; *ord.* 32, *r.* 6.

In an action for specific performance of an agreement to purchase leasehold property, the court, upon the pleadings and correspondence, having come to the conclusion that the defence was a dishonest one, and put in for the purpose of gaining time, ordered it to be struck out under ord. 25, *r.* 4, *and gave immediate judgment for the plaintiffs.*

Motion.

The plaintiffs as trustees under the will and codicil of George Mackellar, who died in 1893, entered into an agreement with the defendant, dated the 7th of November, 1900, whereby they agreed to sell, and he to purchase of them, certain leasehold premises in Dover-street, Piccadilly, which were used as an hotel, for £3,075. Of this sum £307 10s. was to be paid down at once, and the remainder on the 3rd of December, 1900, which was fixed as the date for the completion of the purchase. The business was to be carried on until completion at the risk of the purchaser. The defendant paid the deposit money as agreed, and subsequently entered upon the premises and commenced making extensive alterations. In consequence of delay in completion, correspondence followed between the solicitors for the plaintiffs and the defendant and his solicitor, and on the 28th of December, 1900, the defendant wrote to the plaintiffs' solicitors, "There is not the least doubt that I shall be able to complete this matter in a few days. In the meantime, as you are aware, I am spending a considerable sum in doing this property up—viz., staircase, four reception rooms, and front of building."

The plaintiffs issued the writ in this action on the 29th of December, 1900, and delivered their statement of claim on the 8th of January, 1901.

The statement of claim stated the above facts, and alleged that the defendant had accepted the title of the plaintiffs, who had always been ready and willing to carry out the agreement on their part, but that the defendant refused to pay the balance of the purchase-money or to complete. It claimed specific performance of the agreement.

The defendant put in a defence as follows:

(1) He does not admit that the plaintiffs are such executors and trustees as alleged.

(2) He does not admit that he entered into the agreement of the 7th of November, 1900; or if he did, that the agreement (if any) he entered into is sufficiently or correctly set forth in the statement of claim; or that any provisions to the effect therein stated are contained in such agreement.

(3) The plaintiffs have not made out a title to the premises mentioned in the agreement, nor has the defendant accepted such title.

The plaintiffs now moved the court to strike out paragraphs (1) and (2) of the defence under ord. 25, r. 4, as frivolous and vexatious, and as an abuse of the process of the court; and that judgment should be given for specific performance as claimed. They filed affidavits proving the necessary facts, and making the correspondence an exhibit.

Astbury, K.C., and *Edward Ford*, for the plaintiffs.—The defence is vexatious and should be struck out under ord. 25, r. 4. The correspondence contains admissions which entitle us to judgment under that rule, and under ord. 32, r. 6, which states the admissions may be "on the pleadings *or otherwise*": *Remmington* v. *Scoles*, 45 W. R. 580, [1897] 2 Ch. 1.

Ashton Cross, for the defendant, submitted that such a course would be to decide the action on motion by affidavits.

BUCKLEY, J.—Upon the unanswered statements of the statement of claim and the admissions made in the correspondence I come to the conclusion that this is a dishonest defence, put in merely for the purpose of gaining time. I am glad to find that *Remmington* v. *Scoles* is an authority that I can strike out the defence as an abuse of the process of the court. The plaintiffs do not press for the third paragraph to be struck out, but I order paragraphs (1) and (2) to be struck out; and I give judgment for the plaintiff for specific performance, with costs up to and including the application. There will be the usual inquiry in chambers as to his title.

Judgment for plaintiffs.

Solicitors, *Dalston, Son, & Elliman; Lamb, Son, & Prance.*

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Q. B. Div. (Bigham, J.) Aug. 8, 10, 1900.

EPSOM URBAN DISTRICT COUNCIL *v.* LONDON COUNTY COUNCIL. (*a.*)

Highway—Repairs—Extraordinary traffic—Person "by or in consequence of whose order" traffic has been conducted—Highways and Locomotives (Amendment) Act, 1878 (41 *&* 42 *Vict. c.* 77), *s.* 23—*Locomotives Act,* 1898 (61 *&* 62 *Vict. c.* 29), *s.* 12, *sub-section* 1 (c).

The defendants, on the 2*nd of March,* 1898, *entered into a contract with a firm of contractors to carry out for them certain building operations. On the* 16*th of March,* 1898, *they entered into another building contract with another firm. The site of both buildings was in the plaintiffs' district, and the works involved the carriage of exceptionally heavy traffic along certain roads within the plaintiffs' highway district, and they were put to extraordinary expenses in repairing them. The work under the first contract was completed on the* 5*th of April,* 1899, *and under the second contract on the* 23*rd of September,* 1899. *The writ in this action was issued on the* 22*nd of December,* 1899.

Held, that the defendants were persons "by or in consequence of whose order" the traffic was conducted within the meaning of section 12 *of the Locomotives Act,* 1898, *and were liable for the extraordinary expenses incurred by the plaintiffs in repairing the roads, but that the proceedings to recover the amount in respect of the damage caused in carrying out the first contract were too late, having been commenced more than six months after the completion of hat contract.*

Action tried before Bigham, J , without a jury.

The plaintiffs were the highway authority for the Epsom district, and they brought this action to recover the amount of extraordinary expenses incurred by them in repairing certain highways in that district under circumstances that are set out sufficiently fully in the judgment.

Macmorran, Q.C., Cunningham Glen, and *Swinburne-Hanham,* for the plaintiffs, submitted that the decision of this case turned on the true construction of section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12 of the Locomotive Act, 1898. By the latter Act the words "by whose order" in the earlier Act were altered into "by or in consequence of whose order." The alteration was made in consequence of the decision in *Kent County Council* v. *Lord Gerard,* 46 W. R. 111, [1897] A. C. 633, and was passed to meet such a case as the present. It is impossible to separate the damage done to the roads under each of the contracts. The work must be treated as a whole, and the period of limitation does not begin to run until the completion of that work. The damage done can only be tested by comparing the extraordinary with the ordinary traffic over the roads during the whole time the work ordered to be done was being executed: *Hill* v. *Thomas,* [1893] 2 Q. B. 333, 41 W. R. Dig. 85; *Etherley Grange Coal Co.* v. *Auckland District Highway Board,* 42 W. R. 198, [1894] 1 Q. B. 37.

Dickens, Q.C., and *Daldy,* for the defendants.—The extraordinary traffic was not caused by or in consequence of any order of the defendants: *Lapthorn* v. *Harvey,* 49 J. P. 709. Moreover, the surveyor's certificate is insufficient, for it merely shows the average expenses of repairing the roads in question, whereas it ought to show the average expenses of all the roads in the neighbourhood: *Reg.* v. *Williamson,* 45 J. P. 505.

Cur. adv. vult.

Aug. 10.—BIGHAM, J., read the following judgment: The question in this case is whether the plaintiffs are entitled to recover from the defendants the cost of repairing the damage done to some roads in their district by certain exceptionally heavy traffic thereon. They contend that the traffic came on to the roads by or in consequence of the order of the defendants, and that therefore the defendants are liable under section 23 of the Highways and Locomotives (Amendment) Act, 1878, as amended by section 12 of the Locomotives Act, 1898. The facts are these: The defendants in the year 1898 entered into agreements with two firms of contractors for the erection of a temporary hospital and for the alteration of certain existing buildings so as to adapt them for use as a permanent hospital. The site of both buildings was in the plaintiffs' district, and the works involved the carriage of exceptionally heavy traffic along certain roads in the district. The work under one of these contracts (Kirk & Randall's) was completed by the 15th of April, 1899. On the 12th of July, 1899, the plaintiffs' surveyor granted a certificate in the following form for the purpose of complying with the requirements of section 23 of the Act of 1878: "Extraordinary Traffic.—I hereby certify that, having regard to the average expenses of repairing highways along the line of traffic to the Horton Asylum temporary buildings, extraordinary expenses to the amount of £484 15s. 11d. have been incurred by you in repairing such highways by reason of the damage caused by excessive weight passing along the same or extraordinary traffic thereon. In calculating the above amount I have ascertained the cost of repairs of these roads for the past five years and have deducted the average annual cost from the total expended.—(Signed) Edward R. Capon." The writ was issued on the 22nd of December, 1899.

The first question is whether the defendants are persons "by or in consequence of whose order" the traffic was conducted within the meaning of the two Acts of Parliament. Under the earlier Act the persons made liable were those persons "by whose order" the traffic was conducted. By the later Act the words "by or in consequence of whose order" are substituted for the words "by whose order." In the case of *Kent County Council* v. *Lord Gerard,* 46 W. R. 111, [1897] A. C. 633, the question arose as to the meaning of the expression "by whose order" which occurs in the earlier Act. In that case Lord Gerard had contracted with several persons for the delivery at his residence of certain material. Extraordinary expenses within the meaning of the statute were incurred by the road authority in repairing the roads over which the materials were brought to the house, and the plaintiffs sought to recover the amount from Lord Gerard. The House of Lords held that inasmuch as Lord Gerard had bought the material "delivered," he had nothing to do with the conduct of the traffic along the roads; that the traffic was conducted by the order of the persons who had sold the goods "delivered," and that, therefore, Lord Gerard was not liable. In the Court of Appeal, Lopes, L.J., had read the words "by whose order" as equivalent to the words "in consequence of whose order"; and had come to the conclusion (differing from the other members of the court) that Lord Gerard was liable. The Lords did not think that this view was right, but they do seem to me to have expressed an opinion (which, of course, was *obiter*) that, if it had been possible to give the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

words of the statute the meaning which Lopes, L.J., gave to them, then Lord Gerard would have been liable. The amendment in the Act of 1898 was introduced in consequence of the decision in *Lord Gerard's case*. The words "by whose order" were discarded, and the words "by or in consequence of whose order" were substituted. There can be no doubt that the object of the Legislature was to alter the earlier Act in such a way as to bring a case like Lord Gerard's within its scope. Whether the Legislature has succeeded may be open to doubt, but I am of opinion that it has succeeded, and that if *Lord Gerard's case* had been decided under the later Act Lord Gerard would have been held to be liable. Then is there any distinction in principle between *Lord Gerard's case* and the present case? In the former the building owner contracted for the delivery of the building materials on his land; in the latter the building owner (the London County Council) contracted for the erection of the buildings on their land. In each case the same consequence follows from the contract—namely, that the materials are conducted along the road. The only difference is that in the one case the materials belong to the building owner as soon as they are delivered, whereas in the other the materials do not belong to the building owner until they are worked into the structure by the contractor. In both cases orders were given—that is to say, contracts were made—and in both cases the consequence of the orders or contracts was that the traffic was conducted along the roads. I think that the plaintiffs are entitled on this, the main question in the case, to succeed.

But then it is said that inasmuch as the two building contracts were made before the later Act came into force—namely, before the 1st of January, 1899—no orders within the meaning of the Act can be said to have been given at all. But I think it is not the giving of the order which creates the liability; it is the doing the damage, and therefore, though the contracts were made before the new Act, yet if, and to the extent that, damage was done afterwards, I think the defendants are liable.

Another point was taken on behalf of the defendants. It was said that in respect of the damage done in the execution of Kirk & Randall's work the proceedings to recover the amount were begun too late. I think that is so. The damage done by Kirk & Randall was, in my opinion, the consequence of their particular building contract, and, therefore, clause (*b*) of sub-section 1 of section 12 of the Act of 1898 applies. That provision is that "proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or, where the damage is the consequence of any particular building contract or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." Kirk & Randall's contract was completed on the 15th of April, 1899, and the writ was not issued until the 22nd of December, 1899. Finally it was said that the form of the surveyor's certificate was not sufficient because it does not appear on its face that in making it regard has been had to "the average expenses of repairing highways in the neighbourhood" within the meaning of the 23rd section of the Act of 1878. I think nothing of this point. I am quite satisfied that the certificate did make it appear to the plaintiffs that extraordinary expenses within the meaning of the section had been incurred; and, if it did that, it was a certificate which complied with the requirements of the law.

The amount recoverable by the plaintiffs must, therefore, be ascertained in accordance with the principle I have laid down, and I trust neither party will spend any more of the ratepayers' money in litigating this question.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Lyell & Co.*, for *E. G. Wilson*, Epsom.

Solicitors for the defendants, *Blaxland.*

Prob. Div. & Adm. Div. Admiralty. } May 11, 1900.

"THE SAVONA." (*a.*)

Ship—Charter party—Damage to cargo—Goods carried into England and Wales—Admiralty Court Act, 1861 (24 *Vict. c.* 10), *s.* 6—*Reasonable care of cargo—Cargo unloaded at port of refuge—Refusal to carry on—Excepted perils.*

Case in which a master of a vessel laden with a cargo of coals, having been compelled to put into a port of refuge and discharge the cargo in order to repair his ship, was held justified in refusing to carry on the cargo which had in parts been saturated with sea water and become heated.

Notara *v.* Henderson, 20 W. R. 433, *L. R.* 7 *Q. B.* 225, *discussed.*

This was an action *in rem* under the sixth section of the Admiralty Court Act, 1861, instituted on behalf of the owners of a cargo of coals laden on board the ship *Savona* against *The Savona* to recover for the breach of charter-party in not delivering the cargo at the agreed port of discharge.

The petition alleged that by a charter-party dated the 27th of October, 1899, made between the plaintiffs and defendants, it was agreed that *The Savona* should load at Cardiff a cargo of coals, and being so loaded should proceed to Cape Town and there discharge the cargo; that the coals were loaded in due course and *The Savona* started with them to Cape Town, but owing to stress of weather was obliged to put into Falmouth for repairs; that the defendants there discharged the cargo and in breach of the terms of the charter-party refused to load it again and carry it on to Cape Town; and that the defendants alleged and the plaintiffs denied that the coal had been rendered by perils of the sea unfit to carry on to Cape Town.

The defendants set up a defence that on the voyage bad weather was met with and both ship and cargo thereby sustained damage; that the cargo became wet and damaged and with the plaintiff's assent, and necessarily, was discharged at Falmouth; that it was then found to be in an unfit state to be reloaded and carried on; and that the defendants were never required by the plaintiffs to carry it on, but were excused from doing so by reason of excepted perils—namely, perils of the sea.

May 9.—On this day the suit was heard before the judge in court (Barnes, J.) assisted by two of the Elder Brethren of the Trinity House.

Scrutton, for the plaintiffs.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants.

The following cases were referred to *Notara* v. *Henderson*, 20 W. R. 443, L. R. 7 Q. B. 225; *Assicurazioni Generali* v. *The Bessie Morris Steamship Co.*, [1892] 1 Q. B. 571, 40 W. R. Dig. 238; 41 W. R. 83, [1892] 2 Q. B. 652.

Cur. adv. vult.

(*a.*) Reported by C. F. JEMMETT, Esq., Barrister-at-Law.

May 11.—BARNES, J.—This is an action by the owners of a cargo of coals lately laden on board the ship *Savona* "against the owners of the ship *Savona*" for damages for what is alleged to be a wrongful refusal on the part of the defendants to carry the cargo to Cape Town, and, in the alternative, for a contribution to general average from the defendants. *The Savona* had been chartered, on the 27th of October, 1899, by the Castle Mail Packet (Limited) to load a cargo of coals at Cardiff, and to proceed therewith to Cape Town and deliver the same there. The freight was to be 19s. 9d. per ton, of which two-thirds, less 5 per cent. for all charges, was to be paid in London within eight days of the final sailing of the vessel. The vessel started on her voyage after loading the cargo and she met with extremely severe weather so much that when she was somewhere off Finisterre she was compelled to put back to Falmouth. The evidence of the master shows that she met with very severe weather, sustained a variety of damage, and that a large quantity of water had found its way to different parts of the ship and down into the cargo. When the vessel reached Falmouth it was found necessary to discharge the cargo, partly, as I understand, because of the necessity of doing so arising from the condition of the ship herself, and partly also because of the condition of the cargo, which the surveyors who saw it as it was discharged found to be heating in several places, and to be damaged largely by sea-water in different parts of the ship and down into the cargo. Thereupon the plaintiffs and the defendants appointed surveyors to examine the cargo as it was discharged, and these surveyors attended throughout the discharge. One of them who was called stated that he saw the cargo on thirty different occasions when it was being discharged. The surveyors who had been so appointed —one of them, Mr. Buckley, who went at the request of Messrs. Donald Currie & Co., the shippers of the cargo, and the other, Mr. Downing, who, I think, acted on behalf of the defendants, reported from time to time. I think we have had only the report of Mr. Buckley read, but as far as I read the evidence, substantially he and Mr. Downing agreed about the points which are specified in that report which was put in. The report of Mr. Buckley of the 12th of January, when the ship had first come back, wound up by saying that he was of opinion that "the risk would be too great for the vessel to proceed with the cargo to Cape Town," and when the discharge was finally completed, which was about the 22nd or 23rd of February, he wrote this report: "Having carefully considered the facts stated in my daily reports, I am of opinion that the condition of the coal renders it totally unfit for reshipment for any port beyond the tropics." Now the owners of the coal in the meantime had abandoned it to their underwriters, and, as far as I can follow from the correspondence, the underwriters had sent down a surveyor, who saw the coal, and there is a letter of the 17th of January from Messrs. Fox & Co., who acted as agents to Messrs. Donald Currie & Co., to the effect that they gathered that, under all the circumstances, the surveyor did not consider that it would be wise for the voyage to be continued. None of the surveyors who inspected the cargo at that time on behalf of the underwriters were called at the hearing of the case, and the only persons who inspected this cargo with anything like accuracy, and whose reports and evidence have been before us, were the surveyors who acted on behalf of the owners of the ship and the owners of the cargo. Now I have said that the whole of the cargo appears to have been discharged by about the 22nd of February. There then came some correspondence. On the 7th of March the firm who acted for the owners of the ship wrote to Messrs. Donald Currie & Co. asking what course they propose to adopt with regard to the cargo, and saying that the owners of the ship proposed to abandon the cargo, and were claiming for their loss of freight against their underwriters. To that letter Messrs. Donald Currie & Co., on the 9th of March, wrote: "We beg to inform you that the underwriters have declined to agree to the abandonment of the cargo, and consequently we see nothing for it but for the ship to complete the voyage." That letter is treated by the plaintiffs as being a request to the defendants to carry the cargo on, and the prior letter is treated as a refusal on the part of defendants to carry it on. Thereupon the writ in this action was issued on the 28th of March last, claiming the damages which I have referred to, and a contribution in general average. It seems to me that the case must be dealt with as at the date at which this action was commenced—namely, on the 28th of March, 1900. At that time the plaintiffs in the case had insisted that the cargo must be carried on, though I think it is clear that they did not themselves desire this to be done, but were forced to take up that position by their underwriters. The defendant shipowners, on the other hand, had contended that the cargo ought not to be carried on. The question, therefore, to be decided is whether at the date of the issue of the writ there was a breach of contract on the part of the shipowners, because it must be made out that there was a breach at that time in order to establish a right of action. The evidence of this consists practically of the reports of Mr. Downey and Mr. Buckley, who saw the cargo and advised upon it up to that date, with the exception of the underwriters' surveyors, who have not been called, though they seem to have seen the cargo. Mr. Buckley and Mr. Downey were of opinion that the cargo was not fit for reshipment, and they substantially maintain that opinion up to the present time, based upon the condition of the coal as seen by them as it was discharged. The further evidence which has been given by the plaintiffs and defendants is with reference to what took place after that date. The plaintiffs called an expert analyst who saw this cargo on the 27th of April, and another expert analyst, Dr. Dyer, who, in consequence of Mr. Nimmo's report on samples, made an analysis of the coal though he did not see the cargo itself. Mr. Addie saw the cargo on the 31st of March—that is, after the date of the writ—and Mr. Milbank, of the Salvage Association, saw it on behalf of the plaintiffs on the 5th of May. Now, the evidence of these gentlemen, dealing with it broadly, is to the effect that the cargo is in a condition to be carried to its destination. The evidence of those who saw the cargo on behalf of the defendants is, from first to last, that it is not even now fit to be carried on, though Professor Lewis, a very experienced chemist, considers that whilst it was not fit to be carried on at the date of the writ—namely, the 28th of March, it could now be re-shipped and carried on if the small coal which has been produced by the different handlings of the cargo were eliminated from it. It seems to me that the result of the evidence is to show these two facts: first, that the cargo was not fit to carry on and was not fit for reshipment at any time prior to the issue of the writ; secondly, that it is at the present date fit to be carried on provided the cargo has eliminated from it the large portion of small coal which according to the evidence would constitute a source of danger in respect of spontaneous combustion if it were shipped with the rest of the coal. Assuming that to be the conclusion to be drawn from the evidence, a question of very considerable difficulty arises; but before I deal with it I will dispose of one point raised by the plaintiffs—namely, that in

the course of the discharge of the cargo, whoever was responsible for the care of it—that is, the master acting through his agents—might have separated the wet coal from the dry, and placed the dry coal in a position to be reshipped. That seems a practical question, which the defendants have met by evidence that, having regard to the general nature of the wetting which the coal had received—that is, wetting not over the whole of it, but in a great many places it was not a practicable matter. I have consulted the Elder Brethren about this, and—taking the evidence upon the point given by the defendants, which is, I think, correct—their opinion is that it would not have been a practical matter to have separated the dry coal from the wet; in other words, that there was nothing wrong in the mode in which the coal was discharged or in the mode of storing the coal ashore, or in dealing with it in the way it was in fact dealt with.

Having disposed of that point, I come to the question which I have to solve with regard to the unfitness of the cargo and its subsequent fitness for reshipment if something was done to it, which seems to me to go to the root of this case. Shortly before the issue of the writ the plaintiffs said, really for their underwriters, "The cargo must go on," and the defendants said, "We cannot take it on." I have to consider what then and there ought to have been done—in other words, whether the master committed a breach of contract by refusing to carry the cargo on, which I have found was at the time unfit to be reshipped and carried to its destination in safety. This, I think, is really, after the findings of fact, more a matter of law than of fact. But there is one matter about which I have asked the Elder Brethren their opinion because it fortifies the position which I think is the correct one to take up having regard to the law applicable to this case, and that is whether from a practicable point of view the master of the ship, who had been informed by everybody who saw the cargo up to that time, including the surveyors on both sides, that it could not be carried on safely, would be justified in taking the risk of reloading it and carrying it on. On this point the Elder Brethren take a strong view, and say that no master, having regard to the danger which was to be anticipated of spontaneous combustion and to the materials for forming a judgment which both sides placed before him at that time, would have been justified in taking the risk of reshipping the cargo. It is said, however, that that will not get rid of the difficulty, because, as matters have subsequently turned out, by waiting two months or so, the cargo, after something has been done to it, might be reshipped, and that the plaintiffs, acting for the underwriters, are proceeding to reship it, and have chartered a ship for that purpose. But I do not think this case can be decided by what happened afterwards, except as a test of what was the true state of things at the time when the question of breach has to be considered.

The position, therefore, is this: At the time when this action was commenced everybody agreed that it could not be reshipped with safety, and I have stated the view as to the risk which the master would have taken on himself by acting in defiance of that opinion. It seems to me that, regarding the matter at that time, there was nothing to show how long it might possibly be before those concerned could come to the conclusion that the cargo could be reshipped. Then the master, looking at the matter from the point of view of time, would have to face the position: "I cannot ship this cargo now. Everybody agrees that the risk would be too great. How long am I to wait until it is possible to do so?" That was a problematical matter, as is shown by the fact that some of the experts called maintain that even now it is not fit to be reshipped. How long is a master face to face with that position to wait till he can make up his mind that he can carry the cargo without risk to the ship and to the lives of those on board of her. I do not think that the observations that were referred to by counsel, and which are to be found in *Notara* v. *Henderson*, are precisely applicable to this position, but they illustrate the difficulty in which a master is placed who has to face the position whether he shall reload and carry a cargo or not. In that case, Willes, J., delivering the judgment of the court, said: "A fair allowance ought to be made for the difficulties in which the master may be involved. The performance of such a duty whether it be for the joint benefit of the shipowner and the shipper or for the benefit of the shipper only could not be excused by reason of insignificant delay not amounting to deviation; and there are many cases of reasonable delay in ports of call for purposes connected with the voyage though not necessary for its completion which do not amount to deviation. It could not be insisted upon if a deviation were involved. The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay and inconvenience must be taken into account. Nor ought it to be forgotten that the master is to exercise a discretionary power, and that his acts are not to be censured because of an unfortunate result, unless it can be affirmatively made out that he has been guilty of a breach of duty."

In this case it appears to me that the plaintiffs—the nominal plaintiffs because they represented the underwriters, left the master to deal with the matter and determine it. The correspondence undoubtedly shows that, especially the letter in which the plaintiffs say, "We see nothing for it but for the ship to complete her voyage." What was the master to do? My opinion is that he was, taking all the circumstances into consideration, justified in saying that the cargo could not safely be reshipped, and that he must refuse to do it; that he was not bound to wait for weeks, or it might be months, to ascertain whether it would be fit at some future date when something had happened in the way of further drying or something had been done to it in the way of screening. The only other point I think it necessary for me to refer to is this, that I have found as a fact on the evidence that even now it is not safe to reship this cargo without the separation of the small coal as indicated by Professor Lewis. With regard to that point the witnesses said that there were no facilities for carrying out the separation at Falmouth, and that the time and money which would be involved were out of all question. That element, I think, comes into consideration in arriving at the decision at the time, because it is not merely a question of risk of reshipment or of waiting, but it is also a question of the cost which would have to be incurred if the master has to act to produce a state of safety at a later period. If the time and expense involved are out of all proportion to the value of the cargo, which is the opinion of those who have given evidence on this point and about which there is no conflict, I think that that further element must be taken into consideration in determining at the time whether the master is then and there bound to decide to take the cargo on. A strong point made by the plaintiffs is that they say "Someone else is willing to do it," but that is at a

long period afterwards, when circumstances have entirely changed and it is to be done under a contract by the underwriters, who are bound to pay all the forwarding expenses. That is not the same position as if the reshipment had been taken up at the simple risk of merchants on one side with the shipowners to deal with on the other side.

The case is one of some difficulty, but, exercising the best judgment I have been able to form and having regard to all the facts, I am of opinion that there was no breach of contract by the shipowners entitling the plantiffs to recover in this action. There is an alternative claim for general average expenditure, but there may be a question with regard to that as to whether any right of action can be maintained *in rem* in respect of a claim for general average. The only right of action in this case is a right of action under the sixth section of the Admiralty Court Act, 1861, giving the right to sue for any breach of duty or breach of contract on the part of the owners of *The Savona*. It has not been shown that there has been any wrongful refusal to pay general average, and as the defendants have agreed to accept service in this country in an action *in personam* for general average if any such action be brought, the claim for general average will by consent be struck out of the proceedings in the present suit.

Solicitors for plaintiffs, *Walters, Johnson, Bubb, & Whatton.*

Solicitors for defendants, *Cooper & Co.*

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — Jan. 22; Feb. 22.

CITY OF LONDON ELECTRIC LIGHTING CO. *v.* MAYOR, &c., OF THE CITY OF LONDON. (*a.*)

Contract — City of London Corporation — Interest of member — Illegality — City of London Sewers Act, 1848, *s.* 42—*City of London Sewers Act,* 1851, *ss.* 53, 57.

The fact that a commissioner of sewers or an alderman or common councilman of the City of London is interested or concerned in a contract made by the Commissioners of Sewers with a company, by reason of his being a shareholder in such company, is sufficient to render the contract null and void.

This was an appeal from a decision of Farwell, J., of the 4th of May, 1900.

In this action the plaintiffs claimed a declaration that three several agreements—(1) an agreement dated the 19th of May, 1890, and made by and between the Brush Electrical Engineering Co. (Limited) and the Commissioners of Sewers of the City of London; (2) an agreement dated the 28th of May, 1890, and made by and between the Laing, Wharton, and Down Construction Syndicate (Limited) and the said commissioners; and (3) an agreement dated the 5th of February, 1891, and made by and between the Brush Electrical Engineering Co. (Limited) and the said commissioners—were valid and subsisting.

The three agreements were transferred to the plaintiffs by two indentures, dated the 21st of August, 1891.

The defendants, who were the successors in title and office of the Commissioners of Sewers, pleaded by way of defence to the plaintiffs' claim that, at the respective times when the contracts and indentures were made and thereafter, persons being Commissioners of Sewers and persons being members of the court of aldermen, and persons being members of the common council of the City of London were, or became, directly or indirectly, interested or concerned in the said contracts, and that by reason thereof, and by virtue of section 42 of the City of London Sewers Act, 1848, the said contracts were and became null and void.

The contracts in question were for lighting the city by electricity.

The city had been lighted under these contracts since 1891, but in 1898, the defendants, in consequence of certain facts which then came to their knowledge, repudiated the contracts.

The plaintiffs thereupon commenced this action.

It appeared that at the date of the contracts some of the commissioners, aldermen, and common councilmen were shareholders in the Brush Co. and also in the plaintiff company, and it was contended on behalf of the defendants that that fact rendered the contracts null and void.

The question depended upon the construction of the City of London Sewers Acts, 1848 and 1851.

The Act of 1848, after repealing certain earlier Acts and vesting the power of lighting in the commissioners, and providing for the appointment of the commissioners and their meetings, quorum, and the like, enacted in section 33 as follows:

"And be it enacted that it shall be lawful for the commissioners, or any committee appointed by them, to enter into and contract in the name of the commissioners with any persons for the execution of any works directed or authorized by this Act to be done by the commissioners, or for furnishing materials or labour, or for any other matters or things whatsoever necessary for enabling them to carry the purposes of this Act into full and complete effect, in such manner, and upon such terms, and for such sums of money, and under such stipulations, regulations, and restrictions as the commissioners or such committee shall think proper."

The Act then provided, by section 41, that the commissioners were not to be personally liable on such contracts, and section 42 enacted as follows:

"That no person, being a commissioner, or a member of the court of aldermen of the common council of the city, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who, being a commissioner, or a member of the said court of aldermen or of the common council, shall be so interested or concerned therein shall for every such offence forfeit and pay the sum of £100 to any person who shall sue for the same, to be recovered in any of the superior courts by action of debt or on the case."

The Act also enabled the commissioners to contract for the supply of water (section 55) and to contract with gas companies or other persons to supply gas or light to the city by any other mode (section 116).

By the Act of 1851, which was passed in order to continue the earlier Act (which would otherwise have expired) with such variations and additions as had been shown to be necessary, it was (by section 53) enacted as follows:

"That no person, being a commissioner, who is a

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

shareholder in, or surveyor, solicitor, or agent for any gas company, water company, paving company, or any work, undertaking, or speculation the contracting with or the promotion or carrying out of which shall be discussed at any meeting of the commissioners, shall be eligible to sit or vote as a commissioner while such subject is under the discussion of the commissioners.

Farwell, J., was of opinion that the Act of 1848 contemplated that the commissioners would enter into contracts of two sorts—(1) for the construction of works or supply of materials to the city which would become their own property, and which he called "construction contracts"; and (2) for the supply of water for cleansing or of gas or other illuminant for lighting the city by companies or persons owning waterworks or gasworks or the like; that the contracts in question in this case fell under the second head; that sections 33 to 42 formed a group of sections dealing with construction contracts; and that notwithstanding the generality of the language of section 42, that section applied to construction contracts only. Moreover, section 42 ought to be read with section 53 of the Act of 1851, and (in his opinion) it would be idle to enact that a commissioner who was a shareholder in any contracting company should not be eligible to vote on the contract if the mere fact of his being a shareholder rendered it impossible that any contract could be entered into. Lastly, he thought that if section 42 was ambiguous, as he held it was, the more reasonable construction ought to be preferred. He therefore made a declaration in favour of the plaintiffs.

The defendants appealed.

Swinfen Eady, K.C., Danckwerts, K.C., and *A. J. Walter*, for the appellants.

Cripps, K.C., and *Roskill*, for the plaintiffs.

Cur. adv. vult.

Feb. 22.—VAUGHAN WILLIAMS, L.J., read the following judgment of RIGBY, L.J., in which he concurred: After careful consideration of the provisions of the Act of 1848, of the judgment of Farwell, J., and of the arguments addressed to us, I am quite unable to concur in the construction put upon the Act by the learned judge. This, speaking broadly, consists in treating all the sections of the Act from 33 to 42, both inclusive, as dealing only with what the learned judge calls construction contracts, leaving all other contracts, as, for instance, lighting contracts, outside their provisions, with the remarkable result that, notwithstanding the provisions of section 42, there is nothing to prevent any commissioner, alderman, or common councillor from having the largest interest in any contract with the commissioners not a construction contract. In contradiction of this construction, I hold that the sections above-mentioned do, in one part or another, deal with every possible contract that the commissioners can enter into by virtue of the Act, and that the provision contained in section 42, whatever its effect, is to be applied to every such contract; and I proceed to refer to the different sections of the Act, so far as it seems to me necessary for establishing that proposition. Section 33 authorizes the commissioners or any committee appointed by them (no authority to any such committee is conferred elsewhere in the Act) to contract for the matters hereinafter mentioned: (*a*) The execution of any works directed or authorized by the Act to be done by the commissioners. This would plainly authorize a contract for constructing sewers, though the power to deal with sewers is not, except by general terms, given or referred to by sections 33 to 42 inclusive, or previously to section 53. (*b*) The furnishing of materials. This would clearly authorize a contract with quarry owners in Wales, for instance, to furnish hundreds of tons of granite sets to be delivered at any appointed place in the city. Such a contract could by no ingenuity be described as a construction contract. (*c*) The furnishing of labour. This might extend to the laying down of the granite sets so as aforesaid purchased or other dealings with materials supplied, or to some totally independent purpose unconnected with the supply of materials—*e.g.*, the watering or sweeping of the streets. Some of these contracts might possibly, others could not properly, be described as construction contracts. (*d*) Any other matters or things necessary for enabling them to carry the purposes of the Act into full and complete effect I can hardly imagine words better calculated to exclude any *ejusdem generis* construction than these last, even if it were possible to indicate any one genus to which all the contracts coming under heads (*a*) (*b*) and (*c*) could be referred, which I do not think it is. Obviously a lighting contract would be within these general words, and I do not know any contract for purposes of the Act which could be excluded. If the precedent words of the section were to be treated as cutting down the generality of the subsequent words, it would only be by a construction which would render both the execution of works and the supply of materials or labour essential to every contract. For this there can be no reason, and such a construction cannot be accepted. [His lordship then discussed other sections of the Act of 1848, and continued as follows:] It does not require argument to prove that all contracts dealt with in section 33 are also referred to and dealt with in section 42, and it is almost impossible to suppose such one-sided legislation as would apply the stringent provisions of that section to construction contracts only and leave it lawful to any commissioner, alderman, or common councilman to have the largest interest in any contract with the commissioners that is not a construction contract.

As to the meaning of section 42, the important point for decision is whether a corporator or shareholder of an incorporated company is or is not interested directly or indirectly in any contract entered into with the company. It was admitted on behalf of the plaintiff company that as a general rule he is so interested, and indeed to deny that would be equivalent to saying that in case of a contract within an incorporated company no person whatsoever is interested though the whole fortunes of the corporators or shareholders may depend upon the contract—a contention which is manifestly absurd. But, beyond what I think may fairly be called the main contention—viz., that only construction contracts are within section 42—the plaintiffs have contended, and the learned judge has in their favour held, that the Act of 1851, and particularly section 53 thereof, proves that under the special legislation affecting the Commissioners of Sewers a shareholder is not considered as being interested in a contract made by his company, though he must necessarily share in any profits or loss that might be the result thereof. If there were words in the Act of 1851 necessarily involving that conclusion, effect must be given to them; but no mere conjecture based on probable grounds would be sufficient for the purpose. The argument of the plaintiffs, adopted by the learned judge, turns entirely upon section 53 of the Act. That is a section not relating to concluded contracts, but to discussion and votes antecedent to contracts. It refers only to commissioners, and not to aldermen or common councilmen, though they are dealt with by section 42 of the Act of 1848. The section was

obviously intended to extend still further the disabilities of commissioners, and there is nothing to indicate that any relaxation of the provisions of the earlier statute was intended. But, whilst providing that no commissioner being a surveyor, solicitor, or agent of a company with whom it is intended to enter into a contract shall sit or vote, it applies naturally the same provision to a shareholder of the company. It would be strange, indeed, if a surveyor, solicitor, or agent were prevented from sitting or voting and a shareholder permitted to do both. But from the fact that a commissioner shareholder is prohibited by section 53 to sit or vote upon the question of entering into a contract with his company, it has been argued that he could not be possessed of such an interest as under section 42 of the Act of 1848 would render the contract, if and when made, null and void. It would be unnecessary, it is argued, to prevent him from sitting and voting if the fact of his holding shares would of itself avoid the contract. The argument loses sight of the fact that a shareholder commissioner might, by taking part in and voting as to the expediency and policy of a contract with his company, exercise perhaps a decisive influence on the entering into such contract and yet might not, when the contract was signed, be any longer a shareholder or any longer a commissioner, in either of which cases the contract would be unaffected by section 42. There is, in fact, no necessary connection between section 42 of the earlier and section 53 of the later Act, and it would be illogical and merely conjectural to assume that the later section should interpret the earlier.

The conclusion I arrive at is that a shareholder commissioner, alderman, or common councilman is interested within section 42, and that the existence of his interest is sufficient to render a contract with his company null and void. The fact that express provision has been made by Parliament that a member of an ordinary municipal council shall not be precluded, by being interested only as a shareholder of an incorporated company, from taking part in making a contract between his company and the corporation of which he is a member only emphasises the distinction in this respect between ordinary municipal corporations and the city corporation, as to which no similar Parliamentary provision exists, or apparently ever has existed. Mr. Danckwerts pointed out that in legislation relating to the City Corporation clauses substantially similar in effect to section 42 of the Act of 1848 have been regularly inserted from a time long anterior to the date of the Municipal Corporations Act, 1882, down to the present time. This disposes of the suggestion that the legislation of 1848 was a mere experiment, which, being found unsatisfactory, was amended in 1851.

Turning now to the facts of the present case, so far as they are relevant, we find from the statement of claim and the particulars to paragraph 4 of the defence, which are admitted to be accurate, the facts hereinafter stated. With regard to the central and western districts the Brush Co. obtained provisional orders, with the consent of the Commissioners of Sewers as local authority, and those orders were confirmed by an Act of Parliament not containing any statutory power of assigning the contracts which might be made with the promoters. The Brush Co. entered into contracts with the Commissioners of Sewers, dated, as to the central district, the 19th of May, 1890, and, as to the western district, the 5th of February, 1891, as to electric light. At each of those dates a common councilman was a shareholder in the Brush Co., and each of the two contracts was null and void *ab initio*. Notwithstanding this, by a deed dated the 21st of August, 1891, the Brush Co. affected to convey the contracts to the plaintiff company, but this assignment could not render valid the contracts which were already null and void. We have only to give effect to the provisions of the statutes, and have not a dispensing power, even if we were disposed to exercise it. With regard to the contract as to the eastern district, dated the 28th of May, 1890, it appears that the Laing, Wharton, and Down Construction Syndicate (Limited), the contracting parties, had no shareholder whose existence would render null the contract; and, although it appears that the Board of Trade might have revoked the provisional order but for the assurance of the Commissioners of Sewers that the syndicate would be financed and the contract taken over by the Pioneer Co. and the City of London Co. respectively, and that both those companies were disabled from entering into any valid contract with the Commissioners of Sewers, yet, on the assumption, which I see no reason to doubt, that the contract of the 28th of May, 1890, was originally entered into in good faith, I can find no provision in the Acts of 1848 and 1851, or either of them, entitling us to set it aside.

STIRLING, L.J., read a judgment to the same effect.

THE COURT declared that the first two contracts were invalid, but did not interfere with the third; and, on the ground that each party had in part succeeded and in part failed, no costs were given in either court.

Appeal allowed.

Solicitors, *The City Solicitor; Ashurst, Morris, Crisp, & Co.*

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — Feb. 15, 18.

EASTWOOD BROTHERS (LIMITED) v. HONLEY URBAN DISTRICT COUNCIL. (a.)

Local government—Sewers—Prescriptive right of drainage—Trade effluents—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 21—*Public Health Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 17—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 7, 16.

Where the owners of buildings have acquired a right to discharge drainage into a public sewer through a connection lawfully made, that right extends to the discharge of trade and manufacturing effluents, and section 7 of the Rivers Pollution Prevention Act, 1876, *does not justify a local sanitary authority in cutting off the connection with their sewer, even although it is shown that the discharge of the trade effluent prejudicially affects the disposal of the sewage matter conveyed through the sewer.*

Decision of Byrne, J. (48 *W. R.* 614), *affirmed.*

This was an appeal from a decision of Byrne, J. (reported 48 W. R. 614).

The plaintiff company were the owners in fee of land and mills at Honley, near Huddersfield, known as Thirston Mills, where they carried on the business of woollen and worsted manufacturers. They acquired the property in 1890 as successors in title to a firm of Eastwood Brothers, who in their turn had derived title through a firm of Dearnley, Drury, & Co.

In the year 1853 a drain was constructed from the mills which carried the trade effluent discharged in the processes of manufacture into a ditch or channel

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

known as Thirston Dyke, and that channel discharged into a drain known as the May Brook, and so into the River Holme. There was no interruption in the user of that drain for trade effluents so long as it discharged into Thirston Dyke.

In the year 1885 the Honley Local Board, which at that time was the local sanitary authority for the district within which the mills were situated, projected and carried out a sewerage system under which they constructed a sewer near the Thirston Dyke, and, as it appeared from the evidence, the workmen of the board, without any special directions and without previous communication with the then owners of Thirston Mills, took up the drain from the mills at the point where it met the new sewer, and made a connection between them; so that from 1885 to the present time the drain had ceased to discharge into Thirston Dyke, and the effluent from the mills had passed through the sewer into the River Holme.

Thirston Mills had since 1853 been from time to time enlarged, and there was some evidence to the effect that the volume of the trade effluent had increased in recent years, but that there had been no material change in its character.

Under the Local Government Act, 1894, the Honley Local Board became the Honley Urban District Council.

In 1896 a joint committee was formed of the Honley Urban District Council and the South Crosland Urban District Council for the purpose of making main sewers for the two districts, and in 1897 that committee acquired land for the construction of outfall and purification works.

Under a provisional order of the 10th of April, 1897, a joint sewerage board was constituted which superseded the joint committee, but its duties and functions affected only main sewers made by the joint board, and sewers already made by either of the two district councils remained vested in and under the control of the council in whose district they were situated.

The defendant council being advised that the discharge of the trade effluent from Thirston Mills into their sewer was on account of its temperature and for other reasons prejudically affecting the disposal of the sewage matter and exposing them to liabilities under the Rivers Pollution Prevention Act, 1876, informed the plaintiffs of their intention to cut off the connection between the sewer and the drain from Thirston Mills. The plaintiffs accordingly commenced this action claiming an injunction to restrain the defendants from disconnecting the drain in accordance with their threat.

Byrne, J., granted an injunction, holding that effluents produced in the course of a trade or manufacture may be included among the matters discharged into a public sewer through a connection lawfully made, and that the provisions of the Rivers Pollution Prevention Act, 1876, s. 7, did not justify the defendants in cutting off the connection made with their sewer, even though it could be shown that the trade effluent prejudically affected the disposal of the sewage matter conveyed through the sewer.

From this decision the defendants now appealed.

Asquith, K.C., and *Clayton*, for the appellants, contended that they were under no obligation to receive into their sewers anything but domestic sewage and not trade effluents.

Danckwerts, K.C., and *Waggett*, for the plaintiffs, argued that they had a right to send their trade effluent into the sewer, and that in any event the defendants had no right to cut off the connection, but must have recourse to the ample remedies given them by the Public Health Act.

The principal cases referred to were *Attorney-General* v. *Clerkenwell Vestry*, 40 W. R. 185, [1891] 3 Ch. 527; *Ogilvie* v. *Blything Sanitary Authority*, 67 L. T. Rep. 18, 41 W. R. Dig. 153; *Peebles* v. *Oswaldtwistle Urban Council*, 45 W. R. 454, [1897] 1 Q. B. 384, 625.

RIGBY, L.J., said there was some difficulty in the case owing to the vague way in which it was brought forward. There was no doubt, however, that the plaintiffs had for a considerable time discharged an effluent into the sewer, and a trade effluent as well as domestic sewage. Byrne, J., saw no reason for thinking that the liquid discharged from the drain into the sewer would prejudicially affect the disposal of the sewage. The defendants now come before us and say that they are under no obligation to receive anything into their sewers except domestic sewage, and allege that the trade effluent in question is prejudical to the disposal of their sewage. I think that under the circumstances they are not entitled to cut off the connection, and the appeal must therefore be dismissed.

VAUGHAN WILLIAMS, L.J., agreed.

STIRLING, L.J., said: Whether you look at section 21 of the Public Health Act, 1875, or at section 7 of the Rivers Pollution Prevention Act, 1876, there is no ground for disturbing the order of the court below. If section 21 applies there is an absolute right to discharge the effluent into the sewer. If the right is qualified by section 7 of the Rivers Pollution Prevention Act it seems to me that the facilities given by that Act ought not to be withdrawn unless the case falls within one of the provisoes of the section, which has not been shown to be the case here.

Appeal dismissed.

Solicitors, *Jaques & Co.*, for *Armitage, Sykes, & Hinchcliffe*, Huddersfield; *Van Sandau & Co.*, for *Mills & Co.*, Huddersfield.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) — Feb. 12.

CHESSUM & SONS v. GORDON. (a.)

Practice—Judgment or order—Correction of mistake—Certificate of taxing-master—Accidental omission in bill of costs—R. S. C., 1883, *ord.* 28, *r.* 11.

A plaintiff, who had obtained judgment for a certain sum with costs, carried in his bill of costs for taxation, but one item which ought to have been included was accidentally omitted. After the taxing-master had given his certificate the mistake was discovered.

Held, that the court had power to order that the item should be referred to the taxing-master, and that his certificate should be amended.

Appeal from an order of Day, J., directing the taxation of certain costs.

The action was brought by builders against a building owner. At the trial before Lord Russell of Killowen, C.J., and a jury, judgment was ordered to be entered for the plaintiffs for an amount to be ascertained by a special referee with costs. The referee duly made an award, and the plaintiffs' solicitors took up the award, at the same time paying the referee's fees, which amounted to £160 11s. 8d. Formal judgment was entered for the plaintiffs for the amount fixed by the award with costs to be taxed.

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

So far we have not got to any conclusion as to the precise meaning of the words "profits available for dividend," but there is no difficulty in surmising what they must mean. They must mean profits which are properly applicable for payment of dividends, and when we go to clause 74 of Table A we find a provision which, so far as I know, is the only provision—there may be others, but there is this at any rate—which provides for a limitation of the profits which are applicable and can properly be applied for payment of dividends, for we find that "the directors may, before recommending any dividend"—that takes the matter quite clearly out of the profits available for dividend—set aside out of the profits of the company such sum as they may think proper as a reserved fund to meet contingencies or for equalizing dividends, or for repairing or maintaining the works connected with the business of the company." It seems to me that one of the duties, perhaps the very first duty, they have to undertake when they formulate a statement of account of the profits for the period they are dealing with is to determine what they shall set apart for a reserve fund, and when they have set it apart they must invest and settle it, and from that moment when they have set apart the reserve fund it is no longer a fund of profit available for dividend.

Then clause 5 does not in any way deal with what they set apart as a reserve fund. They have power to do it; as prudent men they ought to do it, to meet any contingencies. They ought to apply their minds to determine whether or not it shall be done, whether a reserve fund shall or shall not be created, and from that moment clause 5 of the memorandum, and articles 11 and 12 of the special articles of the company, have nothing whatever to do with the matter. They must divide the sum which remains after deducting the reserve fund. As I said before, there may be some other things to be done first—I have not had my attention called to anything, but there may be—but if there are, then the other funds must be set apart too, and it is only when you have set apart these that you can begin to estimate, and ultimately set apart in the form of dividends any profits which are available for a dividend.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think this is an easy case. I think, moreover, that it is extremely probable that the question which has been raised upon this particular memorandum of association and these particular articles is one which may affect a great many companies. Of course one knows that the forms which are used are in common use. But although I think the case a difficult one, and the point a difficult one, I agree that it is not necessary to take time to consider it, because these cases probably are decided better freshly after hearing the arguments than after deferred consideration.

The question which we really have to decide is a question of the construction of clause 5 in the memorandum of association. It is really a question what is the meaning of the words "the profits from time to time available for dividend." In considering that question both sides have invited us to treat clause 5 of the memorandum as an ambiguous clause, and to construe it in the light of the articles, and I propose therefore to do so. I think that the words "profits from time to time available for the dividend" in clause 5 mean the net profits after deducting all proper appropriations by the directors. I said in the course of the argument that I did not think that it could mean the net profit balance as shown by the profit and loss account. I do not think that anybody contended that it did mean that. If it does not mean that, it seems to me that there is no resting-place between that and saying that it is the net profit after deducting all sums properly appropriated by the directors before they arrive at the sum out of which the dividends are to be paid. If they had the power and they chose to appropriate a portion of the profit balance, as shown by the profit and loss account, to the replacement of so much of the capital as had been expended for revenue purposes, nobody denies that they could do that, and, on the other hand, nobody says that there is an obligation on them to do that. It is a matter within their discretion so to appropriate the profit balance. They might, if they chose, appropriate the whole profit balance without making any such appropriation for the purpose of replacement of capital. That being so, I think that this question arises, whether this appropriation of part of the profit balance to the formation of a reserve fund to meet contingencies is a proper appropriation by the dirictors, and I think it is a proper appropriation by the directors.

Everyone seems agreed that it is a proper appropriation by the directors if article 74 of Table A is an article which is in force. The articles here begin by saying "In so far as these articles do not exclude or modify the regulations contained in the table marked A in the first schedule to the Companies Act, 1862, the last-mentioned regulations shall, so far as the same are applicable, be deemed to be the regulations of the company." Then one finds later on in clause 34 that articles 52, 53 and 54 of Table A shall not apply. That being so, it is plain that article 74 is not expressly excluded, and it only can be excluded because of its inconsistency with something that one finds expressly provided in the memorandum of association or the articles. I see nothing in the memorandum or the articles to exclude article 74. On the contrary, if I had to construe clause 5 of the memorandum without the assistance of the contemporaneous articles I should not say that there was anything in clause 5 inconsistent with the power of the directors to set aside out of the profits of the company such sum as they thought proper as a reserve fund. But if one must turn to the articles to construe the memorandum—a thing which I always do with very great hesitation—I think that article 74 in this case is not excluded, and if it is not excluded and is to be treated as written into the special articles, and one turns to those articles to construe the clause, *a fortiori* there is nothing in clause 5 to prevent the directors setting aside out of the profits of the company such a sum as they think proper as a reserve fund; because I think that the word "profits" in the 5th clause means profits after deducting all sums properly appropriated by the directors out of the profit balance shown in the profit and loss account.

I wish to say that I am always sorry if one has to come to a conclusion which may possibly be a conclusion which business people would not arrive at, and I confess that I had some doubt as to whether business people might not read "profits" in clause 5 of the memorandum of association in a different way from that which I am reading it. When I look at the report of the directors themselves at the very moment they are dealing with this subject-matter, the wording of the report looks as though they do not use that word "profit" in the way I am taking it. Although they do not use the word "profit" they do say "Out of the sum available—viz., £13,225 11s. 4d., it is recommended that the dividend be declared at the rate," &c. It rather looks as though they themselves, the directors, who were making this reserve fund, thought that the profits available for dividend were the whole sum of £13,225 11s. 4d., but whatever they may have thought, it is the province of

the court to determine what that expression means, and according to my view it does not mean the £13,225, but it does mean that sum less so much of it as the directors have, within their powers, properly set aside as the reserve fund to meet future profits.

ROMER, L.J.—The point involved is, I think, a somewhat difficult one, but it has been very well argued on both sides, and I cannot say that I have had much difficulty myself in coming to a conclusion upon it. In particular I must say that I think the arguments on behalf of the respondent could not have been better put than they were by Mr. Nepean. As we are differing from my brother Kekewich I think it right to state my reasons in my own language.

I think that the words "available for dividend" in the memorandum of association following the word "profits" are intended in some shape or form to modify the word "profits," and I think the phrase "profits from time to time available for dividend" in the memorandum means profits which, after making all proper deductions, remain for the purpose of paying dividends. One may arrive at the point of view I am taking by consideration of another point. What is the period of time you have to consider when you have to ascertain within the memorandum of association what are the profits available for dividend? I think it is the time after you have already properly ascertained the profits which are applicable for the payment of dividend and not any prior time. Then is there any difficulty in the way of that construction by reason of the wording of articles 11 and 12? I cannot see that there is at all. In my view the word "profits" in articles 11 and 12 must be taken to mean the same profits as are referred to in the memorandum of association—that is to say, "profits available for dividend," just as much as if those words had been repeated in those articles. This is borne out by the fact that in dealing with articles 11 and 12 all the payments there mentioned are described as payments of dividends.

Then with regard to the articles of Table A undoubtedly this is clear, that articles 72, 73, and 74 are not expressly excluded, and it is to be borne in mind that when any articles of Table A are to be expressly excluded you find in these articles of association those articles specified, and I think it is a fair deduction from that, that those who prepared the memorandum and articles of association must have had articles 72, 73, and 74 in their minds, and did not think it necessary to expressly exclude them. So in my opinion certainly those articles ought to be considered to be included unless there is some grave reason why you should exclude them. I am bound to say that I see no reason why you should exclude them at all; on the other hand, I do see great difficulty in the way of holding that you should exclude them, and especially article 74. In my opinion article 74 of Table A is included in these articles of association.

There is only, however, one further point on which I think it right to say a word. With regard to article 74, as at present advised, I do think that that article 74 is modified to a certain extent—that is to say, I do not think that article 74 could be used for the purpose of creating a reserve to be applied in equalizing dividends. That is my present opinion, though I need not express any concluded opinion upon it, because it is not before me, but I point that out, as otherwise it might be held that article 74 might be worked for the purpose of creating an injustice as between the owners of the founders' shares and the owners of the ordinary shares. For these reasons I agree that the appeal ought to succeed.

Solicitors, *William Fisher; Dubois & Williams.*

High Court of Justice.

Chan. Div. Byrne, J. } Jan. 24.

KELLY'S DIRECTORIES (LIMITED) *v.* GAVIN AND LLOYD'S. (*a.*)

Copyright—Infringement—Portions of one book printed by different printers—"Cause to be printed"—Sanctioning publication—Partnership—5 & 6 Vict. c. 45, s. 15.

A. agreed with B., in consideration of receiving a percentage of profits, to allow B. the use of A.'s name in the publication of a book containing shipping information. The whole was to be printed by A.'s workmen. The title-page, containing the statement "Printed by A.," and the first eighty-one pages of the book and certain advertisements, were printed by A., but at B.'s request the remainder of the book was subsequently printed elsewhere. The portion printed elsewhere contained matter pirated from the plaintiffs' copyright. The book was published and sold by B. A. was ignorant of the piracy till notified of the same by the plaintiffs.

Held, that there was no partnership between A. and B., and that A. had not caused the printing of the pirated portion of the book within the meaning of the statute; but that, inasmuch as A. had not altered the statement "Printed by A." to suit the facts, A. was not entitled to costs.

In this case a company known as "Kelly's Directories (Limited)" sought to restrain the defendants Gavin and Lloyd's, their managers, servants, printers, publishers, and agents, from printing, publishing, selling, and delivering, and otherwise disposing of any copy of a book called Lloyd's Merchants' and Shippers' Diary for 1900, which the plaintiffs contended contained a piracy of a book of which the copyright belonged to the plaintiffs.

The facts were shortly as follows: Gavin conceived the idea of bringing out the book in question, and approached Lloyd's with a view to obtaining the benefit of Lloyd's name in the publication thereof. This resulted in an agreement which was embodied in a letter signed by Gavin of the 25th of May, 1899, of which the terms were as follows: "In reply to your favour of the 17th respecting the printing and publication of a work to be called Lloyd's Diary of Merchant Shippers, I agree to the following—First, for the use of Lloyd's name I will pay the committee" [of Lloyds'] "a subsidy of £100 a year, 5 per cent. upon all moneys received from advertisements appearing in the diary, and 5 per cent. upon all moneys which accrue to me," &c. "I will pay the committee for printing the diary 25 per cent. of the actual cost of printing and machining," &c.

By the third clause Gavin guaranteed that the total minimum profit to the committee should not be less than £200 a year, and it was understood that when the profits reached £500 Gavin was to be free from any payment in such year of the £100 subsidy.

By the seventh clause "The information in Lloyd's Diary for Merchant Shippers should be the same as is inserted in Lloyds' Shipping Diary, with the exception that the international parts of the directory shall not be included in the Merchant Shippers' Diary, but in the event of any new literary features being introduced for the purpose of rendering the work more attractive to merchants, they shall not add to

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

the clerical labour involved in the compilation of the Shipping Diary and shall be submitted to you" [Lloyd's] "for approval, such approval it is understood, however, is not to be unreasonably withheld."

Then by clause 8 it was provided that "the same clerical labour shall still be performed by Lloyd's for the Merchant Shippers' Diary as is now performed for Lloyd's Shipping Diary." Then there was an undertaking as to the binding. By clause 10 Lloyd's were to be entitled to refuse the insertion of any advertisements which might be of an objectionable kind, but beyond this all matters relating to the form and character of advertisements, reading matter, sale and price of the work should be decided by Gavin.

By clause 12 Gavin was to pay all expenses incidental to the production of the Merchant Shippers' Diary, such as paper, binding, postages, &c.

The agreement was to continue for fourteen years, unless after two years it was found that the Merchant Shippers' Diary did not pay, in which case Gavin was to have the right to discontinue the publication of the same.

The preparation for bringing out the book went on, and certain lists were prepared by Gavin and sent abroad. For the purposes of the book Gavin wrote to the secretary of Lloyd's: "I send you herewith the copy of the letter I would suggest your writing to the agents" [Lloyd's agents abroad]. "If you will send me over the paper I will have it manifolded and send it back for you to sign." The enclosure as originally drawn purported to show an intention on the part of the committee of Lloyd's to publish this book, and put the committee forward in fact as being the intended publishers and the persons to give the advertisements. But the letter was altered and ran as follows: "It is the intention of the committee to sanction the publication of a diary for 1900 intended to circulate amongst merchant shippers. The information which you have been good enough to supply in connection with the Shipping Diary has been, I understand, greatly appreciated by shipping firms in this country, and I would deem it a favour if you would kindly supply me for the new diary the information in the enclosed form." Ultimately it was published, and as manifolded was signed on behalf of Lloyd's, and was used to obtain from Lloyd's agents abroad the information required by Gavin for getting on with his book. Gavin sent out certain lists, and it was clearly shown to the satisfaction of the judge that whatever lists were supplied abroad, or however Gavin got the information for the particular portion of the book in question, there had been a clear case of copying from the plaintiff's book.

Matters went on and at a certain point it became apparently impossible for Lloyd's to do the printing of the whole book so as to get it issued at the proper time. They printed up to p. 83, but no more, except a certain portion of the advertisements at the end of the book. An agreement was then come to varying the terms of the original agreement—viz., that at Gavin's request he was to be at liberty to get such portion of the book as could not be printed by Lloyd's printed elsewhere. Gavin had the rest of the book, including the portion complained of, printed elsewhere, and the portions so printed were sent to the binders and bound up with the portion printed by Lloyd's. The front page, which was printed by Lloyd's before the new arrangement last referred to had been come to, or contemplated, contained the full title of the book and the words "Printed at Lloyd's, Royal Exchange, London."

The question before the court was whether under the circumstances Lloyd's had made themselves liable under 5 & 6 Vict. c. 45, s. 15, which provides that "if any person shall in any part of the British Dominions after the passing of this Act print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright without the consent in writing of the proprietor thereof, or shall import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or knowing such book to have been so unlawfully printed or imported shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire any such book so unlawfully printed or imported" then certain penalties are imposed. It was not suggested that Lloyd's knew that the book had been unlawfully printed or that they were aware of the piracy committed by Gavin.

Levitt, K.C., and *E. Ford*, for the plaintiffs.—Having regard to the agreement existing between Lloyd's and Gavin and to the fact that the former had supplied the means of assisting Gavin to obtain the information required for the book through their agents abroad, and that the title-page contained the statement "Printed at Lloyd's," Lloyd's must be held to have caused the printing of the portion of the book complained of within the meaning of the Act. The relationship between Lloyd's and Gavin was in the nature of a partnership.

T. E. Scrutton and *F. D. Mackinnon*, for Lloyd's.—There are no cases exactly in point. The statute is perfectly clear. The statement on the title-page "Printed at Lloyd's" does not act by way of estoppel against Lloyd's.

They referred to *Russell* v. *Briant*, 8 C. B. 837, and *Lyon* v. *Knowles*, 11 W. R. 266, 3 B. & S. 556, as being decisions on similar words in a similar statute, 3 Will. 4, c. 15, s. 2.

The defendant Gavin did not appear.

BYRNE, J.—It has been proved to my satisfaction as against the defendant Gavin, and is not disputed by the defendants Lloyd's, that as to a portion of this work there has been a clear case of copying and infringement of copyright. The real point as between the plaintiffs and Lloyd's is whether they are responsible in the circumstances for the pirated portion of the work. There are, as far as I know, no cases decided under this particular section, but there are authorities that have been decided under a section having somewhat similar words in another Act. The first case cited was *Russell* v. *Briant*. [His lordship then reviewed the case, and continued:] The second case referred to was *Lyon* v. *Knowles*. [His lordship proceeded to review the case, and continued:] Now, of course these are only illustrations of what may be considered as causing a representation within the other Act, but they do help to this extent, that in reference to representation the court came to the conclusion that the meaning of causing to do the act complained of meant either by the person himself or his agent. Now what I have got to do here is to see whether, the whole of the order for the printing which is complained of having been given by Gavin with the sanction of Lloyd's—it is true by agreement with Lloyd's—I can fairly regard the printer who actually did the work as being an agent of Lloyd's for the purpose of printing the book. First of all there was no partnership between Gavin and Lloyd's. It is true that there was an agreement between them for the printing and publication of a certain work. It is true that they were to receive profits by reason of the publication of the work contemplated. It is true

that they were to allow the use of their name as a sort of authority for the book—that is to say, they allowed it to be stated that it was published under their supervision, and they were content to allow it to go forth to the world with the title-page stating that it was printed by Lloyd's, of the Royal Exchange, London. I have said no partnership was constituted by the agreement, and I do not think, having given it careful consideration, that I should be justified in holding that the printing by a third party, who was not a party to the agreement, that having been done in consequence of orders given by Gavin and paid for by Gavin, I do not think I should be justified in saying that that was something done by an agent of Lloyd's. I think that by allowing their name to appear on the title-page, Lloyd's have not made themselves liable as actual printers of this book. But I am bound to say, having regard to the whole of the facts, that I do not think I ought to give them any costs of the action. I think the plaintiffs are entitled in this case to an injunction against Gavin with costs, but are not entitled to costs as against Lloyd's.

Solicitors for the plaintiffs, *Scott, Spalding, & Bell.*

Solicitors for the defendant Lloyd's, *Waltons, Johnson, Bubb, & Whatton.*

Chan. Div. Buckley, J. — Jan. 17.

In re STANFORD.
STANFORD *v.* ROBERTS. (*a.*)

Settled land—Building—Existing occupation—Additions or alterations—Necessary or proper—Present intention for future letting—Settled Land Act, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (*ii.*).

An alteration in a building may be made "to enable the same to be let" within section 13 (*ii.*) *of the Settled Land Act,* 1890, *even although the building is occupied under existing tenancies, if the alterations are made with the present intention of enabling the building to be let at some future time.*

Such an alteration is necessary or proper if it is such as a prudent man absolutely entitled would make in his own interests.

Adjourned summons.

This summons was taken out for obtaining the sanction of the court to the application of certain capital moneys standing in court to the credit of the settled estate being applied in making alterations in a building part of the estate for the purpose of preventing dry rot.

In May, 1900, the trustees of the Stanford estate purchased the building in question, Copthall House, Copthall-avenue, in London, under an order of the court.

The house was a large one containing some 150 rooms. These were let to stockbrokers and stockjobbers and others, for offices.

This house was clearly, his lordship said, purchased, not for the residence of the beneficiaries, but as an investment by the letting of the rooms.

In the basement there were thirty-three rooms, let to some seventeen tenants. The floors of the basement were constructed of wooden boards resting upon sleeper joists over a bed of concrete, and were a little below the external area. The consequence was that there was no ventilation through the joists and nearly all the floors became more or less affected with dry rot.

Builders had been employed in the case of four of the rooms to replace the floors with concrete and wooden blocks upon the concrete.

According to the evidence of the surveyor the proper course to adopt was to take up the floors and substitute concrete and wooden blocks over the whole of the basement, and that that was the only radical and satisfactory cure for the conditions obtaining in the building. If the then floors were patched up, the dry rot was certain to return, and there was considerable risk of its spreading throughout the building. If new floors were provided in the above manner there would be a permanent improvement. The presence of dry rot caused great inconvenience and annoyance to tenants, and rendered it impossible to relet the rooms at a fair rent. The sum of £59 odd had been properly expended upon the four rooms already altered, and it would require £400 more to complete the basement.

There were capital moneys belonging to the estate in court, and the application was by the plaintiff, who was the tenant for life, that the sum of £459 odd might be authorized to be raised thereout for the above purposes.

Wace, for the plaintiff.—The proposed repairs are additions or alterations, reasonably necessary and proper for enabling the house to be let, and such as the court can allow under section 13 (ii.) of the Settled Land Act, 1890: *In re De Teissier's Settled Estates,* 41 W. R. 184, [1893] 1 Ch. 153; *In re Lord Gerard's Settled Estates,* [1893] 3 Ch. 252.

He also referred to *In re Gaskell's Settled Estates,* 42 W. R. 219, [1894] 1 Ch. 485.

S. O. Buckmaster, for infant tenant-in-tail, defendant.—These are not repairs within the section. The section only allows structural alterations, and not such as these, which are only for the purpose of enabling a higher rent to be obtained by the tenant for life. Moreover, these alterations are not "to enable the house to be let," as it is already let. The decisions in *In re De Teissier's Settled Estates* and in *In re Lord Gerard's Settled Estates*, which are relied on to show that contemplated letting in the future is sufficient, turned upon the fact that the tenants for life wanted the buildings for their own occupation.

E. F. Ball, for the trustees.

BUCKLEY, J.—The question is one of importance having regard to the number of applications under this section. I think these repairs are additions to or alterations of the building within the section. I think they are substantial and structural alterations. I also think that they are necessary or proper. The test is whether they are such as an absolute owner of the property, if he were a prudent and a reasonable man, would do in his own interests. I think they are. The next question is, are they made to enable the building to be let? Now substantially all the rooms are let. Consequently these alterations are not for the purpose of enabling the house to be let immediately. But is that necessary? In *In re De Teissier*, 41 W. R., at p. 185, [1893] 1 Ch., at p. 159, Chitty, J., says, with regard to repairs coming within this sub-section 13 (ii.): "In my opinion there must be a present intention to let, if not an immediate prospect of letting, before any application under this sub-section can be properly made." This view is approved of by each of the Lords Justices in *In re Lord Gerard's Settled Estates.* In my judgment a present intention to let the building, either at the present, or at some future time, is sufficient to satisfy the section. I am far from saying

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

that whenever a tenant for life comes to the court and says that he wants alterations to be made, to enable the house to be let in the future, they should be authorized. The jurisdiction is discretionary, and must be exercised having regard to all the circumstances of the particular case. There will be a reference to chambers to ascertain the proper amount to be allowed for these repairs.

Application granted.

Solicitors, *Martyn & Martyn*; *Attree, Johnson, & Ward*, for *Hunt, Currey, Nicholson, & Co.*, Lewes; *C. E. Jones.*

Chan. Div. Joyce, J. } Feb. 21.

In re CALLIS. (*a.*)

Solicitor — Costs — Payment on account — Taxation— Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 41.

The plaintiff had paid the amount of an account sent in by his solicitor, which account was not, however, a "bill of costs" inasmuch as it did not set out the particular items charged. More than twelve months after such payment, the plaintiff took out a summons for delivery and taxation of the solicitor's bill of costs. No bill of costs had been delivered at the date of the hearing of the summons.

Held, that the payment on account could not in the circumstances be made referable to the bill of costs which would be delivered after the hearing of the application; and that the plaintiff was entitled to the common form order for delivery and taxation, notwithstanding the payment made upwards of twelve months before the issue of the summons.

Summons for delivery and taxation of a solicitor's bill of costs.

The plaintiff employed the defendant as his solicitor. From time to time in 1898 the plaintiff paid certain sums on account.

In January, 1899, on an account being sent in by the defendant, the plaintiff paid the balance and received a receipt for the same. The account, however, did not show the particular items charged, and in consequence was not sufficient as a "bill of costs."

The summons was issued on the 22nd of January, 1901. No bill of costs was sent in previous to the hearing of the application.

By the Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 41, the payment of a bill of costs shall not preclude the court from referring such bill for taxation "provided the application for such reference be made within twelve calendar months after payment."

Mark Romer (*Younger, K.C.*, with him), for the plaintiff.

Hughes, K.C., and *R. J. Parker*, for the defendant.—The court will not order taxation as well as delivery of a bill of costs. The object of ordering the delivery of a bill is to see whether there are such special circumstances as would cause it to be taxed: *Duffett* v. *McEvoy*, 10 App. Cas. 300, 33 W. R. Dig. 238. If a bill is delivered after a payment on account, the court will hold the payment so made to be referable to the bill subsequently delivered: *Hitchcock* v. *Stretton*, 40 W. R. 555, [1892] 2 Ch. 343, followed in *In re Thompson*, 42 W. R. 462, [1894] 1 Q. B. 462. Taxation, therefore, will not be ordered as the payment was made upwards of twelve months before the issue of the summons.

Mark Romer, in reply.—In *Hitchcock* v. *Stretton* previous payments were held referable to a bill delivered after the issue of the summons. That decision was commented on by the Court of Appeal in *In re Baylis*, 44 W. R. 533, [1896] 2 Ch. 107; and the principle will not be extended. Here there has been no delivery of a bill either before or after the issue of the summons.

JOYCE, J.—No bill of costs has been delivered either before or after the issue of the summons. I find no case in which a payment on account has been made referable to the bill when none has been delivered at the date of the application to the court. There must be the common order for the delivery and taxation of a bill of costs.

Solicitors, *Rowcliffe, Rawle, & Co.*; *Busk, Mellor, & Co.*

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

K. B. Div. (Lord Alverstone, L.C.J.) } Feb. 12, 18.

LAMBERT *v.* MAYOR, &c., OF LOWESTOFT. (*a.*)

Local government—Highway—Defect in sewer causing hole under surface of road—Subsidence—Nuisance— Highway authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 19.

In an action against an urban sanitary authority for damages for injury sustained by a horse while passing along a highway, owing to one of its feet going through the crust of the road into a hole underneath, it was proved that this hole was caused by a defect in a mortar joint in a sewer running under the highway, which defect was caused by rats working through the mortar. The sewer had been constructed by a private body, and had been taken over by the defendants many years before the accident. Under the weight of the horse the crown of the road gave in, thereby causing the injury. Nothing had occurred to give the defendants warning that there was anything wrong with the sewer, and there was no evidence of negligence on their part.

Held, that, in the absence of negligence on the part of the defendants, the action was not maintainable. The responsibility of the defendants to maintain the sewer rested upon the Public Health Act, 1875, *and no action would lie for injury caused by the execution of that statutory duty unless it had been negligently performed.*

Further consideration.

This was an action to recover damages from a local authority, and was tried at Norwich by Lord Alverstone, L.C.J., when he held that there was no evidence of negligence, and dismissed the jury and reserved for further consideration the question whether the action could be maintained in the absence of negligence.

The plaintiff carried on business in Norwich, and the defendants were, under the Public Health Act, 1875, the urban sanitary authority of the borough of Lowestoft.

The plaintiff brought his action to recover damages for injuries sustained by a horse while passing along a road in the said borough, owing to one of the horse's feet going through the crust of the road into a hole underneath. Under the road was an old brick sewer, constructed about 1863.

The road was taken over by the defendants in 1886, when it was made up and manholes placed at certain points communicating with the sewer, and new gully pits constructed, which were connected with the existing drains, for surface water.

The sewer was at a depth of four or five feet, and

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

the drains from the gully to the sewer were between eight and nine feet in length.

It was proved that the junction of one of the drains with the sewer had been made of mortar, and that at some time rats had worked through the mortar of the joint and had subsequently made a hole of about two feet in diameter underneath the surface of the road.

Under the weight of the plaintiff's horse the crown of the road gave in and the horse was injured.

There was no evidence that the defendants were aware of the defect in the sewer.

Witt, K.C. (*E. E. Wild* with him), for the plaintiff.—The question here is whether the defendants are liable for damages by reason of the fact that the drain was in such a condition that the road became excavated and in consequence subsided. The defendants are the authority responsible for the maintenance of the sewers and are therefore liable, apart from negligence, if owing to a defect in a sewer a hole is caused under the surface of the road and the surface subsides thereby causing injury to a horse on the road. This sewer was taken over by and became vested in the defendants, it became defective and caused the existence of a nuisance, and the plaintiff is therefore entitled to recover: *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256, 27 W. R. Dig. 139: see also the remarks of Lord Herschell in *Municipal Council of Sydney* v. *Bourke*, [1895] App. Cas. 433, at p. 441, 43 W. R. Dig. 74.

Kemp, K.C., and *Poyser*, for the defendants.

Cur. adv. vult.

Feb. 18.—Lord ALVERSTONE, L.C.J., read the following judgment: In this case the plaintiff brought an action against the Mayor and Corporation of Lowestoft to recover damages for injuries sustained by a horse while passing along Cambridge-road, Lowestoft, owing to the horse's foot going through the crust of the road into a hole underneath. Running along the middle of that road was an old brick sewer constructed about the year 1863 by the Ipswich Building Society. The road was taken over by the defendants in the year 1886, when it was made up and manholes placed at certain points communicating with the sewer, and the old gully pits replaced by new and larger ones which were connected with the existing six-inch drains which had been put in to take surface drainage when the sewer was originally constructed. The sewer was at a depth of some four or five feet and the length of the six-inch drain from the gully pit to the sewer was between eight and nine feet. It was proved before me, and I find as a fact, that the junction of the six-inch drain with the sewer had been made in mortar, and that at some time rats had eaten or worked through the mortar of the joint and had subsequently made a hole of about two feet in diameter underneath the surface of the road. The crown of the road had given in under the weight of the horse, thereby causing the injury. After the accident the road was repaired by the defendants and the joint made good in cement. It was proved before me, and I find as a fact, that it was the common practice in the year 1863, and for some years afterwards, for sewers to be made in the way in which this sewer was constructed—namely, with mortar joints for the connecting drains. Nothing had occurred to give the defendants warning that there was anything wrong with the sewer and drains or with the road. A previous subsidence in the road, which was suggested as having been brought to the notice of the defendants some years before the accident, was proved at the trial to be in no way connected with, and I find that it was not connected with, either the sewer or the connecting drains.

I held at the trial, and still hold, that there was no evidence to go to the jury of any negligence on the part of the defendants which caused or contributed to the accident. I therefore discharged the jury, the counsel on both sides agreeing that the court, or if necessary, the Court of Appeal, should have the power to draw any inferences of fact necessary to decide the case.

Upon further consideration before me counsel for the plaintiff did not rely upon negligence, nor was any argument addressed to me to show that I was wrong in holding that there was no evidence of negligence to go the jury, but the plaintiff sought to recover on the ground that the existence of a hole under the road caused by a defect in the sewer constituted a nuisance, and that the defendants, as the authority responsible for the maintenance of the sewers, were liable apart from negligence.

In my opinion this contention cannot be successfully maintained. The responsibility of the defendants to maintain the sewers rests upon sections 13, 15, and 19 of the Public Health Act, 1875. In fulfilling those duties they are acting under statutory authority, and it is now clearly established that under ordinary circumstances no action lies for injury occasioned by the execution of statutory duty unless it has been negligently performed: *Geddes* v. *Proprietors of Bann Reservoir*, 3 App. Cas. 430, at p. 455, 26 W. R. Dig. 259; *Bateman* v. *Poplar Board of Works*, 36 W. R. 501, 37 Ch. D. 272; *Thompson* v. *Mayor of Brighton*, 42 W. R. 161, [1894] 1 Q. B. 332, at p. 341; *Stretton's Derby Brewery Co.* v. *Mayor of Derby*, 42 W. R. 583, [1894] 1 Ch. D. 431, and many other cases. It was, however, argued that if the condition of the sewer which had been taken over by and vested in the defendants did in fact cause a nuisance, the plaintiff could recover apart from negligence. In support of this view the case of the *Borough of Bathurst* v. *Macpherson*, 4 App. Cas. 256, 27 W. R. Dig. 139, and particularly the language of the Lord Chancellor (Lord Herschell) in *Municipal Council of Sydney* v. *Bourke*, [1895] A. C., at p. 441, 43 W. R. Dig. 74, explaining that case, was relied upon.

I am clearly of opinion that neither of these cases are sufficient to support the argument of the plaintiff. In the *Bathurst case* not only might the plaintiff have recovered upon the ground of negligence but, as pointed out by the Lord Chancellor in the *Sydney case*, the defective drain had caused the road to become dangerous, and no steps had been taken by the defendants in that case to prevent accidents although they were well aware of the condition of the road. Their lordships in the *Bathurst case* found that the appellants had caused a nuisance in the highway by the construction of the drain, by their neglect to repair it, and by leaving a dangerous hole open and unfenced. In my opinion the expressions of the Lord Chancellor at p. 441, upon which great reliance was placed by counsel for the plaintiff, must be construed with reference to the subject-matter under discussion, and were not intended to lay down a general rule that, simply because an accident has occurred in a road due to a latent defect in a sewer, the defendants, whose duty it is to maintain the sewer, are liable, apart from negligence. I find that in this case there was nothing to warn the defendants that there was anything wrong with the sewer, nor could they by the exercise of any reasonable care have discovered the existence of the hole under the road until the accident happened. I therefore dismiss the action and give judgment for the defendants with costs.

Judgment for defendants.

Solicitor for the plaintiff, *C. F. Martelli*, for *T. C. M. Rackham*, Norwich.

Solicitors for the defendants, *Sharpe, Parker, & Co*, for *R. B. Nicholson*, Town Clerk, Lowestoft.

Q. B. Div.
(Kennedy and Darling, JJ.) Dec. 18.

SCOTT (*Appellant*) *v.* MIDLAND RAILWAY CO. AND OTHERS (*Respondents*). (*a.*)

Mine—Quarry—Stone or "other minerals"—Sand and gravel—Quarries Act, 1894 (57 & 58 *Vict. c.* 47), *s.* 1 *—Metalliferous Mines Regulation Act,* 1872 (35 & 36 *Vict. c.* 77), *ss.* 11, 28*—Regulation of Railways Act,* 1871 (34 & 35 *Vict. c.* 78), *s.* 6.

By section 1 *of the Quarries Act,* 1894, *it is provided that "This Act shall apply to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act."*

Held, that gravel and sand are minerals within the meaning of this section.

Held, also, that the getting of sand and gravel by a railway company for their own use as ballast, out of land belonging to them, is not an act done "in the course of working the railway," within the meaning of section 6 *of the Regulation of Railways Act,* 1871.

Special case.

This was a case stated by the justices of the peace for the county of Norfolk for the purpose of obtaining the opinion of the court.

The informations, three in number, alleged that the respondents, being the owners of a certain quarry, had committed breaches of sections 11 and 28 of the Metalliferous Mines Regulation Act, 1872, as applied by the Quarries Act, 1894, in failing on certain dates to cause an abstract of the said Metalliferous Mines Regulation Act with the name and address of the inspector of the district and the name of the owner or agent appended thereto to be posted up in legible characters in some conspicuous place at or near the said quarry where it might be conveniently read by the persons employed; and further, that they were guilty of an offence against the said Act in failing to send, within twenty-four hours, notice in writing to the inspector of the district of an accident and of the loss of life occasioned thereby which occurred at the said quarry.

The following facts were proved or admitted before the justices:

The respondents were the lessees, for the purpose of taking ballast, of a certain place in the parish of Corpusty, in the county of Norfolk, called the "Corpusty Ballast Siding," by the side of their line of railway and running back 150 yards from the main line, and by their workmen, from time to time, got therefrom gravel and sand which was used by the respondents for the maintenance and repair of their line, and was only used for such maintenance and repair.

The place was more than 20 feet deep with a slope of 40 to 50 feet in length in its deepest part and was within the limits of deviation shown on the deposited plans of the railway.

No abstract of the Metalliferous Mines Regulation Act, 1872, was posted up at or near the said "Corpusty Ballast Siding" on either of the dates mentioned in the said informations.

On the 15th of March, 1900, a fatal accident occurred to one of the defendants' workmen who was engaged in taking gravel or sand from the said place. Such accident was caused by the bulging out of a quantity of sand and gravel from the sloping face of the said ballast siding.

No notice of such fatal accident was given to the informant, the inspector of the district, as required by section 2 of the said Metalliferous Mines Regulation Act.

It was stated by the respondent's solicitor, and the statement was not challenged by the appellant, that notice of the accident was given to the Board of Trade.

It was contended on behalf of the appellant that gravel and sand were included within the term "other minerals" in section 1 of the Quarries Act, 1894, and that a place where such substances were got was within the mischief intended to be remedied by the Quarries Act, 1894. For the respondents it was contended that such substances were not minerals within the meaning of the said section, and were not included in the term "other minerals," as they were not *ejusdem generis* with "slate," "stone," or "coprolites," which are therein specifically mentioned.

It was also contended by the respondents that taking gravel and sand from the said "Corpusty Ballast Siding," whenever the same might be required for the maintenance or repair of the railway, was not working within the meaning of section 1 of the Quarries Act, 1894, on the ground that (1) the respondents did not take the said gravel and sand for the purpose of making profit out of the same; and (2) that the said gravel and sand were not taken systematically, but only whenever the same were wanted for the maintenance and repair of the said railway.

It was further contended for the respondents that as the gravel or sand was taken for railway repairs or maintenance, and as the said "Corpusty Ballast Siding" was within the limits of the land authorized to be taken for the use of the railway it was not subject to the provisions of the Metalliferous Mines Regulation Act, but was only subject to the general railway Acts, which require notice of accidents to be given to the Board of Trade.

The justices determined "that the place was used by persons" working habitually whenever ballast was wanted; that "the regulations had not been posted nor notice of the" accident given; that the things taken out were gravel and sand, and that they were not minerals within the meaning of section 1 of the Quarries Act, 1894, and on this ground they dismissed the informations, giving no determination as to whether the working was otherwise "a place within the meaning of the Act."

The question of law for the opinion of the court was whether the justices ought to have convicted the respondents.

Sir E. Carson, S.G., and *Sutton*, for the appellants. —Gravel and sand are minerals within the meaning of section 1 of the Quarries Act, 1894, so also in point of fact are all things which are under the surface of the soil and which may be quarried. Both gravel and sand are only small particles of stone. The expression "other minerals" in section 1 is used in the widest possible meaning. In the case of *Midland Railway Co.* v. *Checkley*, 15 W. R. 671, L. R. 4 Eq. 19, Lord Romilly, M.R., at p. 25, says: "Stone is, in my opinion, clearly a mineral, and in fact everything except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

any purpose whatever, whether it is gravel, marble, fire-clay, or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land; every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, within the same category." In *Hex* v. *Gill*, 20 W. R. 957, L. R. 7 Ch. App. 699, Mellish, L.J., at p. 712, says: "The result of the authorities . . . appears to be this: that a reservation of 'minerals' includes every substance which can be got from underneath the surface of the earth for the purpose of profit. . . ." See also the judgment of Lord Herschell in the case of *Lord Provost and Magistrates of Glasgow* v. *Farie*, 37 W. R. 627, 13 App. Cas. 657, at pp. 682-3. *Hex* v. *Gill* was approved of and followed in the case of *Earl of Jersey* v. *Guardians, &c., of Neath Union*, 37 W. R. 388, 22 Q. B. D. 555; Lord Esher, M.R., at p. 559, expressing his opinion that the definition of minerals by Mellish, L.J., in that case was correct. The object of the Act in this case should be looked at, which was that people in the act of working quarries should be protected from some substance, whether gravel or stone or slate, falling upon them without notice being given to the proper authority. The magistrates were wrong in their decision and there ought to have been a conviction.

McCall, Q.C., and *J. D. Crawford*, for the respondents.—The decision of the magistrates was right. The finding is a finding of fact which there was evidence to support. The meaning to be attributed to the words "mines and minerals" depends in each particular case upon the facts of the case. If, in the present case, those words had been meant to be used in the wide sense, the Legislature would have said so. It was never intended that every sand-pit was to be a quarry under this Act, and the present case does not come within the words or the intention of the Act. This is in no sense a stone mine. As regards the protection of the workmen, this case is amply provided for by section 6 of the Railway Regulations Act, 1871, under which notice of any accident accompanied by personal injury or loss of life must be given to the Board of Trade—which notice was given in this case. It could never have been intended that two notices should be served, one on the Board of Trade and the other on the Home Office. The getting of the sand in this case was a "working" of the railway within the Railway Regulations Act, 1871.

KENNEDY, J.—In my opinion our judgment ought to be for the Crown. It seems to me that every requisite has been proved to bring the case within the Quarries Act, and that the judgment which we are asked to give is upon a question of law.

The place in question is a place from which gravel or sand is taken for the railway company by workmen as they want it. It is not suggested that it is a place which in its character in respect of size or otherwise is not within the purview of the Metalliferous Mines Regulation Act, 1872, and the Quarries Act, 1894. The object of those Acts is plain—namely, to afford protection and also to ensure investigation for the benefit of workmen who are working in certain places where there are special dangers. The regulations of the former Act are to apply by section 2 of the latter Act to quarries, and, while this Act does not define a quarry, section 1 provides that it "shall apply to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act."

Now, that the word "minerals" in an Act of Parliament, or in a legal document, *primâ facie* includes such things as sand and gravel is, I think, clearly settled, and I see nothing in the Act or in this case which should narrow that which would be, *primâ facie*, the full and wide meaning of the term "minerals."

In this case we have workmen employed in a place, some part of which is more than twenty feet deep, and in which the things that were being gotten were minerals. Under the circumstances it appears to me that the requisites of the Act have been satisfied. The magistrates, apparently, have decided, on the ground that the things that were being gotten—namely, sand and gravel—were not minerals within section 1 of the Quarries Act, 1894. In my opinion they were wrong.

Then it was suggested, by counsel for the respondents, that it ought to be held that the place, and the case of accidents happening there, are governed by section 6 of the Railways Regulations Act, 1871, and that this place was a place in which men were employed in the working of the railway, and, therefore, that the Acts previously referred to do not apply; and that, if in the course of working this railway an accident happens it ought to lead merely to notice being given under that section. In my opinion this was not an accident in the course of working the railway within the meaning of section 6 of the Act of 1871. Further, I think that the respondents, whether or not it be their duty under the aforesaid section 6 to give notice of an accident happening in this quarry, which is formed and has come into being in the construction of a railway siding, are certainly bound by the Metalliferous Mines Regulation Act, 1872, and the Quarries Act, 1894, to give the notices thereby required. Therefore in my opinion the case ought to be decided in favour of the appellants, and the matter ought to go back to the magistrates.

DARLING, J.—I am of the same opinion. The question really to be determined is whether gravel and sand can be taken to be included in the word "minerals" as used in this statute. Now it is perfectly clear, from the cases already cited, that "minerals" is a word with a meaning which is very indeterminate. Sometimes, in statutes, it has a very restricted meaning, sometimes it has a very wide meaning, and, in some cases, it has been held to include gravel. Now in order to find whether the expression is used in its wide or narrow sense, I think we must do what Lord Herschell, in his judgment in *Glasgow* v. *Farie*, said ought to be done—namely, that the object of the Legislature should be looked at. It is perfectly plain that the object of the Legislature was to prevent people being injured by stone and such-like things falling upon them, and that object would not be obtained if a number of stones of such small size as to be properly denominated gravel did not come within the provisions of the Act. Further, it was stated that the present case is provided for by section 6 of the Railways Regulations Act, 1871. I think the distinction pointed out by the Solicitor-General—namely, that that Act applies to something which takes place in the working of a railway, is a good one, and I am inclined to think that that statute does not cover this case. It seems to me that the object of the Legislature really was to give to people working in places which are not metalliferous mines the same protection which they had given to people working in places properly called metalliferous mines. Otherwise we should have to hold that the object of the Legislature was to protect people upon whom slates, or stones, or coprolites, or any other mineral which was something like a slate, or stone, or

coprolite, might fall, but that it did not, and intentionally did not, profess to protect anybody who might have gravel falling upon him. I cannot think that that was their intention. My opinion is that the Act intended to protect all those people who in working in the earth at a depth of more than twenty feet had not been protected by the Metalliferous Mines Regulation Act, and that with that object it uses this word "minerals," and that, therefore, the widest intention must be given to such word, and not the narrowest, and if that is so there is authority for saying that "minerals" may mean gravel, and in this case I think it does.

Judgment for the appellants with costs.

Solicitor for the appellant, *The Solicitor to the Treasury.*

Solicitors for the respondents, *Beale & Co.*

Q. B. Div. (Div. Court.) (Kennedy and Phillimore, JJ.) } Nov. 26.

ATTORNEY-GENERAL *v.* HAWKINS. (*a.*)

Inland revenue—Estate duty—Policy of life insurance—Settled property—Finance Act, 1894 (57 & 58 *Vict. c.* 50), *ss.* 1, 2, 3.

A. was tenant for life of certain estates, and B., his son, was tenant in tail in remainder. A. had effected several mortgages on his life interest to secure payment of certain debts, and he had also effected several policies on his life by way of further security. A family arrangement was entered into, under which B. concurred in the execution of a disentailing deed, and a further deed of resettlement was executed by A., B., and certain trustees. Under the said arrangement a sum of money was raised by way of mortgage on the estates to pay off A.'s incumbrances, and the aforesaid policies were assigned to the said trustees, who were to receive all moneys (if any) which should, during the life of A., become payable under any of the policies and apply the same towards the discharge of the mortgages, and A. undertook, out of the income of his life estate, to pay the premiums on the policies and the interest on the mortgage. The residue of the income was to be paid, as to two-thirds to A., and as to one-third to B. On the death of A. in 1898, *the trustees received all the moneys due under the policies and paid the same to B.*

Held, that, on A.'s death, B. was liable under the Finance Act, 1894, *to pay estate duty on the policy moneys, they being an "interest purchased or provided by the deceased" within the meaning of section* 2, *sub-section* 1 (d).

Information by the Attorney-General claiming estate duty under the Finance Act, 1894, in respect of certain life insurance policies.

Prior to the 13th of July, 1897, considerable landed estates were vested in one Henry Ashhurst Hawkins, the father of the defendant, for life, with remainder in tail male, and considerable personal property was held upon corresponding trusts.

The said Henry Ashhurst Hawkins had borrowed the sum of £70,000 upon mortgage of his said life interest, in order to secure the payment of debts incurred by him, and he had effected policies on his life for sums amounting in the whole (exclusive of bonuses) to £69,500, and had given them by way of further security. He had also incurred other unsecured debts.

By an indenture or deed of family arrangement, dated the 13th day of July, 1897, and made between the said Henry Ashhurst Hawkins of the first part, the defendant Henry Hawkins of the second part, and certain trustees of the third part, it was witnessed that in pursuance of a family arrangement under which the defendant Henry Hawkins executed a disentailing deed, he the said Henry Ashhurst Hawkins covenanted to pay the interest on the said sum of £70,000 during his life, and it was thereby agreed and declared that the trustees should stand possessed of the aforesaid policies on the life of the said H. A. Hawkins upon the trusts and subject to the provisions thereinafter declared and contained concerning the same. And it was thereby agreed and declared that the trustees should receive all the moneys (if any) which should during the life of the said Henry Ashhurst Hawkins become payable under any of the said policies (but the trustees should not without the consent in writing of the said Henry Hawkins, his executors, administrators, or assigns, commute any bonus from time to time credited in respect of any policy or policies or permit the same to be applied in the reduction of any premium or premiums) and should pay or apply the same moneys or such part or parts thereof as should under the same indenture of mortgage be capable of being so paid or applied in or towards the discharge of the said sum of £70,000 or so much thereof as might for the time being be secured by the said indenture of mortgage. And it was also agreed and declared that subject and without prejudice to the trusts and provisions thereinbefore contained the said trustees should hold the said policies, moneys, and accumulations in trust for the said Henry Hawkins, his executors, administrators, and assigns. And the said Henry Ashhurst Hawkins thereby covenanted with the trustees and with the said Henry Hawkins that he would not do or suffer anything whereby the said policies or any of them might become void or voidable, and that if any such policy had or should become voidable he would forthwith at his own cost do all things necessary for restoring the same, and that if any such policy or any new policy to be effected as thereinafter mentioned had or should become void, the said Henry Ashhurst Hawkins would forthwith at his own cost effect or enable the trustees to effect a new policy or policies on his life in the names of the trustees in the like amount or amounts. And that every such substituted policy should be held upon the trusts of the said original policies. And that he the said Henry Ashhurst Hawkins would punctually pay the annual premiums and other sum or sums of money (if any) necessary for keeping on foot the said original policies and any substituted policy or policies, and would forthwith deliver the receipt for every such payment to the trustees. And it was further witnessed that Henry Ashhurst Hawkins as beneficial owner conveyed unto the said trustees all his life estate and interest under certain previously recited indentures and the disentailing indenture, or in the hereditaments and premises comprised in or subject to the same indentures or any of them: To hold the same upon the trusts thereinafter declared (that was to say) upon trust to pay out of the rents, profits, and income of the said hereditaments and premises the interest on the said sum of £70,000, and the annual premiums and other sum or sums of money from time to time payable for keeping on foot every policy specified in the third schedule to the now stating indenture, and every other policy (if any) effected in pursuance of the covenants in that behalf thereinbefore contained, and the expense of repairing buildings or insuring against fire, and to pay the surplus of the said rents,

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

profits, and income as to two-thirds thereof to the said Henry Ashhurst Hawkins, and as to the remaining one-third thereof to the said Henry Hawkins, his executors, administrators, and assigns. But subject if such surplus should exceed £3,000 to a provision for creating a fund for payment of any succession duties which might become payable by reason of the falling in of leases as in the now stating indenture mentioned.

All the said policies were effected by the said Henry Ashhurst Hawkins and all the premiums which were paid thereon were paid by him during his life. The said policies belonged at the date of the said indenture of the 12th of July, 1897, to the said Henry Ashhurst Hawkins absolutely, subject only to the agreement carried into effect by the said deed of family arrangement. The said Henry Ashhurst Hawkins died on the 10th day of May, 1898. No moneys became payable under any of the said policies during his life. After his death the trustees of the said indenture of the 13th of July, 1897, received all the moneys (including bonuses) payable under the said policies, and they paid or accounted for the same to the said Henry Hawkins. Under these circumstances the Commissioners of Inland Revenue claimed that estate duty had become payable under section 2 (1) (*d*) (or if not then under the other provisions of sections 1 and 2 of the Finance Act, 1894) in respect of the moneys received under the said policies of assurance as property passing on the death of the said Henry Ashhurst Hawkins within the meaning of those sections, and they caused application to be made to the defendant for payment of such duty, but the defendant refused to pay the same and contended that no such duty was payable.

Sir R. B. Finlay, A.G. (*Sir E. Carson, S.G.*, and *Vaughan Hawkins* with him), for the Crown.—After the disentailing deed had been executed there was a resettlement, under which the defendant only took, according to the decision in the case of *Earl Cowley* v. *Commissioners of Inland Revenue*, 47 W. R. 525, [1899] A. C. 198, an equity of redemption, and it was only on that interest, and not on the full value of the estate, that the Crown now claimed duty. This family arrangement did not amount to a purchase by the defendant of the policies, so as to be exempted by virtue of section 3 (1) of the Finance Act, 1894, from the payment of estate duty. The practical effect of this arrangement was to substitute the policies for what was taken out of the family estates by the mortgages. Duty is therefore payable in respect of the policies by virtue of section 2 (1) (*d*): *Brown* v. *Attorney-General*, 79 L. T. Rep. 572, 47 W. R. Dig. 83. The present case is still stronger than that one. This is not a commercial transaction at all, but merely a family arrangement. *Attorney-General* v. *Dobree*, 48 W. R. 413, [1900] 1 Q. B. 442, decides the present case.

Counsel also cited *Fryer* v. *Morland*, 25 W. R. 21, 3 Ch. D. 675.

Haldane, Q.C. (*J. F. H. Bethell* with him), for the defendant.—The case of *Attorney-General* v. *Dobree* does not apply to the present case. In that case there was a marriage settlement. This was not a mere family arrangement; the deceased and the defendant were not on good terms, and the bargain was carried out at arm's length. It was not a case of a substitution of one sum for another, as was suggested. There had been a transaction by which the defendant took the policies for money or money's worth. The policies were therefore exempt from the payment of estate duty by virtue of section 3 (1) of the Finance Act, 1894. In substance there was a purchase for valuable consideration, and the defendant ought not to be called on to pay estate duty.

Counsel cited *Lord Advocate* v. *Earl of Fife*, 11 Ct. Sess. Cas., 4th Ser.

KENNEDY, J.—In this case it is needless to recapitulate all the detailed facts which are set out in the information. There is no doubt at all that those facts are set out very correctly; and we accept also (it being admitted by the Attorney-General on behalf of her Majesty) that the parties here concerned (the present defendant and the deceased, his father) at the time when they entered into the transaction were at arm's length and the father at the time in bad health.

Shortly, the position was this: There had been a condition of the property and of the relations between father and son which placed the son in the position of being entitled to deal with it. The father is in difficulties and insolvent. The son is also no doubt desirous of getting some income for himself and is acting for his own interest. Between the two an arrangement is come to which involves the inclusion in a settlement of the moneys arising from policies of insurance upon the life of the father—I will not say in substitution for but coincidently with their disappearance from the settlement by reason of what was done in cutting off the entail and in entering into this family arrangement.

Now it seems to me that it is impossible under those circumstances to say that these policies do not come under section 2 (1) (*d*) of the Finance Act, 1894, and that there ought not to be an estate duty paid upon these moneys. It appears that the contention against this is that whatever might have been the effect of sub-section (1) (*d*) upon the passing of these policies, had there been no section 3, sub-sections 1 and 2, we ought to say there is no liability to estate duty because of the terms of section 3 of the Act, sub-sections 1 and 2, and that we ought to say that there has been a *bonâ fide* purchase from the deceased by the defendant for a consideration in money or money's worth, and that there has been, not a succession, but merely a performance of part of that which was to be got by the purchase being payable only upon death.

Now it seems to me that that is not the true relation of the facts. It seems to me that there really was, whether you call it a settlement or a family arrangement, or any other name, that which for the purposes of this Act, and in the terms of this Act, was an "interest purchased or provided by the deceased," and which is taxable "to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." This arrangement was not an assignment of these policies to the son. It was an arrangement by which an interest passed to the son in those policies under the terms of the settlement upon the death of his father—that is to say, a succession—a valuable interest which accrued to him by surviving his father. In that way, it seems to me—and on that ground alone—that this case may be distinguished from *Lord Advocate* v. *Earl of Fife*. There it was found that there was an actual assignment to the son of the policies. The son took them over as part of the distinct bargain by which the father was relieved of considerable difficulty. The son, in other words, became assignee. Although he could not at the time actually realize, he would have had the right to deal with these policies [illegible] surrender as he pleased. That is not the [illegible] is really an arrangement made by [illegible] effect, because he

becomes survivor, gets an interest in the proceeds of these policies upon the death of his father.

The case of the *Brown* v. *Attorney-General* seems to me to throw some light upon the kind of principle by which these cases ought to be decided. For example, is it in substance here a purchase, or is it in substance an arrangement—a settlement by which a benefit passed on the death of the father? We cannot apply the exact case, the circumstances are different, but it seems to me that it is a stronger case here, where there is no attempt at a purchase really, but merely a benefit on the other side.

The case of *Attorney-General* v. *Dobree* has been cited. That is a case in this court, but I agree with Mr. Haldane that it is not a binding authority in the present case. You have got there unquestionably an element which does not exist here; you have there the fact that the only original consideration was the consideration of marriage. Now I think that is a sufficient distinction. I think it is not a decision in any way binding or covering this case, because, here, if there is any consideration, it is not a question of marriage but a question of the benefits which the son was giving to the father by concurring in the acts which cut off the entail and made these other arrangements possible, and is in a sense to be treated as a bargain and consideration, although not to my mind a transaction of purchase at all. There is a bargain, there is an arrangement. The arrangement is in one form a settlement, or in another a family arrangement, for the benefit, it may be, of both parties, but it does not constitute a purchase within section 3. I think the judgment, therefore, must be for the Crown.

PHILLIMORE, J.—I am of the same opinion. Shortly before the 13th of July, 1897, considerable landed estates appear to have been vested in one Henry Ashhurst Hawkins for life, remainder to his successor in tail male, and considerable personal property seems to have been held upon corresponding trusts. Henry Ashhurst Hawkins, the father, was in considerable difficulty; he had borrowed something like £70,000 upon mortgage of his life interest, and he had effected policies to very nearly the same extent on his life. Besides that, he had a considerable debt unsecured, and for which, I suppose, he could not in any way give any security. The son was also in difficulty. He was dependent upon his father's bounty, and could get nothing from his father, and he had borrowed under an order of Kekewich, J., and had had his reversion charged to meet the expenses of his education. In those circumstances a transaction was effected by two deeds. First of all the estate was disentailed in the ordinary way and, subject to a joint power of appointment, was settled upon Henry Ashhurst Hawkins for life, remainder to Henry Hawkins in fee. Secondly, Henry Hawkins, the son, joined in a mortgage and enabled his father to transfer the mortgages from his life estate to a mortgage on the land; in other words, he joined with his father in mortgaging the fee simple of the property for £70,000. He also concurred in asking the trustees to assign £16,000 of the settled personalty generally for the benefit of Henry Ashhurst Hawkins, the father. In return he got the sum of, possibly, £2,000 himself; he got provision made for the payment of his debt that otherwise would have been a reversionary charge, and he got an income for himself during his father's life of a thousand a year. The settlement of these matters may be taken in substance to balance that £16,000. But to balance the incumbrance created on the fee of £70,000 the father brought into settlement the policies on his life, which were worth very nearly the same amount. In other words, the £70,000 was taken out of the settlement in the form of a mortgage on the land; £69,500 was brought into the settlement in the form of policies, and as far as the son was concerned the benefit with the burden would accrue to him. But on the other hand Henry Hawkins had no interest in the property except his allowance until his father's death, and on his father's death he would succeed to the property less by £70,000 and more by £69,500.

Now, the House of Lords have, if I may say so respectfully, given effect to common sense by the decision in the case of *Earl Cowley* v. *Inland Revenue Commissioners*. The son does not pay duty on the whole estate of the property, but only on his beneficial interest in the estate of the landed property. On the other hand, why is he not to pay duty on the other property which is brought in in substitution? It seems to me that the mere statement of the facts is enough to show that the judgment in this case must be for the Crown.

I can conceive that an arrangement might have been made in which this case would become like that of *Lord Advocate* v. *Earl of Fife*, a case in which I respectfully entirely agree. If the arrangement had been that the son was to have these policies out and out—if, in fact, the policies had not been brought into settlement, but assigned to the son, then this case would have been like that case. But they are not the son's policies. They are brought into settlement, and express directions are given in case bonuses are received or in case the terminable policies become realized, when the money is to be applied in relief of the settled estates, and not to go to the son. I think it is conceivable under the clause which Mr. Haldane read to us that if the father had lived long enough there might have been some balance on the policies which might have come to the son. If the father had lived over the ten years, and the terminable policies had been paid in full, it might have been that the surrender value of the other policies with their bonuses would have come to more altogether than £70,000, and that amount would more than have paid off the mortgage of £70 000. But those events did not happen, and in the result the son found the estate diminished on the one side and added to on the other; and he is asked to pay on the value. There must therefore be judgment for the Crown.

Solicitors, *Solicitor of Inland Revenue; Langlois & Co.*

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — Feb. 6.

ARNOT v. UNITED AFRICAN LANDS (LIMITED). (*a*.)

Company — Special resolution — Requisite majority — Declaration of chairman—Conclusive evidence—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 61.

The declaration of the chairman of a company meeting that a special resolution has been duly carried is conclusive, unless challenged by means of a poll demanded by five members; and, in the absence of any evidence of mala fides *on the part of the chairman, the court will not receive evidence impeaching the declaration.*

In re Gold Co., 27 *W. R.* 341, 11 *Ch. D.* 701, *and*

(*a*.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

In re Hadleigh Castle Gold Mines (Limited), [1900] 2 *Ch.* 419, *followed.*

In re Horbury Bridge Coal, &c., Co., 27 *W. R.* 433, 11 *Ch. D.* 109, *distinguished.*

This was an appeal against the refusal of Kekewich, J., to restrain the defendant company and their directors from acting on certain resolutions, which purported to have been duly passed by the shareholders as special resolutions for the winding up of the company, and the sale of its assets to a new company to be formed.

The plaintiffs were shareholders in the company, who alleged that these resolutions had not been properly passed.

The plaintiffs filed affidavits to the effect that a motion for the adjournment of the meeting had been declared by the chairman to be lost. Considerable uproar had ensued, during which the chairman had put the resolutions for the winding up of the company and had declared them carried, though, owing to the disturbance, most of the shareholders were unaware that anything was being done, and had no opportunity of voting on the resolutions.

Affidavits were filed in reply on behalf of the company that shareholders who were further away from the chairman than the plaintiffs had heard the resolutions put and voted on them, that the first resolution had been carried unanimously, that a large number of shareholders had voted in favour of the other resolutions, while very few had held up their hands against, and that the chairman had accordingly declared the resolutions duly carried.

Under section 51 of the Companies Act, 1862, unless a poll is demanded by at least five members, a declaration of the chairman that a special resolution has been carried is to be deemed conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the same.

Kekewich, J., held that the resolutions were duly carried, and dismissed the action.

The plaintiffs appealed.

Kirby, for the appellants.—Notwithstanding section 51 of the Act, the chairman's declaration ought not to be accepted as conclusive evidence that the resolutions were duly carried, because his own affidavit proves that he declared them carried without ascertaining whether there was a three-fourths majority in favour of them or not.

Manning (*Warrington, K.C.*, with him), for the defendants. — The chairman's declaration is conclusive: *In re Gold Co.*, 27 W. R 341, 11 Ch. D. 701; *In re Hadleigh Castle Gold Mines* (*Limited*), [1900] 2 Ch. 419.

Kirby, in reply, referred to *In re Horbury Bridge Coal, &c., Co.*, 27 W. R. 433, 11 Ch. D. 109.

RIGBY, L.J.—Upon all the evidence there is a good deal of contradiction, and I have no doubt a good deal of exaggeration, it may be on both sides, but as the natural outcome of the evidence I consider that the learned judge, Kekewich, J., has come to a right conclusion, that the chairman of the meeting did put the resolutions, notice of which had been given, and which had to be carried as special resolutions before the scheme could go on effectively, and that he did declare those resolutions carried, and that the entry of that declaration was made in the books of the company. Upon the authority of *In re Gold Co.*, and the case of *In re Hadleigh Castle Gold Mines*, in which it was followed and explained by Cozens-Hardy, J., with regard to extraordinary resolutions, the conclusion ought to be, and our conclusion is, that the resolutions were passed and declared to be carried. That would preclude any inquiry into the number of shareholders who voted for or against, because under the regulations of the company it is not necessary to inquire into the proxies.

I think the explanation is that which was suggested. It may be that there were a majority present at the meeting who were opposed to these resolutions—I do not know; it is possible that there was—but their opposition was made unavailing, and they recognized it to be unavailing, from the knowledge that there were a large number of proxies which were taken to overrule such opposition. Whatever be the cause I consider that the resolutions were duly declared to be passed, and must be taken to have been passed by the requisite number of shareholders.

VAUGHAN WILLIAMS, L J.—I entirely agree. It was suggested that the case of *In re Horbury Bridge Coal, Iron, and Waggon Co.* is an authority that, although in the 51st section of the Companies Act, 1862, the word used is "conclusive," it is not to be read as conclusive, but as *primâ facie* conclusive. The words of the section are "A declaration of the chairman that the resolution has been carried shall be deemed conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against the same." I do not agree with this contention, and I think when the case of *In re Horbury Bridge Coal, Iron, and Waggon Co.* is looked at it decides nothing of the sort. I thought at first that the interlocutory observation of Sir George Jessel had reference to the 51st section, but Stirling, L.J., has called my attention to the fact that that was not so and that he was referring really to the 37th and 38th articles of the articles of association of that particular company which are set forth on p. 110 (11 Ch. D.), in which the words used are "A declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of proceedings of the company shall be sufficient evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution," and it is in reference to those words that Sir George Jessel says (11 Ch. D., at p. 114): "Sufficient evidence in the absence of evidence to the contrary, but not conclusive evidence." He was not dealing with the 51st section at all, and really when one comes to look at the short statement of facts by Sir George Jessel the whole thing is quite plain. The question was whether Mr. Kippax had been properly appointed liquidator, and then Sir George Jessel states: "The facts for the purpose are beyond controversy. There were five persons present corporeally. One of the five held what was called a proxy, but it has been admitted for the purpose of the argument by the respondents that that is not to be taken into account. Of the five persons present two only voted for Mr. Kippax. Three voted against him. The two who voted for him held more shares in the company than the three who voted against him, and according to the law of this company there was a vote for every share. No poll was demanded and consequently no poll was taken." That is the statement, and the next point is whether the chairman rightly decided that Mr. Kippax was duly elected because the two persons, including himself, who voted for Mr. Kippax held more shares in the company than the three who were against it, and Bramwell, L.J., said: "First, a poll was not demanded, and secondly, there was no waiver of a poll." Under those circumstances it seems to me that that case when it is looked at does not affect the question as to the word "conclusive" in the 51st section at all.

STIRLING, L.J.—I am of the same opinion. I have only this to add, that as regards the passage in the 51st section which has been commented upon by Vaughan Williams, L.J., I entirely agree with the

reasoning of Cozens-Hardy, J., in the case of *In re Hadleigh Castle Gold Mines* which came before him; and as regards *In re Horbury Bridge Coal, Iron, and Waggon Co.* I should only wish to add this: That it appears to me, as has been pointed out by the Lord Justice, that the 51st section did not come at all in question there. The statement of facts on p. 111 was this, "The company being in difficulties a meeting was held which had been summoned for the purpose of passing an extraordinary resolution under the Companies Act, 1862, s. 129, that it had been proved to the satisfaction of the company that it could not by reason of its liabilities continue its business." To that resolution, of course, the 51st section would apply, but what happened was this, "Five shareholders only attended, and a resolution to the above effect was passed unanimously." That resolution having been unanimously passed, what they proceeded to do was to appoint a liquidator, and that was a resolution which was not required to be a special resolution. The evidence as to what followed was this, "A motion was made and seconded that Mr. Kippax should be appointed liquidator," and upon that there was a dispute as to who voted on that. But the 31st article of the company's articles of association did apply, and consequently, it seems to me, as has already been said, that case is not an authority to the contrary of what we have decided.

Solicitors, *Armitage & Chapple; Blair & W. B. Girling.*

From Q. B. Div. (Earl of Halsbury, L.C., and A. L. Smith and Vaughan Williams, L.JJ.) July 27; Aug. 8, 1900.

BROWN *v.* PETO. (*a.*)

Mortgage—Lease by mortgagor in possession—Sporting rights over mortgaged land not in occupation of mortgagor—Validity—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.

A lease by a mortgagor in possession of a house and adjoining premises included the right of sporting and shooting over a portion of the mortgaged property, which was in the occupation of an agricultural tenant, to whom it had been, previously to the mortgage, leased with a reservation of the sporting rights.

Held, that, as against the mortgagee, the lease was valid under section 18 *of the Conveyancing Act,* 1881.

Appeal of the plaintiff from the judgment of Bigham, J., at the trial of the action without a jury.

The plaintiff claimed from the defendant (1) possession of a house and premises known as Knowlton Court; (2) a declaration that the defendant had no right of shooting or sporting over the Knowlton estate; (3) mesne profits.

In the year 1887 Knowlton Court, consisting of a furnished house, stables and gardens, some demesne lands, and about 1,900 acres of agricultural land known as the Knowlton estate, was mortgaged to the plaintiff's predecessors in title, Lewis D'Aeth, the beneficial owner, being in possession. At that date the agricultural land was leased to agricultural tenants, but the shooting and sporting rights were reserved to the landlord.

On the 26th of November, 1890, the mortgage being still subsisting, D'Aeth, the mortgagor, granted a lease of the whole estate, except the 1,900 acres, to the defendant for a term of years. The lease comprised Knowlton Court and the gardens and other lands belonging thereto, and "the right of shooting and sporting over the whole of the lessor's Knowlton estate, containing about 1,900 acres."

The interest due under the mortgage having fallen in arrear, a foreclosure order was made. Subsequently the plaintiff contended that the lease granted to the defendant was not a valid lease under the Conveyancing Act, 1881, and that the defendant was, therefore, only a yearly tenant. The plaintiff gave the defendant notice to quit as a yearly tenant.

Bigham, J., held that the lease was valid as against the plaintiff, and the learned judge accordingly gave judgment for the defendant.

The plaintiff appealed.

The Conveyancing Act, 1881, s. 18: (1) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized. (3) The leases which this section authorizes are: (i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and (ii.) a building lease for any term not exceeding ninety-nine years.

Dickens, Q.C., and *Warrington, Q.C.* (*Morton Smith* with them), for the plaintiff.—The lease does not come within section 18 of the Conveyancing Act, 1881. Under that section a mortgagor of land in possession has power to grant an occupation lease of the mortgaged land, but he cannot by the lease grant an easement, such as the sporting rights, over other land not included in the lease: *Dayrell* v. *Hoare*, 12 A. & E. 356; *In re Gladstone*, 48 W. R. 531, [1900] 2 Ch. 101. Section 18 does not contain any words similar to those to be found in section 6 of the Settled Land Act, 1882, "any easement, right, or privilege of any kind."

Bray, Q.C., and *J. R. Atkin*, for the defendant.—The lease was a valid lease. The word "land" in section 18 must be construed by reference to the definition clause, section 2, the effect of which is that land may include incorporeal hereditaments. *Dayrell* v. *Hoare* was decided before the Act of 1881, and therefore is no authority. Even if there is no power in a mortgagor to grant a lease of an incorporeal hereditament by itself, this lease does not cease to be an occupation lease of land and is not invalidated because it includes the right of shooting over another part of the land.

Dickens replied.

Cur. adv. vult.

Aug. 8.—A. L. SMITH, L.J., read the following judgment: Upon the 3rd of August, 1887, Mr. Lewis Narborough Hughes D'Aeth, who was the owner of Knowlton Park estate, in the county of Kent, mortgaged it in fee to secure an advance of £30,000. The estate consisted of a furnished mansion-house, stables, and gardens, of some demesne lands, and of agricultural lands of about 1,900 acres in extent. At the time of this mortgage the 1,900 acres were leased to agricultural tenants, the shooting thereon being reserved, as is very commonly the case, to the landlord, Mr. D'Aeth. These shootings were thus severed from the occupation of the agricultural lands, and were reserved to the landlord. After this mortgage Mr. D'Aeth was left in possession and enjoyment of the estate by the mortgagees. Upon the 26th of November, 1890—that is, about three years after the mortgage—Mr. D'Aeth, by lease under seal, demised the whole estate excepting the 1,900 acres (which were then, as before stated, in lease to agricultural tenants), together with the shootings over the 1,900 acres, to the defendant, Mr. Peto, for a term of fourteen years from the 25th of March, 1890, at the rental of £383 per annum. The parcels of this lease

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

become, in my opinion, material when considering, as I must do, whether the lease is an occupation lease so as to come within the meaning of section 18 of the Conveyancing Act, 1881. They are, first, the mansion-house, with stables, out-buildings, gardens, and pleasure grounds, containing 11 acres or thereabouts, together with the furniture and fixtures and other effects in the mansion-house; secondly, part of the park opposite the house containing 45 acres or thereabouts; thirdly, a parcel of meadow land known as Dog Kennel Pasture containing 8a. 0r. 5p. or thereabouts; fourthly, the right of shooting and sporting over the whole of the lessor's Knowlton estate containing about 1,900 acres. In my judgment this is a lease of a very common description, where a landlord is letting his mansion-house, grounds, and shooting reserved over lands leased to agricultural tenants, and was a well-known lease both before and since the Act of 1881. It is sought by the mortgagee in the present action to eject Mr. Peto some four years before the lease has expired upon the ground that it is not authorized by the Conveyancing Act of 1881. Many points have been taken and argued, but the above point goes to the whole root of the case, and if Bigham, J., was right in holding as he did, that the lease was a valid lease and within the Act, no other points arise. That section 18 of the Conveyancing Act, 1881, was passed to enable mortgagors to grant leases, as well as mortgagees is plain, and that the section also enacts in express terms what kind of leases mortgagors and mortgagees may grant is equally clear. Now what is it that section 18 of the Conveyancing Act, 1881, enacts. To ascertain this I must read section 18 and section 2, the interpretation section, together. It enacts that a mortgagor of lands—that is, of tenements and hereditaments, whether corporeal or incorporeal—while in possession shall as against every incumbrancer have by virtue of the Act power to make from time to time any such lease of the mortgaged tenements and hereditaments, whether corporeal or incorporeal, or any part thereof as in the section is described and authorized—that is to say, an agricultural or occupation lease for any term not exceeding twenty-one years, or a building lease for any term not exceeding ninety-nine years. This section also enacts that every such lease shall reserve the best rent that can reasonably be obtained, and shall contain a covenant by the lessee for payment of rent and a condition of re-entry on non-payment thereof. This being the section, the question arises whether the lease of the 26th of November, 1890, is "any such lease of the mortgaged premises," or in other words whether the lease comes within either of the three classes of leases which section 18 of the Act of 1881 expressly authorizes a mortgagor in possession to make—viz., an agricultural lease, an occupation lease, or a building lease. I agree that it is not an agricultural lease, nor is it a building lease; but why is it not an occupation lease? It is a lease by which the mansion-house and the stables and gardens, part of the park, and the incorporeal hereditaments—that, is the right of shooting, severed as it was when the lease was made from the 1,900 acres, are leased to the defendant for him to occupy. Why is this not an occupation lease? It is a lease, as I have before said, of a very common description, and for myself, if not fettered by authority, I should have had no doubt but that it was an occupation lease. It was argued that a lease of the shooting *per se* would not be an occupation lease, for that no rent could be reserved, and that no right of re-entry could be reserved; but why could not both of these be reserved by contract? However, I do not decide this point, for what I have to deal with is not a lease of shooting *per se*, but a lease of a house, stables, and lands, and coupled therewith, and as incident to the occupation thereof, is the right of shooting over the lands already let to other lessees. It is argued on behalf of the mortgagees that the case of *Dayrell* v. *Hoare*, shows that the lease of the 26th of November, 1890, is an invalid lease, because, as the lease in that case was held not to be in accordance with the power granted in that case, so the present lease is not in accordance with the power given by section 18 of the Act of 1881. But in my opinion this argument is fallacious, for the two powers are not the same. *Dayrell* v. *Hoare* was decided in the year 1840, and had, of course, nothing to do with the Conveyancing Act of 1881 or the express statutory power given thereby to mortgagors to grant leases. The question which was raised in *Dayrell* v. *Hoare* upon demurrer was whether a lease which demised part of the premises, with the right of shooting over the whole, was a good execution of a power authorizing a lease of "the said several estates, hereditaments, and premises so given and limited"; and it was held that it was not, because that power did not authorize a lease of part of the land with liberty to sport over the rest, Littledale, J., holding the lease bad on the ground that the entirety in the particular part was not demised, for the demise must be of the whole which covers the part demised, and Patteson, J., saying that the power does not contemplate the separation of the incident from the land. It is quite true that *Dayrell* v. *Hoare* was approved of by Sir Nathaniel Lindley in the case of *In re Gladstone, Gladstone* v. *Gladstone*, where that learned judge says: "The decision in *Dayrell* v. *Hoare* was plainly right, both under the old law and under the new law—namely, that a power for a tenant for life to lease settled estates or any part or parts thereof did not authorize a lease of part of the land with liberty to sport over the rest. It is clear that a power to lease land cannot enable a donee of the power to impose a burden on the land." I do not doubt the accuracy of *Dayrell* v. *Hoare* or of the judgment of the Master of the Rolls in *In re Gladstone;* but in the present case the Conveyancing Act expressly enacts that the donee of the power may grant occupation leases for not exceeding twenty-one years, and that such leases may consist of both corporeal and incorporeal hereditaments. In the present case the right of shooting was severed before the lease in question was granted, and was an incorporeal hereditament, the leasing of which the Act of 1881 expressly authorizes. Take the case of a lease by a mortgagor in possession of a mansion-house and grounds, together with a right of way over lands leased to agricultural tenants, why would not such a lease be a good occupation lease within the Act? It seems to me that it would, and if so, the lease of the mansion-house and grounds in the present case, together with the right of shooting over lands leased to agricultural tenants, would equally be within the Act. The case of *Dayrell* v. *Hoare* is no authority as to the true construction of section 18 of the Act of 1881, and the learned judges who decided that case and Sir Nathaniel Lindley in *In re Gladstone* were not dealing with what was the meaning of an express power to grant occupation leases of both corporeal and incorporeal hereditaments, which I have to deal with in this case. I can find nothing in the Act of 1881 to show "a contrary intention" so as to exclude the interpretation of the word "land" in section 2 (ii.), as including tenements and hereditaments corporeal and incorporeal, as was sought to be made out by the learned counsel for the mortgagees. In my judgment the lease in the present case is an occupation lease, and falls within section 18 of Act of 1881,

and is a lease which the Act contemplated either a mortgagor or mortgagee should be empowered to grant. For the reasons above I think Bigham, J.'s, judgment as to the validity of the lease of the 26th of November, 1890, should be upheld and this appeal dismissed.

VAUGHAN WILLIAMS, L.J., read the following judgment: The first question to be decided in this case is whether section 18 of the Conveyancing Act, 1881, authorizes a lease by a mortgagor in possession of a mansion-house and adjacent land, together with the right of shooting over other land not included in the lease, but included in the mortgage security. If this question is answered in the affirmative, it is conclusive of this action in favour of the defendant, and no other question need be answered. Now, section 18 (1) runs as follows: "A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as in this section described and authorized." The description and authority contained in the section, so far as material to the facts of the present case, seem to be: Section 18, sub-section 3: "The leases which this section authorizes are: (i.) An agricultural or occupation lease for any term not exceeding twenty-one years." Sub-section 6: "Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken." Sub-section 7: "Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days." Sub-section 13: "This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing." Now, in order to construe section 18, it is necessary to refer to some definitions in the Act of words therein employed. By section 2 (ii.), "land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, and also an undivided share in land." By section 2 (ix.) "rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise"; and (xi.) "a mining lease . . . includes a grant or licence for mining purposes." It is urged on behalf of the defendant, who contends that this lease falls within the description and authority of section 18 of the Act of 1881, that, as land by the definition includes hereditaments corporeal or incorporeal, the authority necessarily includes the right to lease shooting over land which is not itself demised to the lessee, but this seems to me to depend on whether the definition includes hereditaments which only come into existence by the exercise of the leasing power. The right of sporting has no existence as a hereditament until some grant or lease of it is made by the owner of the soil; it is, so long as enjoyed by the owner of the soil, a mere incident of ownership, and passes from one to another by a mere conveyance or lease of the land; and when a landowner reserves to himself the right of shooting he does not really reserve or except anything from the conveyance or lease, but in law takes under a regrant from the lessee—*i.e.*, not a mere licence, but a grant coupled with an interest. But it is to be observed that, in the present case, at the date of the mortgage the lands over which the mortgagor purported to grant the right of sporting were already let on farm leases reserving the right of shooting. It seems, therefore, that, at the date of the mortgage, the shooting rights over the farm existed as incorporeal hereditaments. The incorporeal hereditaments existed separately—I think it does not matter for what term they had been granted—and fall within the definition of land. But it is further urged that, even if the sporting rights were severed, before the date of the mortgage and existed at that date as incorporeal hereditaments and were leased as such, yet the case of *Dayrell* v. *Hoare* shows that a lease of such sporting rights is not a lease of part of the land as to which section 18 of the Conveyancing Act, 1881, creates the statutory power, but I cannot accept this view. In *Dayrell* v. *Hoare* the lease purported to be executed in pursuance of a power to lease the estates, hereditaments, and premises given to the tenant for life, or any part or parts thereof. Now, the estates, hereditaments, and premises given to the tenant for life appear to have been specific messuages and lands, and Littledale, J., in delivering judgment, says (p. 368): "Nor is it a grant of a part; for, in the power, part is used with reference to the entirety which the tenant for life has. Thus, supposing the estate to consist of two houses and 1,000 acres of land, the power enables the party to grant one house and 100 acres. But the demise must be of the whole which covers the part demised. An easement cannot be granted by itself out of any separate part; that would be subjecting the land to a servitude." But in the present case the sporting rights existed as part of the mortgaged property at the date of the lease, and I do not think *Dayrell* v. *Hoare*, when considered in the light of that fact, has any application. It certainly is dependent on the nature of the entirety to be dealt with under that particular power, and on the entirety of the gift to that tenant for life. The sporting rights were not part of the gift to the tenant for life. The gift was exclusively corporeal, and an incident of the estate was not part of the entirety given. At all events *Dayrell* v. *Hoare* is not an authority on the construction of the Conveyancing Act, 1881. Some question was raised in the case as to whether the rent in the lease granted ought to be treated as an entire rent for mansion-house, land, and right of shooting, or to be treated as apportioned. On the point I am discussing—viz., whether a lease of the right of shooting over land not demised to the lessee of the shooting can fall within section 18 of the Conveyancing Act, 1881—I do not think it matters a bit which way the question is answered. If the lease of such a right of shooting falls at all within section 18, sub-section 1, it does so equally whether the lease also comprises lands or whether it does not do so. I think that, having regard to the fact that before the mortgage the right of shooting had been converted into a several hereditament, the lease of it may fall within section 18, sub-section 1, provided the other conditions of the section are complied with. Now, the following objections are made to show that those conditions have not been complied with: (1) That this lease is neither an agricultural nor an occupation lease; (2) that no rent has been reserved, and therefore not the best rent; (3) that there is no right of re-entry reserved, or possible, on the incorporeal hereditament; (4) that all these matters forbid the application of section 18 to incorporeal hereditaments, because the conditions imposed by that section show a contrary intention. To these objections perhaps another objection should be added—viz., that clause (xi.) of section 2, by its definition of a mining lease as including a grant or licence for mining purposes, by implication excludes such grants or licences from other leases or substantive leases. I do not think that any of these objections should prevail. I think that the words "occupation lease" may well apply to a

lease of an incorporeal hereditament. Use and occupation lies, as is pointed out in *Bird* v. *Higginson*, 2 A. & E 696, at p. 702, for actual enjoyment of a fishery. "Occupy" is a word which in one form and another is not infrequently used of an incorporeal hereditament. Eviction, which presupposes occupation, is a term employed in respect of tithes. I think that the word "rent" is used in this Act to include rent so called—that is, rent which does not issue out of the thing demised, and in respect of which there can be no distress. In case after case the word is used by judges in respect of such rent so called. In legislation also the word is used not infrequently in this sense. The very definition of rent in the Conveyancing Act, 1881, "rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, ton, or otherwise," shows that rent is not used in this Act in its strict sense. In *Lord Hastings* v. *North-Eastern Railway Co.*, 47 W. R. 59, [1898] 2 Ch. 674, [1899] 1 Ch. 656, it was held by the Court of Appeal, affirming Byrne, J., that, in a grant of wayleave, sums payable to the grantor in respect of traffic passing over the line were a rent within the statute 32 Hen. 8, c. 34, and that the benfit of such rent ran with the reversion to the land. As to re-entry, I feel no difficulty. If there can be occupation and eviction, there can clearly be re-entry. I find, then, nothing in these conditions, imposed by section 18 of the Conveyancing Act, 1881, to exclude a lease of an incorporeal hereditament from the statutory power given by the Act to the mortgagor, or from that given to the mortgagee by section 18, sub-section 2. It is only necessary in the present case to decide that, the sporting rights having been severed before the mortgage, the power of the mortgagor at least applies to such an incorporeal hereditament; but I by no means decide that the power to lease under the statute would not extend to an incorporeal hereditament although unsevered until the making of the lease—that is to say, that I do not decide that the power may not apply to a case falling within *Dayrell* v. *Hoare*. We have to construe an Act of Parliament not passed to give a limited gift to anyone, not passed in the interest of the mortgagor or the mortgagee, but passed in the interest of the State, on the ground that it is contrary to the interest of the State that land should be so held that nobody can safely become the tenant for a term of years of either mortgagor or of mortgagee in possession. Certain conditions are made essential to the exercise of this power, that the best rent shall be reserved which can reasonably be obtained. I am by no means prepared to say that, if the best rent can only be obtained by letting land in parts and giving the lessee of one part a right which constitutes in a sense a servitude over another part, such as a right of access or rights of drainage or rights of shooting, this is not within the power. In *Wilson* v. *Queen's Club*, 40 W. R. 172, [1891] 3 Ch. 522, it was held that a lessee under a lease made by a mortgagor in possession by virtue of section 18 can restrain the mortgagee and those claiming under him from obstructing the lessee's enjoyment of a right to light. I have only to add that I do not think that the express powers in section 2 exclude the power to make licences or grant privileges over mortgaged land not demised in cases other than mining leases. There is a reason for the express provision in the case of mining leases based on the fact that the division of the land in mining cases is horizontal.

The Earl of HALSBURY, L.C., concurred.

Appeal dismissed.

Solicitors for the appellant, *Kingsford, Dorman, & Co.*

Solicitors for the respondent, *Lee & Pemberton.*

High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 19, 30.

HAYNES v. FOSTER. (a.)

Married woman—Election—Restraint on anticipation—Married woman becoming discovert—Will—Intention.

A testator by his will, after directing the proceeds of sale of his Turkish real estate to go into his personal residue, gave a life interest in a share of his personal residue to each of his two married daughters, upon whom he placed a restraint on anticipation. By Turkish law the testator's Turkish real estate devolved on his next-of-kin in certain shares. Since the testator's death one of the married daughters became discovert. Upon petition to decide whether, if the married daughters elected to take their shares in the Turkish real estate by inheritance, they were bound to compensate out of their life interests in the personal estate those who lost benefits under the will by such election,

Held, that the restraint on anticipation excluded the application of the doctrine of election, and, being a declaration by the testator of a particular intention that the married daughters should not be able to alienate, was not affected by the fact with respect to one of them that she was now discovert; and that both the married daughters were therefore entitled to take their shares of the Turkish real estate by inheritance without making compensation out of their life interests under the will.

Morgan Hugh Foster, who was the owner of certain real estate in Pera and on the Bosphorus in European Turkey, by his will dated the 1st of November, 1888, directed the persons in whom by the law of Turkey his real estate in that empire should become vested at his decease to sell such real estate and pay the moneys arising from the sale to the trustees of the will to be held by them as if the same were moneys arising from the conversion of the residue of his personal estate.

The testator bequeathed the residue of his personal estate to trustees upon trust for sale and conversion into money to be invested together with the moneys directed to be treated as if arising from such conversion, and to be held by the trustees upon trust for his wife for her life, and after her decease the testator directed the trustees to set apart two sums of £8,000 and to stand possessed of the residue upon trust for his son Arthur Foster for life with remainder to his issue as therein set out. And as to one sum of £8,000 the testator directed the trustees to hold it upon such trusts and subject to such powers and provisoes in favour of his daughter Lady E. M. Thomas and her issue as should correspond with the trusts, powers, and provisoes declared in favour of his son Arthur Foster and his issue, "but so nevertheless that my said daughter Lady E. M. Thomas shall not have power to deprive herself by way of anticipation of the annual produce to which she shall become entitled for her life and shall take the same for her sole and separate use." And as to the other sum of £8,000 the testator directed his trustees to hold it upon such trusts and subject to such powers and provisoes in favour of his daughter Lady Lacon and her issue as should correspond with the trusts, powers, and provisoes declared in favour of Lady Thomas and her issue.

The testator died on the 15th of June, 1891. His wife died on the 14th of November, 1892.

Lady Thomas was a married woman, having been married in 1874. Lady Lacon was now a widow, having

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law

been married in 1878, and her husband having died in August, 1899.

According to Turkish law the testator had no power to dispose of his Turkish property by his will, which by that law devolved in certain shares upon his wife and children. The Turkish property had been sold, and the proceeds of sale were in court.

This was a petition by the trustees of the will to determine the rights of all parties to the funds in court the proceeds of sale of the Turkish property, which raised (*inter alia*) the questions whether, if Ladies Thomas and Lacon elected to take the proceeds of sale by inheritance and not under the will, they were bound to compensate out of their shares in the residue of the testator's personal estate those who lost benefits under the will by such election, or whether they were precluded from so doing by the restraint on anticipation imposed on them; and if they were so precluded whether in the case of Lady Lacon the restraint no longer had that effect she being now discovert.

P. O. Lawrence, Q.C, and *G. Henderson*, for the petitioners.

Warrington, Q.C., and *E. Beaumont*, for Arthur Foster.—The principle of the doctrine of election is that so far as the testator has not expressed a particular intention to the contrary no person can take under his will without giving effect to every part of it. Restraint on anticipation is such a particular intention to the contrary, but in Lady Lacon's case it is no longer effective as she is now discovert. The testator could only have intended the restraint to operate during coverture. If Lady Lacon elects to take against the will she must make compensation.

They referred to *Codrington* v. *Lindsay*, 21 W. R. 182, L. R. 8 Ch. App. 578; *Codrington* v. *Codrington*, 24 W. R. 648, L. R. 7 H. L. 854; *In re Wheatley, Smith* v. *Spence*, 33 W. R. 275, 27 Ch. D. 606; *In re Vardon's Trusts*, 33 W. R. 297 34 W. R. 185, 28 Ch. D. 124, 31 Ch. D. 275; *Hamilton* v. *Hamilton*, 40 W. R. 312, [1892] 1 Ch. 396.

Austen Cartmell, for Lady Lacon.—The testator's intention as evidenced by the restraint was that Lady Lacon should not be able to alienate, she therefore can take against the will without making compensation; that she is now discovert does not affect the testator's intention.

He referred to *Codrington* v. *Codrington; Codrington* v. *Lindsay; In re Wheatley, Smith* v. *Spence; In re Vardon's Trusts; Hamilton* v. *Hamilton;* and *In re Whitwell, Senior* v. *Wilson*, [1890] W. N. 171.

Dighton Pollock, for Lady Thomas.

Cur. adv. vult.

Jan. 30.—KEKEWICH, J.—A somewhat curious question arises in this way. The testator, Morgan Hugh Foster, was the owner of some lands in Turkey, and by his will he purported to direct those lands to be sold, and he further directed the proceeds of sale to be held by the trustees of the will as if the same were moneys arising from the conversion of the residue of his personal estate. He disposed of the residue of his personal estate in such manner as to give interests therein to his three children, Arthur Foster, Lady Thomas, and Lady Lacon. It turns out that according to the law of Turkey the testator had not the power which he professed to have of disposing of the proceeds of sale of land in that country, and the result is that such proceeds are divisible in certain shares between his three children aforesaid, who take them, of course, not under the will but by inheritance.

If they insist on this title they are bound according to what is styled the doctrine of election to compensate out of the interests which they nevertheless take under the will those who thereby lose the benefits which the testator intended for them in the proceeds of sale of the land in Turkey. I do not find it necessary here to expound the doctrine of election, or to do more than state, as I have done, its application in a concrete form to this particular case. But in stating the effect of the will I have intentionally omitted one provision which gives rise to the question falling for decision. Arthur Foster takes such interest as is given him in the residue for his own benefit without more, and the application of the doctrine of election is simple in his case, but as regards Lady Thomas and Lady Lacon, their interests are coupled with restraint on anticipation, and it is that which has occasioned difficulty. I will say no more now about Lady Thomas, but will deal with the case of Lady Lacon only. It is urged on her behalf that the application of the doctrine of election is excluded by this restraint on anticipation, and to that it is replied that whether this might otherwise have been the correct conclusion or not, it is incorrect as matters stand, because Lady Lacon became a widow in August, 1899, and thereupon the restraint on anticipation ceased to have any effect. On this point several authorities were cited, and they must be noticed. Let me first say that *Codrington* v. *Lindsay*, reported in the House of Lords as *Codrington* v. *Codrington*, does not seem to me to have any real bearing on the case in hand. It is a well-known authority of great value, and most instructive, much learning on the doctrine of election being found in the judgments of the learned judges who took part in the decision. But the point with which I am dealing did not arise, and could not have arisen there, and for the present purpose that case cannot be regarded as a guide to any conclusion in this case. My particular attention was called to the decision of the Court of Appeal in *Codrington* v. *Lindsay*, that the plaintiff was bound to account only for income received from the date of the order *nisi* for the dissolution of her marriage, but, apart from the observation that the grounds for this conclusion are not stated, study of the case has convinced me that it does not give me any assistance. A more important and useful case is *In re Vardon's Trusts*, but before commenting on that I must mention *In re Wheatley, Smith* v. *Spence*. In the latter case the claim of a married woman against a will would clearly have brought her within the doctrine of election but that her interest under the same will out of which compensation was sought to be made was restrained from anticipation, and Chitty, J., held that this restraint excluded the application of the doctrine. His views are clearly and forcibly expressed, and briefly come to this, that by adding the restraint on anticipation the testator must be taken to have expressed his intention that the married woman should not be able to part with the interest given to her, and therefore must also be taken to have intended that she should not be at liberty to make that compensation which is the necessary consequence of the application of the doctrine of election. He held it to be a question of intention, and in substance said that one cannot properly insist on a beneficiary under a will giving effect as far as possible to all the testator's dispositions if you find him expressing the intention that the means of doing this shall be withheld. The same learned judge took the same view in *In re Whitwell, Senior* v. *Wilson*, which, I think, calls for no further comment. The case of *In re Vardon's Trusts* first came before Kay, J., and that learned judge held that a restraint on anticipation was no bar to the application of the doctrine of election, and that the court would insist on the

married woman making compensation to those whose interests she defeated by her election, notwithstanding such restraint. He did not consider the question of intention at all. He only considered whether in a case to which the doctrine of election would otherwise have been applicable the restraint on anticipation—that is to say, the inability on the part of the lady to alienate—created any difficulty, and he held that it did not. But the case went to the Court of Appeal and the Lords Justices took a different view. The judgment of the court was delivered by Fry, L.J., and it rests on intention. It is to be observed that that was a case of a settlement and not of a will, and some different considerations may be applicable to the two different instruments, because, as stated by Lord Redesdale in *Birmingham* v. *Kirwan*, 2 Sch. & Lef., 444, in a passage which is cited with approval by Lord Hatherley in *Codrington* v. *Codrington*, "deeds being general matter of contract the contract is not to be interpreted otherwise than as the consideration expressly requires." The judgment, however, does not distinguish between the two classes of instruments and treats the intention as paramount in both alike. The key to the judgment is to be found in the paragraph which concludes thus: "This settlement, therefore, in our judgment, contains a declaration of a particular intention inconsistent with the doctrine of election, and therefore excludes it." Chitty, J.'s, judgment in *In re Wheatley, Smith* v. *Spence*, had been discussed before Kay, J., who disapproved of it, but it was cited again in the Court of Appeal, and although not expressly approved by the judgment must, I think, be treated as upheld by it. If, then, Lady Lacon were still a married woman, it would follow that the restraint on anticipation of her interest in the residue renders it impossible for her to make compensation thereout and excludes the doctrine of election. But then it is urged that she, being now discovert, the restraint has ceased to exist and compensation is therefore possible. If I am right in the view which I have taken of Chitty, J.'s, decision in *In re Wheatley* and of the decision of the Court of Appeal in *In re Vardon's Trusts*, it matters not whether Lady Lacon is now discovert or not. You must look to the will to ascertain what the testator's intention was, and if the testator has said that he intends her not to be capable of alienating her interest—that is, to be incapable of making that compensation which the doctrine of election requires, then because he has expressed that intention the doctrine of election is excluded. Against this view reliance is placed on the decision of North, J., in *Hamilton* v. *Hamilton*. His lordship there held that a lady entitled to repudiate a settlement made by her when under age was bound to make compensation out of her interests under the same settlement which she was not restrained from anticipating to those whom she had thus defeated; and I cannot read his judgment, which I have done with some care, without surmising that if the lady had at that time been discovert he would also have obliged her to make compensation out of interests in the same settlement which she was restrained from anticipating. But this was not the point decided. His judgment deals elaborately with and decides two points, and really two points only. It was argued that the restraint on anticipation contained in the settlement contemplated only the marriage on which the settlement was made, and, therefore, had no application to the subsequent coverture in existence when the case was heard. This argument he rejected, and decided that the restraint was applicable to the then existing coverture. The other point was that she had exercised her election by bringing the action which was commenced before the second coverture—that is, when she was discovert, and that, therefore, the restraint arising on the second coverture might be disregarded. The learned judge rejected this argument also, and held that the obligation to elect arose when he delivered judgment. She was then a married woman and restrained from anticipation, and therefore her income during the then existing coverture could not be applied in compensation. *In re Vardon's Trusts* was cited, and was commented on in the judgment, but I do not understand from the report that there was any argument on the point of intention or that it was considered by the learned judge. If that case stood alone I might be bound to adopt it to the extent of saying that the effect of the restraint on anticipation of Lady Lacon's interest having ceased, and she electing to take against the will—that is, electing to claim by inheritance the property which the testator purported to give her as bounty, she is bound to make compensation to those whom she thus defeats, out of her interest in the residue. But, as already stated, I do not think that North, J.'s, decision covers the exact point, and if it must be treated as doing that by implication, for it certainly does not expressly, it is at variance with the principle upon which the decisions in *In re Wheatley* and *In re Vardon's Trusts* rests, and which principle seems to me to be perfectly sound. There is, however, a subordinate point of which I find no trace in any of the other cases, but of which, after the arguments dealing with it, I am bound to take notice. It is said that the restraint on anticipation indicates only what Mr. Warrington styled a limited intention. It was argued, in fact, that as the restraint can only operate during coverture the testator must be taken to have intended that only during coverture it should interfere with election. This argument of course proceeds on the proposition that testators are supposed to know the law. So they are; but it does not follow that you must attribute to them knowledge of the refined doctrines of equity. And in my judgment it would be going much too far to say that when a testator restrains a woman from anticipation he must be taken to intend, although that, no doubt, is the result, that if at any time during her enjoyment she is discovert the restraint will become wholly inoperative against her alienation. I put to counsel during the argument this test, which upon reflection seems to me a good one. If the testator purported to restrain a man from alienation, his direction would be futile because the law would not allow it; but will it be said that he did not intend such restraint to take effect? Intention which depends on the construction of the testator's language and the legal effect of that language are two different things. I therefore hold that Lady Lacon is not bound to make compensation even though she is now discovert, and is capable of alienating her interest in the residue, because the restraint on anticipation is no longer operative. Arriving at this conclusion I need say nothing about Lady Thomas, who is still a married woman, but who it was said might become liable to make compensation if and when she became discovert. I have dealt with the point on which I reserved judgment, and I think that, subject to that, the several questions arising on the petition, including the question of costs, were disposed of at the hearing.

Solicitors, *Hunters & Haynes; Fladgate & Co.*

Chan. Div.
Farwell, J. March 5.

In re MAYHEW.
SPENCER *v.* CUTBUSH. (*a.*)

Will—Power, exercise of—Special power of appointment —Word "appoint" only.

A testatrix had a special power of appointment by will, given to her by the will of her father, over a share of his personal estate in favour of her nephews and nieces. The words of her will were simply "I appoint, devise, and bequeath my real estate, and the residue of my personal estate, to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between" four named nephews and nieces.

Held, that the power was executed.

Observations on dictum *of* Chatterton, V.C., *in* In re Richardson's Trusts, 17 *L. R. Ir.* 436, *at p.* 442, 35 *W. R. Dig.* 151.

This was an adjourned summons.

By her will dated the 9th of June, 1898, Maria Mayhew, spinster, after appointing her nephew and niece to be her executors and trustees, and making certain specific legacies, continued as follows:

"I appoint, devise, and bequeath my real estate and the residue of my personal estate to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between the four children of my deceased sister Jane Cutbush" (including the said trustees) "or such of them as shall be living at my decease."

It appeared that under the will of her father, William Mayhew, dated the 27th of March, 1858, in the matter of the trusts of which this originating summons was taken out, the testatrix had a power of appointment over a certain part of his personal estate; the words of the power were as follows:

"Upon trust as to one equal undivided moiety or half part . . . upon trust for the children of my said daughter Maria, and in default of children for my grandchildren or others as my said daughter Maria shall by will appoint, in like manner as I have directed and declared with respect to my daughter Matilda as if the same were here again repeated as to my daughter Maria."

The reference was to a gift in favour of the husband and children of Matilda, with remainders over to the children.

The testatrix, Maria Mayhew, died on the 18th of September, 1900.

This summons was taken out by one of the trustees of the testator to have it determined (*inter alia*) whether the power of appointment given by his will to his daughter Maria over the share of his estate given in trust for her during her life with remainders over was a general power or a special power, and whether by her will she exercised such power of appointment.

FARWELL, J., after argument, first decided that the power of appointment given by her father's will to the testatrix was a special, not a general, power.

The second question was then argued.

C. L. Coote, for the plaintiff, a trustee.

J. G. Butcher, K.C., and *J. Gatey*, for the children of Jane Cutbush.—The power has been exercised. Evidence that she had power of appointment must be admissible, for otherwise the court cannot decide whether it has been exercised: *In re Milner, Bray* v. *Milner*, 47 W. R. 369, [1899] 1 Ch. 563. Assuming that, it is a question of intention, and when once you derive an intention to exercise (and here the testatrix had no other power), then the use of words like "my personal estate," or a direction to pay debts, &c., is not enough to show the contrary: see the principle laid down in *In re Williams, Foulkes* v. *Williams*, 42 Ch. D. 93, at p. 97, 37 W. R. Dig. 137. As to the bare use here of the word "appoint," it is a legal term necessarily referring to some power of appointment: see *Pidgely* v. *Pidgely*, 1 Coll. Ch. Cas. 255; *In re Teape's Trusts*, 21 W. R. 780, L. R. 16 Eq. 442; *Cowx* v. *Foster*, 1 J. & H. 30; and *In re Swinburne, Swinburne* v. *Pitt*, 33 W. R. 394, 27 Ch. D. 696. At any rate, if words are used in a deed which are not appropriate, then the court will put aside their literal meaning and construe the words as if they were used appropriately. If the word "power" is used, and an intention to exercise it is shown, it is well settled that that is enough to exercise it; so here, where there is the word "appoint" and the intention, it is enough.

J. S. Green and *J. A. Hay*, for different parties entitled in default of the exercise of the powers.—The *onus* is on the other side affirmatively to show that the power is exercised: *In re Mills, Mills* v. *Mills*, 35 W. R. 133, 34 Ch. D. 186. The intention can only be gathered from the will itself, and where the fund is only personalty, as here, there must be some reference either to the power or to the property subject to the power, and here there is neither. We rely on the *dictum* of Chatterton, V.C., in *In re Richardson's Trusts*, 17 L. R. Ir. 436, where he says, at p. 442, 35 W. R. Dig. 151, that "property which was not that of the testatrix, but over which she had a special power of appointment, cannot, without the aid of a strong context, be held to be described by these words. No such context exists here except merely, the word 'appoint'"; and the decision in that case was that there was no indication of an intention to exercise the power.

The cases of *In re Cotton*, 37 W. R. 232, 40 Ch. D. 41; *In re Sharland*, [1899] 2 Ch. 536, 48 W. R. Dig. 142; *In re Huddleston*, 43 W. R. 139, [1894] 3 Ch. 595; *In re Hayes*, 49 W. R. 21, [1900] 2 Ch. 332, were also referred to; also section 27 of the Wills Act, 1837 (1 Vict. c. 26).

FARWELL, J.—This case is very near the line. On the whole I come to the conclusion that the power is exercised. [Here his lordship read the will of the testatrix.] The testatrix had a limited power of appointment among the grandchildren of her father, obviously including her sister's children. Therefore there is a gift to the objects of the special power. It is plain on the authorities that the mere fact of a direction to pay debts, funeral and testamentary expenses out of the fund subject to a power is not enough to exclude the idea of an intention to execute a power of appointment. Further, there is evidence that here she had no other power. It was suggested that this evidence was not admissible, but I think that it is admissible both on the authorities and on principle, when the court finds the word "appoint" in a will. When there is a devise of real estate, I have to find whether in fact the testator had real estate, and similarly when the testator makes an appointment over personalty, I have to inquire whether there is a power to appoint personalty. I therefore here start with this, that I have it in evidence that she had a special power and no other. Now, the word "appoint" is a word of art, referring to powers only. I do not say that, if there were not

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

the other words, the word "appoint" would not carry all the property. But here I have all three words "appoint, devise, and bequeath;" the word "appoint" in this collocation contains, in my opinion, a necessary reference to a power, and I therefore read it as if it were "in exercise of every power I devise, bequeath, and appoint." I think this is the true view of a will like this, using all three words. At first I felt some difficulty as to whether it would be enough to limit the reference to a general power. The words "my personal estate" might seem to point to this view, but the same thing might have been said as to both *In re Teape's Trusts* and *In re Swinburne*, especially the latter, where the words were "might have any testamentary power of disposition." But it was held to be a sufficient reference to a power. Here there is "devise and bequeath" which, under section 27 of the Wills Act, would be enough to execute the general power. Therefore no violence is done to the will in thinking that in its words there is enough to execute the special power. The only point which made me hesitate was the expression of opinion (not a decision) of Chatterton, V.C., in *In re Richardson's Trusts*, at p. 442 of 17 L. R. Ir. 436. That is a *dictum* of the Vice-Chancellor with which, with all respect to him, if he had applied it to the present case, I could not have agreed. I think there is here sufficient context to show that the word "appoint" applies and refers to and exercises the special power.

Solicitors, *H. E. Griffith; Paterson, Sons, & Candler*, for *A. J. Ellis*, Maidstone.

K. B. Div. (Channell, J.) Jan. 23; Feb. 9.

DULANEY AND OTHERS *v.* MERRY & SON. (*a.*)

Bankruptcy — Deed of arrangement — Registration — Foreign debtor — Mobilia sequuntur personam — *Deeds of Arrangement Act*, 1887 (50 & 51 *Vict c.* 57), *s.* 5.

The provision of the Deeds of Arrangement Act, 1887, *requiring that a deed of arrangement shall be void unless registered in accordance with the Act does not apply to a deed executed abroad by a foreign debtor.*

Two foreigners trading as V. & Co., having personal property situated in England, executed in their own country a deed assigning all their property, wherever situated, to a trustee for the benefit of their creditors. The deed was not registered under the Deeds of Arrangement Act, 1887. *It was good and unimpeachable in the country in which it was made, and would have been sufficient to pass property according to English law had it been duly registered. A creditor of V. & Co., having obtained judgment against them, issued execution against their goods in England. The trustee claimed the goods.*

Held, in an interpleader issue, that the trustee was entitled to the goods as against the execution creditor.

Interpleader issue.

The facts and argument sufficiently appear in the judgment.

Danckwerts, K.C., and *A. H. Carrington*, for the plaintiffs.

Muir Mackenzie and *T. Willes Chitty*, for the defendants.

Cur. adv. vult.

CHANNELL, J.—The facts are not in dispute and are as follows: Christian Defries and Minnie Defries, his wife, carried on business as partners under the style of "The Charles A. Vogeler Co.," as manufacturers and vendors of drugs and patent medicines. They were domiciled in the State of Maryland. They carried on business at Baltimore and also in London, Paris, and Sydney, and elsewhere. Their business in London was managed for them by a manager. They resided at Baltimore and, so far as appears, had never been in England. By deed, dated the 18th of December, 1899, and executed at Baltimore, Christian and Minnie Defries assigned all their estate, real and personal and mixed and wheresoever situated, to Henry S. Dulaney (who also was domiciled in Maryland) for the benefit of their creditors. Dulaney afterwards petitioned the Circuit Court of Baltimore City and obtained authority to "administer his trust under the authority of that court." Subsequently the other plaintiffs in the present issue were duly appointed co-trustees with Dulaney. They also are domiciled in Maryland. It was proved before me by the evidence of experts that the deed was good according to the law of Maryland and that the property became duly vested in Dulaney. That this was effected by the operation of the deed—that is, by the act of the parties and not of the court—and that the proceedings in court were analogous to the administration of an estate in our Courts of Chancery, and operated to give protection and indemnity to the trustee. That the deed could have been impeached within a limited time by bankruptcy proceedings in Maryland, but that the period had elapsed without any such proceedings having been taken, and that the deed was consequently now unimpeachable in Maryland. That under the deed, and also under the bankruptcy law now established in Maryland, local creditors would have no preference over foreign creditors, and that English creditors and other foreign creditors would rank *pari passu* with the American creditors in the administration of the estate under the deed. It further appeared that, after the execution of the deed, proceedings were taken under the bankruptcy law of this country to make the "Charles A. Vogeler Co." bankrupts on the ground, amongst others, that the execution of the deed was an act of bankruptcy, that it had been held by the Court of Appeal, and ultimately by the House of Lords, that there was no jurisdiction to adjudicate them bankrupts as they were domiciled foreigners who had not brought themselves within the jurisdiction of our courts, and that they had not committed an act of bankruptcy available here by the execution of the deed abroad. The decision of the Court of Appeal is reported under the name of *In re A. B. & Co.*, 48 W. R. 424, [1900] 1 Q. B. 541, and the decision of the House of Lords has been reported, in the name of *Cooke* v. *The Charles A. Vogeler Co.*, [1901] A. C. 102, since the argument before me. An interim receiver was appointed in those bankruptcy proceedings, but on the 28th of February, 1900, after the decision of the Court of Appeal, the receiver gave up possession of the goods of Vogeler & Co. in this country to one Baffham, the agent in this country of the plaintiffs, the trustees under the deed, acting under power of attorney for them. On the 5th of March, 1900, the defendants in this issue, who had obtained judgment against Vogeler & Co., caused execution to be levied on the goods so in the possession of Baffham, under a writ of execution which had been delivered to the sheriff on the same day. The usual interpleader proceedings were taken, and I now have to decide whether the plaintiffs had a good title as against the defendants, the execution creditors.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The deed of arrangement was never registered in this country under the Deeds of Arrangement Act, 1887, and it seems clear that this non-registration is the only difficulty which stands in the plaintiffs' way. But for this statute the deed is clearly sufficient to pass the property, according to the law of this country as well as according to the law of Maryland. Mr. Muir Mackenzie did, at the commencement of the case, suggest that the deed might be bad under the statute of Elizabeth, but he withdrew this point when it became clear, on the evidence of the experts, that the foreign law applicable to the deed gave no preference to native over foreign creditors. Mr. Danckwerts for the plaintiffs relied on the maxim *Mobilia sequuntur personam* and quoted the judgment of Lord Loughborough in *Sill* v. *Worswick*, 1 H. Bl. 665, at p. 690, where he says, "It is a clear proposition not only of the law of England but of every country in the world where law has the semblance of science, that personal property has no locality, but that it is subject to that law which governs the person of its owners. With respect to the disposition of it, with respect to the transmission of it, either by succession or the act of the party, it follows the law of the person. The owner in any country may dispose of personal property. If he does, it is not the law of the country in which the property is, but the law of the country of which he was a subject which will regulate the succession." But, although this is the general rule, it is perhaps somewhat too broadly stated in the decision; at all events the rule is subject to exceptions. I was referred by Mr. Muir Mackenzie to a passage in Story's Conflict of Laws (s. 423*a*) which, after stating the law as to movables and that their disposition and the adjustment of priorities and privileges in reference to them follows the law of the domicil of their owner, proceeds: "Exceptions may doubtless exist where the law of the country, in which either movable or immovable property is situate, prescribes a different rule, which must then be obeyed"; again, in section 550, it is said "a nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate therein. It may regulate its transfer and subject it to process and execution and provide for and control the uses and disposition of it to the same extent that it may exert its authority over immovable property." The exceptions to the general rule are somewhat similarly stated in several modern text-books, but the authorities in point are few. I find, however, that Kay, L.J., in *Alcock* v. *Smith*, [1892] 1 Ch. D. 238, at p. 267, 40 W. R. Dig. 25, says: "As to personal chattels it is settled that the validity of a transfer depends not upon the law of the domicil of the owner but upon the law of the country in which the transfer takes place. Our own law as to distress and market overt is illustrative of this. The goods of a foreigner distrained in a house tenanted by an Englishman in this country may be sold for the tenant's rent and the purchaser acquires a perfect title, whatever may be the law of the owner's domicil. So the goods of a foreigner, sold here in market overt by one who had no title to them, could not be recovered from the purchaser. In both cases the property would pass to him by our law." Further, he quotes *Cammell* v. *Sewell*, 8 W. R. 639, 3 H. & N. 617, 5 H. & N. 728, 7 W. R. C. L. Dig. 45, a case in which a sale in Norway, good according to the law there, of the goods of an Englishman, was held good also by our courts. It seems clear that a transfer of movables here good by our law would here be held good, notwithstanding that it might not comply with formalities required by the law of the domicil of the owner, but there has not been quoted to me nor have I found any clear case of a transfer, good according to the law of the domicil of the owner, but held bad for not conforming to the law of the country where the goods are situate. Of course registered stock, such as Consols, can only be transferred according to the regulations under which the register is kept, but this, though possibly an illustration of the rule laid down by Kay, L.J., seems to depend on the special nature of the property. Some cases also were quoted by Mr. Muir Mackenzie which appear to be illustrative merely of the rule that the *lex fori* must govern all questions of procedure and of the form of the remedy. The instance which most clearly shows how far the law of each country is applicable is that of a will. If the surviving partners of the Baltimore firm had died leaving a will, the validity of that will would depend on Maryland law. If one witness were sufficient by that law we should hold a will so witnessed good, although our law requires two witnesses. But, although we should recognize the title of the executor under the foreign will, we should require him to take out probate here and should not allow him to deal with goods in this country without taking probate. This is a distinct instance in which our law, while recognizing the foreign disposition of movables, requires something further to be done here before it is acted on, but the case is probably to be accounted for by the probate being the only evidence of the title of the executor which our courts recognize and is part of the *lex fori* necessarily applicable. On this part of the case, therefore, although no very distinct authority, other than the passage in Story, can be found, I cannot doubt that Mr. Muir Mackenzie is right in saying that it is within the competence of the Legislature of this country to enact rules as to the passing of property situated in this country, and to say that the property in goods situated here, which has been dealt with by foreign owners in accordance with the law of their domicil, shall not pass by such dealing unless certain formalities, imposed by our law, are also complied with; and, indeed, Mr. Danckwerts does not dispute that, if our law does prohibit the transaction which he relies on in this case, effect must be given by our courts to the prohibition, though he contends, as I understand him, that our law is to be disregarded when it goes the length of prohibiting the foreign transaction. The question I have to decide, therefore, seems to reduce itself to one of construction of the Act of 1887. But in order to arrive at that construction we must proceed in the way very clearly defined by the Lord Chancellor in the House of Lords in *Cooke* v. *The Charles A. Vogeler Co.* I may paraphrase the language and say "If the law has intended, and has expressed its intention, that a deed executed abroad by a foreigner shall be registered before it can pass property situate in this country, no court has any jurisdiction to disregard what the Legislature has enacted. And if, on the other hand, it is manifest that the language of the statute does not reach the case supposed, no court has jurisdiction to enlarge the ambit of English legislation beyond what the Legislature has permitted." It is necessary carefully to consider the Deeds of Arrangement Act."

The object of the Act appears to be to secure to creditors information concerning private arrangements outside bankruptcy by making it necessary to register the deeds and to file an estimate of assets and liabilities. Creditors thus become in a position to exercise their option of coming in under the deed, or of treating it as an act of bankruptcy and having the estate administered in bankruptcy. Deeds acquire no

validity by the fact of their registration, and deeds to which the Act applies would, if executed by a debtor subject to our bankruptcy law, be acts of bankruptcy. The Act, therefore, seems to be supplementary of the law of bankruptcy, and we expect to find it made applicable to the same persons as the bankruptcy laws. The decision of the House of Lords shows that the word "debtor" in the Bankruptcy Acts is to be confined to debtors who are subject to the English bankruptcy laws, and I have come to the conclusion, though not without much doubt, that this Act must be limited in a similar way. If the Act applies to deeds executed by debtors not subject to our bankruptcy laws, its effect would be to enable the first creditors, who put in an execution, to get paid in full without the other creditors having any means of securing a rateable distribution of assets. for the deed would not be available as an act of bankruptcy as shown by *Cooke* v. *The Charles A. Vogeler Co.*, and the suffering a levy by execution and sale would not be an act of bankruptcy as shown by *Ex parte Blain, In re Sawers*, 28 W. R. 334, 12 Ch. D. 522. This result would be anomalous, and, I think, unjust, but nevertheless it may be the true construction of the statute, and some further examination of the enacting words is necessary. The first matter commented on before me was the second section, "This Act shall not extend to Scotland." A similar clause in the Bankruptcy Act was also commented on in the case in the House of Lords, and I cannot say that it has no bearing on the point, but I myself attach very little weight to it. I think this section merely means that it is not intended by the Act to alter the law of Scotland. We have but one Legislature to enact the laws for England and for Scotland, but the laws of the two countries are very different, and even when it is desired to make a law to take effect in England and in Scotland it is often impracticable, by reason of this existing difference in the laws of the two countries, to make the alterations in the law of both by the same Act of Parliament. Moreover, the law of Scotland might, so far as I know, in 1887 have already included provision for the registration of deeds, or something which would obviate the mischief intended to be remedied in England by the Act of 1887. Passing on, the fourth section defines the deeds, to which the Act is to apply, as including deeds (afterwards again specified) made by or in respect of the affairs of a debtor for the benefit of his creditors generally, otherwise than in pursuance of the law for the time being in force relating to bankruptcy. The reference here to the laws of bankruptcy is, of course, accounted for by the fact that the Bankruptcy Act then in force, as well as a prior Act and also a subsequent one, has provided for deeds being executed in certain cases, and registration of such deeds was, of course, unnecessary, but the reference seems to assume the debtor to be one subject to the bankruptcy law. If debtor is read in this section in the same way as the House of Lords read it in *Cooke* v. *Charles A. Vogeler Co.* the present deed would not be within the Act. The fifth section enacts that a deed to which the Act applies shall be void unless registered in a limited time. Now it could not have been intended that such a deed as the present should be void altogether. It must operate on the goods in Baltimore, and the Legislature could never have intended to enact to the contrary. It is necessary, therefore, to read the section with some limitations, and Mr. Muir Mackenzie asks me to read it "void as to goods in this country." The next words in the section go on to show that it is contemplated that a deed to which the Act applies may be executed out of England or Ireland, but these words are required to meet the case of an absconding debtor, subject to our bankruptcy laws, who goes abroad and then executes a deed for the benefit of his creditors. The period for registration is undoubtedly so short as to be very inconvenient if it is to apply to a deed such as the present, which goes a little to show that such a deed was not contemplated, but the difficulty might perhaps be met in practice by section 9. Then section 6, sub-section 2, provides that the original deed is to be produced, and that it is to be stamped with an *ad valorem* stamp on the value of the property passing by it. The production of the original of a foreign deed would almost always be inconvenient and sometimes impossible. Mr. Danckwerts pointed out that by the law of many foreign countries an original of a deed is in a notary's book and is kept by him, and that the grantees get nothing but notarial copies. One would think that, if foreign deeds were to be included, the production of the original would be dispensed with by the Act. Further, if the Act were intended to apply to foreign deeds, the Legislature would have made the *ad valorem* stamp on the value, not of the whole property passing, but of that within the jurisdiction. Then the 13th section seems to assume that every debtor executing a deed to which the Act applies must have his place of business or reside either in the London bankruptcy district, or in Ireland, or else in some "county court district"—*i.e.*, either in Ireland, England, or Wales—for by the expression "county courts" English county courts, which have bankruptcy jurisdiction, are clearly meant, and not foreign courts.

Thus a critical examination of the words of the Act of Parliament seems to show that the Legislature certainly had not in their contemplation a deed by foreign debtors operating on property abroad as well as property here. The fact that the Legislature overlooked this particular case is, however, hardly enough to justify a court in saying that it is not included. If the operative words of the Act in their ordinary meaning clearly included the case, and there was no legislative principle by which those words could be qualified, the case must be held within the Act, notwithstanding that there was reason to think that it had been in fact overlooked by the Legislature. Here the operative words of the Act read shortly are "a deed made by a debtor for the benefit of his creditors shall be registered, and shall be void if not registered." Is there any legitimate way of reading these words so as not to include the deed of a foreigner? Besides the small matters in the Act on which I have commented, I think there is some limitation required. The Act cannot mean that such a deed will be void as regards the property situate abroad; as pointed out in the House of Lords all legislation is primarily territorial and not intended to control persons not subject to the jurisdiction. It is, at least, as legitimate to read "debtor" as meaning "debtor subject to our jurisdiction" as it is to say the word "void" means "void as regards property within our jurisdiction." And when we find that in an Act in *pari materia* the word debtor does bear that meaning, I think it is more legitimate to put here the same limitation than a different one. I bear in mind Mr. Muir Mackenzie's observation that the House of Lords proceeded very much on the fact that bankruptcy affects the personal *status*, and that English legislation could not affect the *status* of foreigners, and although these domiciled foreigners never submitted themselves personally to the jurisdiction of an English court, they did subject some of their goods to our English law by leaving them here, as the illustration of Kay, L.J., as to the law of distress clearly shows. It would, therefore, be within the competence of the English Legislature to say that these foreigners should only transfer those

goods by registered deed. But this Act is not an Act regulating the transfer of property. It includes deeds of composition where no property passes, and if, therefore, there is to be a limitation in the generality of the operative words in it, that limitation should be rather on the deeds that come within it than on the property. As the Act includes only some deeds, a limitation, which takes a class of deeds—those executed abroad by foreigners—out of the Act altogether, does less violence to the language of the Act than a limitation which makes some deeds, to which the Act does apply, void in part, when the Act says they are to be void altogether.

On the whole, it seems to me that, acting on the same authority as the House of Lords did, I am justified in putting on this Act the same limitation as they put on the Bankruptcy Act, and saying that "debtor" means "debtor subject to the Bankruptcy Acts." This interpretation has the advantage of preventing the unseemly scramble for the English goods of foreign debtors which would take place if this deed were held to be within the supplementary branch of the law of bankruptcy as to deeds for the benefit of creditors, yet not within the general law of bankruptcy, so that the makers of the deed would be adjudged bankrupt. In the view I take there is no English law which requires this deed to be registered. Consequently there is no *lex rei sitæ* to interfere with the operation of the maxim *mobilia sequuntur personam.* I therefore hold that the plaintiffs have established a good title against the execution creditor, and find the issue for the plaintiffs and with costs of the issue.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *J. A. Bartrum.*

Solicitors for the defendants, *Gibbs, White, & Strong.*

Q. B. Div. (Mathew, J.) — Dec. 18.

BURTON *v.* VESTRY OF ST. GILES AND ST. GEORGE, BLOOMSBURY. (*a.*)

Metropolis — Rating—Appeal—Valuation list—Alteration in list striking out whole amount of rate—Rates paid during appeals—Right to recover—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 44.

The plaintiff, an advertising contractor, was entered in a provisional valuation list as the occupier of an advertising station and hoarding. He appealed against the valuation list to the assessment committee and the quarter sessions, on the ground that he was not the rateable occupier. The quarter sessions confirmed the assessment, subject to a case for the opinion of the High Court. The High Court held that the plaintiff was not the rateable occupier, and ordered the entry of the plaintiff as occupier to be struck out in the valuation list. While these proceedings on appeal were pending, the plaintiff had paid several rates, two of which were paid after summonses to enforce the payment of the same had been taken out

Held, that the plaintiff was entitled, under section 44 *of the Valuation (Metropolis) Act,* 1869, *to recover the whole amount of the rates so paid, including those paid after summonses had been taken out, as the entire alteration of the whole amount of the rate was an "alteration in such valuation list" within the meaning of the section.*

Action tried before Mathew, J., without a jury.

The plaintiff claimed the repayment of sums paid by him to the defendants amounting to £92 6s. 4d. in respect of rates.

The rates so claimed to be recovered back were paid by the plaintiff on the 6th of August, 1897, on the 21st of February, 1898, the 12th of March, 1898, the 24th of June, 1898, and the 26th of August, 1898, and two of these sums—namely, the rates paid on the 12th of March, 1898, and on the 21st of February, 1898, had been paid after a summons for their recovery had been taken out.

The plaintiff claimed to be entitled to the repayment on the ground of the alteration of the supplemental valuation list for the parish of St. George, Bloomsbury, in consequence of an appeal by him against that list.

The facts, which were admitted, were as follows: The plaintiff carried on business in London as an advertising contractor under the name of Partington & Co.; and the defendants were by virtue of their local Act (11 Geo. 4, c. x.), overseers of the united parishes of St. Giles-in-the-Fields and St. George, Bloomsbury.

The plaintiff, in the course of his business, which was that of displaying advertisements for persons desiring to advertise, obtained licences from builders and others to affix advertisements on the exterior of hoardings erected during building operations, and he then affixed to the hoardings the advertisements which he had agreed to exhibit.

In a provisional valuation list made for the parish of St. George, the defendants in June, 1897, inserted the plaintiff as being the rateable occupier of an "advertising station" and of a "hoarding" situate at Southampton-row in that parish.

In June, 1898, the plaintiff gave notice of objection to the valuation list on the ground that he was not the occupier legally rateable in respect of the advertising station or the hoarding. The assessment committee confirmed the assessment, and the plaintiff appealed to the quarter sessions, sitting as the general assessment sessions under the Valuation (Metropolis) Act, 1869, and the Local Government Act, 1888, and in February, 1899, the quarter sessions dismissed the appeal, subject to a case for the opinion of the High Court

In January, 1900, the Queen's Bench Division allowed the plaintiff's appeal, and ordered that the entry of the plaintiff as the occupier of the advertising station and of the hoarding in the list should be struck out: *Burton* v. *Assessment Committee of St. Giles-in-the-Fields and St. George, Bloomsbury,* 48 W. R. 222, [1900] 1 Q. B. 389.

On the 27th of February, 1900, the quarter sessions ordered the name of the plaintiff as occupier to be struck out in the supplemental valuation list, but the name had not in fact been struck out in pursuance of this order.

The plaintiff now sought to recover the rates so paid by him, which the defendants admitted they had received. The defendants refused to refund the rates on the ground that by section 44 of the Valuation (Metropolis) Act, 1869, as no alteration had been made in the list "which altered the amount of the assessments, contribution, rate, or tax levied thereunder" the plaintiff was not entitled to have the rates refunded.

Section 44 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), enacts: "Notwithstanding any appeal under this Act which may be pending at the commencement of the year, the valuation list shall come into force unaltered, and every assessment, contribution, rate, and tax in respect of which the valuation list is conclusive, shall be made, required, levied, and paid in accordance with such valuation list; and where in consequence of the decision on any appeal under this

(*a.*) Reported by Sir SHERSTON BAKER, Bart., Barrister-at-Law.

Act to assessment sessions or a superior court, an alteration in such valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, shall be repaid or allowed, and if too little shall be deemed to be arrears of the assessment, contribution, rate, or tax (except so far as any penalty is incurred on account of arrears), and shall be paid and recovered accordingly."

R. Cunningham Glen (*Bethune* with him), for the plaintiff.—The plaintiff was held not to be the rateable occupier and not liable to pay these rates. He can, under section 44, recover from the defendants the rates which he has been called upon to pay. Section 44 applies to the case. In this case in consequence of the decision of the Divisional Court on the plaintiff's appeal an alteration was made which altered the amount of the assessment. It was ordered by the quarter sessions that the plaintiff's name should be struck out of the valuation list; but in fact the rating was not altered in the valuation list. It makes no difference that the alteration was not in fact made. The order takes effect from the time it was made, and the alteration must be taken to have been made as ordered. There was thus an "alteration" in the amount of the rate, and it is none the less an alteration within section 44 because the whole amount has been altered and has in fact been struck out. There has therefore been such an "alteration" which altered the amount of the rate as entitles the plaintiff to recover under section 44.

Macmorran, Q.C. (*W. C. Ryde* with him), for the defendants.—The plaintiff adopted a wrong procedure. Instead of appealing against the valuation list, which is only conclusive as to amounts, but not as to the names of occupiers, he ought to have waited until rates were demanded; then, if he were not the occupier, he could refuse to pay, and if he were summoned for the rates before the magistrates he could then defend himself by showing, if he could show it, that he was not the occupier. He ought to have raised the defence of not being the occupier in that way, and not by appealing to the quarter sessions against the valuation list. His appeal on that ground was futile, as he was appealing against the valuation list on a ground for which that list is not conclusive. Section 44 does not apply here at all. The occupier is first placed on a provisional list; then that list passes into the supplemental list. Then the person rated has a right of appeal as to amount; and if on such appeal he is found to have paid too much, he can recover back the difference under the section. The appeal here was not against the amount, but against the valuation list. No alteration has been made as to the amount. The amount remains as it was before, and the only effect of the decision was that the plaintiff was struck out as not being the occupier. Non-occupation may always be shown before the magistrates on a summons for the rates: Ryde on Rating, pp. 570-571, where the authorities on the point are collected. If, on appeal against the rate itself, an alteration had been made in the amount of the rate, then section 44 would have applied; but where, as here, there was an appeal against the valuation list, on the ground that the person rated was not the occupier, and where the decision merely was that the person rated was not legally rateable as occupier, no change being made in the amount, the section does not apply. The vestries are merely conduit pipes to collect and pay over these sums to others, and they have no moneys in their hands from which they could refund these rates. With regard to two of the rates, they were paid after summonses for them were taken out. They were thus paid under compulsion of law, and as to these they at all events cannot be recovered.

R. C. Glen in reply.

MATHEW, J.—It seems to me that section 44 does apply to the claim made by the plaintiff in this case. It has been argued for the defendants that the appeal contemplated by section 44 is not an appeal on the ground that the appellant was not the occupier of the premises for which he is rated; and it was said that any such objection as that must be dealt with differently—namely, as a defence upon an application made to the magistrates to enforce payment of the rates. If the earlier words of the section were alone to be looked at, there would be something in favour of the defendants' contention. It says: "Notwithstanding any appeal under this Act," &c.; but the section goes on to say that "where in consequence of the decision on any appeal under this Act to assessment sessions or a superior court, an alteration in such valuation list is made which alters the amount of the assessment, contribution, rate, or tax levied thereunder, the difference, if too much has been paid, shall be repaid or allowed." In this case what occurred was that the plaintiff appealed to the quarter sessions on the ground that he was not the occupier. The quarter sessions reserved its judgment subject to a case to be stated for the opinion of the High Court, and on the case coming before the Queen's Bench Division it was held by them that the plaintiff was not the occupier, and was not liable to be rated. The only question now is whether the fact that the plaintiff has been held to be liable for no part of the rate is an "alteration" in the valuation list within the meaning of the section. Objection was taken for the defendants that this money was received by the vestry, and has been paid away, and that it would be very hard, or contrary to law, that they should be compelled to repay the money as to which they were mere agents or conduit pipes to hand it over. That argument would strike away the whole of the section, because the same argument would apply equally in the cases to which counsel for the defendants said the section was confined, those cases—namely, where there is an alteration in the amount not going to the whole of the rate. But the Act has provided for repayment in that very case where there is an alteration in the valuation list which alters the amount of the rate. The question then is reduced to an extremely narrow one, whether an entire alteration of the rate is an alteration within the meaning of the section. I am of opinion that it is. It follows, therefore, that the plaintiff is entitled to recover the amount he has paid. As to two of the assessments, it seems that they were paid after summonses had been taken out. They were thus paid by compulsion of law in the sense that they were paid after proceedings had been taken before the magistrates to enforce payment. There was no appeal against these two rates, but there was an appeal against the valuation list on which the rates were made. I think these two rates must follow the fate of the others. They are all cases in which an "alteration" has been made in the valuation list which entitles the plaintiff to recover what he has paid My judgment, therefore, will be for the plaintiff for the amount claimed—namely, £92 6s. 4d., with costs.

Judgment for the plaintiff.

Solicitors for the plaintiff, *John H. Mote & Son.*

Solicitor for the defendants, *Henry C. Jones.*

Q. B. Div. (Mathew, J.) Nov. 29.

FRASER & WHITE v. BEE. (a.)

Ship—Charter-party—Pilot paid by charterers—Damage to vessel due to pilot—Payment of hire during repairs.

The plaintiffs chartered the defendant's ship for the period of twenty-five years, with the option of purchase, the ship to be employed "between safe ports of the Continent of Europe where she may always safely lie." By the charter-party the charterers were to pay for pilotages, and, in the event of loss of time from damage preventing the working of the vessel, the payment of hire should cease until the vessel should be again in an efficient state to resume her services. The negligence of the pilot, master, mariners, and other servants of the owner was mutually excepted.

While under charge of a pilot, the ship grounded in getting to her berth in a harbour, and, in consequence, she was prevented working for three weeks. The berth was a safe berth, and the grounding was due to the negligence of the pilot.

Held, that the pilot, though paid by the charterers, was not their servant, and therefore the charterers were not bound to pay hire during the period that the ship was in dock undergoing repairs.

Commercial cause.

The plaintiffs were the charterers and the defendant was the owner of *The Sir Bevis*, a steamship of 1,200 tons dead-weight capacity. The charter-party, dated the 24th of February, 1899, was for a period of twenty-five years, with an option to purchase, the rate of hire being £300 per month. The ship was to be employed in lawful trades "between safe ports of the Continent of Europe where she may always safely lie." The charter-party provided that the owner should provide and pay for all provisions and wages of the captain and crew, and that the charterers should pay for (*inter alia*) pilotages; that in the event of loss of time from damage preventing the working of the vessel the payment of hire should cease until the vessel should be again in an efficient state to resume her services; the negligence of the pilot, master, mariners, or other servants of the owner was mutually excepted.

On the 2nd of April, 1900, *The Sir Bevis* was on a voyage from Hartlepool to Cowes, when the plaintiffs desired to change her destination, and they accordingly sent a pilot on board at Spithead with orders that the vessel was to go to a berth in the Camber, an arm of Portsmouth Harbour. The pilot took the ship into the harbour, but she grounded near the entrance to the Camber by reason of about 16 feet of a telegraph cable, which crosses the harbour at that point, getting wound round the screw. Repairs being necessary, the plaintiffs claimed exemption from the payment of hire during the three weeks these took to carry out.

The defendant pleaded that the berth to which the ship had been ordered was not a safe one; that the accident was due to the negligence of the pilot, who, he alleged, was the plaintiffs' servant.

Scott Fox, Q.C., and *Adair Roche*, for the plaintiffs.

Robson, Q.C., and *J. A. Hamilton*, for the defendant

MATHEW, J.—In my judgment the berth in question from the evidence given must be regarded as a safe one. There would have been no difficulty in taking in a ship of the size of *The Sir Bevis* or even a larger one if proper care had been exercised. The accident was solely due to the act of the pilot. He alone was responsible. If the plaintiffs are to bear the loss, that liability must be found in the charter-party. Was there, then, anything in the charter-party imposing upon them liability for the acts of the pilot? On behalf of the defendant the extraordinary contention was put forward that the pilot was the servant of the charterers. They relied on a clause in the charter-party to the effect that the charterers should provide and pay for, among other things, pilotage. In my judgment that clause was no foundation for the defendant's argument. The fact that the owners were to pay the captain and crew and the charterers the pilot did not make the pilot their servant, and he had no authority to involve them in liability. The plaintiffs took him on board because he happened to be the pilot who had always been employed on the ship at Portsmouth before the charter-party was entered into. For these reasons the plaintiffs must succeed, for they have made out their case that they were not bound to pay for the hire of the ship during the time that she was prevented from working.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff.

Solicitor for the defendant, *C. E. Harvey*.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Probate. Jan. 28.

In the Goods of BLENKINSOP. (a.)

Probate — Grant of administration — Heir-at-law not cited—Probate Act, 1857 (20 & 21 *Vict. c.* 77). *s.* 73 *—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-section* 4.

Notwithstanding the provisions of section 2, *sub-section* 4, *of the Land Transfer Act*, 1897, *and the fact that the heir-at-law of an intestate had not been cited, the court granted administration under section* 73 *of the Probate Act*, 1857, *to one of the next-of-kin, the heir-at-law being abroad and his address being unknown.*

Motion.

George Blenkinsop died on the 11th of May, 1898, a bachelor and intestate, without father, but leaving a mother surviving him.

The applicant, Susan Elliott Haggie, was the sister of the deceased, and was entitled under the will of his grandfather to one-seventh of the residuary real and personal estate, which was valued at £803.

John Blenkinsop, the heir-at-law of the intestate, left this country some twenty years ago, and had last been heard of in September, 1898; his whereabouts were unknown, and in consequence he had not been cited. The registrar refused to issue a grant of administration to the applicant on the ground that the heir-at-law was equally entitled with the next-of-kin to the grant, having regard to section 2, sub-section 4. of the Land Transfer Act, 1897, which enacts that "where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate."

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

The applicant accordingly now moved the court for the grant of administration.

Barnard, for the applicant, contended that the court would generally order the grant to issue to the party to whom the bulk of the property would go.

BARNES, J., held that the grant might go as prayed for to the applicant on justifying security being given.

Solicitors, *Crossman, Prichard, Crossman, & Block*, for *Kidson, McKenzies, & Kidson*, Sunderland.

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) Jan. 22; Feb. 22.

COSTA RICA RAILWAY CO. *v.* FORWOOD. (*a.*)

Company — Director — Fiduciary character—Contracts with company — Declaration of interest—Collateral profits.

The articles of association of a company provided that the rules as to vacating the office of director should be subject to the exception that "No director shall vacate his office by reason of his being a member of any company or partnership which has entered into contracts with, or done any work for, the company, or by reason of his being interested, either in his individual capacity or as a member of any company or partnership, in any adventure or undertaking in which the company may also have an interest."

Held, that, having regard to the above article, a director was not liable to account for profits arising out of contracts with another company or partnership in which he was a shareholder or partner.

Imperial Mercantile Credit Association *v.* Coleman, 18 *W. R.* 570, *L. R.* 6 *Ch. App.* 558, *followed.*

Decision of Byrne, J. (48 *W. R.* 553, [1900] 1 *Ch.* 756), *affirmed.*

This was an appeal by the plaintiffs from a decision of Byrne, J. (48 W. R. 553, [1900] 1 Ch. 756).

The facts are given at length in the report in the court below.

Neville, K.C., and *Younger, K.C.*, for the plaintiffs.

Levett, K.C., Swinfen Eady, K.C., and *Bremner*, for the defendants.

Cur. adv. vult.

Feb. 22.—RIGBY, L.J., said this was an action brought by the Costa Rica Railway Co. against Sir Arthur Forwood, the ground of the action being that the defendant, being a director of, and in a fiduciary position to, the plaintiff company, had made profits which he had not disclosed to the company. The equitable doctrine that a person in a fiduciary relation who made a secret profit was bound to give it up to the principal for whom he was acting was a very salutary one, and he hoped that it would not be infringed upon in this or in any other case, because it was found to be the only means of making sure that a man would do his duty under circumstances of unusual difficulty. It did not depend upon fraud; and there was no suggestion in the present case of anything like fraud on the part of Sir Arthur Forwood. It did not, however, follow that the defendant, without his being aware of it, might not have done something which was contrary to that rule. The action had reference to three contracts called respectively the construction contract, the banana contract, and the syndicate contract, which for the present purpose might be treated as contemporaneous. His lordship then discussed in detail the provisions of the banana contract, and said that it was clear from that contract that the two steamship companies (the Atlas Co. and Phipps & Co.) and the railway company under the management of Keith & Co. were working in concert to carry on the exportation of bananas from Costa Rica to New York and New Orleans, and that it was proposed to continue the working in concert, and further that the railway company treated Keith and the two steamship companies as the persons entitled to dispose of the bananas which were shipped from Port Limon. The contract obviously contemplated that the steamship companies should have a direct interest in the bananas themselves and in the profits to arise from the proceeds. The syndicate contract was to supplement and give effect to arrangements made between the parties, which, though perfectly understood, yet required to be reduced into writing. Those arrangements related to the division of profits arising from the sale of the bananas. The railway company were of course not parties to that agreement, and it was a matter of absolute indifference to them how the profits were divided as between the steamship companies and Keith. How, then, was it possible to say that they ought to have been informed of this agreement? Only in this way, that Sir Arthur Forwood was a director of the railway company, and was known by the company to take an important interest as a shareholder in the Atlas Co., and as a partner in the firm of Leech, Harrison, & Forwood. The railway company knew perfectly well that Leech, Harrison, & Forwood were the managers of the Atlas Co., they knew that the Atlas Co. were intended to make profits out of the banana speculation, and they knew that Leech, Harrison, & Forwood were to be paid in some way. It was only by reason of Sir A. Forwood's fiduciary position that they could claim any interest in the syndicate contract, and it was only on that ground that they had an interest in knowing what was done under it. In the present case the general rule of equity as to secret profits by a person in a fiduciary position such as a director do not apply, because the matter was expressly dealt with by the articles of association. *Primâ facie* the provision would seem to have been inserted for the purpose of excepting from the general rule of equity any interest which Sir A. Forwood might take as a member of the Atlas Co. It was true that the article in terms applied only to the vacating the office of director, but it had been held by Lord Hatherley in the *Imperial Mercantile Credit Association* v. *Coleman*, 18 W. R. 570, L. R. 6 Ch. App. 558, that the effect was to relieve the director from the equitable rule. That was accepted by Lord Cairns for the purpose of his judgment on the appeal, 21 W. R. 696, L. R. 6 H. L. 189, at p. 205, though without affirming it. It had not since been questioned, and consequently the decision of Lord Hatherley was binding upon this court. His lordship therefore held that as regards Sir A. Forwood's interest in the Atlas Co. his estate was not liable to account. Then it was said that the profits in the firm of Leech, Harrison, & Forwood stood on a different footing; but that firm had no other position than as agents of the Atlas Co., and whatever they were paid out of the profits of the banana speculation would be merely a deduction from what otherwise would have gone to swell the profits of the company. His lordship therefore held that as regards the Atlas Co. Sir A. For-

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

wood was protected by the articles of association, and as regards Leech, Harrison, & Forwood by the fact that the Atlas Co. could make what profits they liked, and that the payment to them was a deduction from those profits. The plaintiffs perfectly well knew that the contracts were to be made for profit. No attempt had been made to show that Sir A. Forwood did anything contrary to the articles. The appeal would therefore be dismissed.

VAUGHAN WILLIAMS, L.J., agreed, and referred to *Aberdeen Railway Co.* v. *Blaikie*, 1 Macq. 461; *Dunne* v. *English*, L. R. 18 Eq. 524; *Boston Fishing Co.* v. *Ansell*, 39 Ch. D. 339, 37 W. R. Dig. 117, as showing the principles applicable to persons in a fiduciary position making secret profits. Starting with those propositions his lordship held that Sir Arthur Forwood had not been brought within the operation of those wholesome doctrines of equity; and, further, that the plaintiffs did in truth and in fact know of the defendant's interest.

STIRLING, L.J., delivered judgment to the same effect.

Appeal dismissed.

Solicitors, *Norton, Rose, Norton, & Co.; Ashurst, Morris, Crisp, & Co.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Jan. 22.

REG. *v.* SOWTER. (*a.*)

Ecclesiastical law—Churchwarden—Admission—Visitation of bishop—Inhibition to archdeacon—Jurisdiction of archdeacon.

Where the bishop, during his visitation, inhibits the archdeacon from admitting churchwardens, the bishop is the only person entitled to admit, and a mandamus *to admit a churchwarden during the period covered by the inhibition will not lie to the archdeacon.*

Rex *v.* Simpson, 1 *Stra.* 609, *explained.*

Judgment of the Divisional Court (ante, *p.* 170, [1901] 1 *Q. B.* 66) *reversed.*

Appeal from a judgment of the Divisional Court (Lord Alverstone, L.C.J., and Kennedy, J.) making absolute a rule *nisi* for a *mandamus* to the Archdeacon of Dorset, commanding him to admit one Samuel Vine as a churchwarden for the parish of Winterborne Came, in the archdeaconry of Dorset: reported *ante*, p. 170, [1901] 1 Q. B. 66.

At an election of churchwardens for the parish in May, 1900, Vine and Passmore were both candidates for the office of parishioners' churchwarden.

The rector of the parish, who presided, voted in favour of Vine, and the votes for both candidates being equal, he gave his casting vote for Vine and declared him elected.

On the 29th of May, before any admission of churchwarden to the office was made, the archdeacon was served with the Bishop of Salisbury's inhibition dated the 28th of May, and sent preparatory to the bishop's triennial visitation, inhibiting him for the space of three months from exercising within his archdeaconry "any spiritual or ecclesiastical jurisdiction concerning the visitation of the clergy, the admission of the churchwardens, the receiving of presentments, and the doing of any other act, matter, or thing appertaining to the visitation of a bishop."

In June the bishop admitted Passmore as churchwarden.

On the 13th of July Vine applied to the archdeacon to admit him. The archdeacon replied that he was not in a position to do so.

On the 24th of July a rule *nisi* for a *mandamus* was obtained as above, made returnable on the 4th of August.

The argument of the rule was heard on the 14th of November, when the Divisional Court made it absolute.

The archdeacon appealed.

Dibdin, for the appellant.

Edwardes Jones, for the respondent.

In addition to the authorities cited in the court below *Lunne* v. *Dodson*, 3 Salk. 201, was referred to.

A. L. SMITH, M.R.—In my opinion the Queen's Bench Division did not decide the real point in the case—namely, whether the rule *nisi* for a *mandamus*, which was obtained on the 24th of July against the archdeacon, ought ever to have been granted at all. The question is whether the rule was properly obtained against the archdeacon, and that depends upon the further question whether the duty of admitting churchwardens was one which lay within the domain of the bishop or of the archdeacon. It is said that the rule ought to have been obtained against the bishop, whose duty alone it was to admit churchwardens at that time. That is the point which we have to decide. Two persons named Vine and Passmore were candidates for the office of parishioners' churchwarden. Vine was elected by means of the vote of the rector of the parish. The point sought to be determined by the application for the *mandamus* is whether the rector was entitled to vote at the election of the parishioners' churchwarden. Vine having been declared elected, an application was made in July to the archdeacon to admit him as churchwarden, and unless at that time the matter was within the jurisdiction of the bishop by reason of the bishop's visitation and inhibition, the application would have been in order, and the proper person to apply to for admission would have been the archdeacon. The archdeacon, however, in answer to the application, said that, as the bishop's visitation was proceeding, and as he had been inhibited by the bishop from admitting churchwardens during the visitation, the inhibition not expiring until the 28th of August, the bishop was the only person entitled to admit. A rule *nisi* for a *mandamus* to the archdeacon to admit was obtained on the 24th of July—that is to say, before the inhibition had expired, and the rule was made returnable on the 4th of August, also before the expiration of the inhibition. Now it seems to me that the only point for our consideration is whether, during the period covered by the bishop's inhibition—that is, down to the 28th of August, the archdeacon or the bishop was the proper person to admit to the office of churchwarden. There does not seem to me to be the semblance of authority for saying that during that period the archdeacon was the proper person to admit. When I look at the inhibition I find that it bears out the contention of the archdeacon that during the period covered by the inhibition the jurisdiction of the archdeacon in that respect was suspended and the jurisdiction of the bishop came into operation. What is the meaning of that document? It cannot be treated as a mere piece of waste-paper. It seems to me that it is cogent evidence to show that the bishop had exclusive jurisdiction to admit churchwardens, and that the archdeacon's jurisdiction to admit, whether it is called an inferior jurisdiction or not, was suspended. In my opinion, during the period

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

in question, the bishop had exclusive jurisdiction to admit churchwardens. The question whether the act of admission is a purely ministerial act is not material. The rule *nisi* for a *mandamus* was therefore directed to the archdeacon, calling upon him to show cause why he should not be commanded to do an act which he had no jurisdiction to do. In the court below the Lord Chief Justice said that the case of *Rex* v. *Simpson*, 1 Stra. 609, "has undoubtedly been treated as an authority for the point in many text-books; and as we are dealing with a temporal office it seems to me good sense that the mere prohibition by a spiritual authority in such a matter ought not to prevent the person whose duty it is to admit the elected person to the office from admitting him." With great respect that seems to beg the question, because the sole question is, Whose duty was it to admit? Therefore, when the archdeacon showed cause against the rule on the 14th of November, the rule ought to have been discharged, and we must now discharge it with costs here and below.

COLLINS, L.J.—I am of the same opinion. The point when analyzed seems to me to be a simple one. The real mistake, if mistake there has been, in the court below arose because the minds of the judges were not directed to the real point—namely, whether the *mandamus* was addressed to the right person. It was addressed to the archdeacon during the bishop's visitation, when the bishop's inhibition was in force. It seems to me to be clear law that during the period when the inhibition was in force the ministerial duties of the archdeacon were suspended, or perhaps it would be more correct to say had lapsed and passed to the bishop. If so, the proper person to admit churchwardens, when the rule *nisi* for a *mandamus* was obtained, was the bishop and not the archdeacon, and the *mandamus* has gone to the wrong person. No question arises here as to whether the archdeacon had any duty, whether ministerial or not, to discharge in the performance of which he could be controlled by the bishop in the same way as an inferior court could be controlled by a superior court. No such question arises here, the whole point is whether the jurisdiction of the archdeacon had lapsed. Mr. Dibdin contended that it had, and referred us to the case of *Lunne* v. *Dodson*. From that case it appears clear that at the date of that case—and in my opinion the law has remained the same ever since—when the archbishop visited he inhibited the bishop, and when the bishop visited he inhibited the archdeacon, and this is put upon the ground of necessity of preventing scandal and distraction. The only answer suggested on behalf of the repondent is that the archdeacon had some independent right by common law quite apart from the bishop, and that therefore the presence of the bishop, though it might supersede the ecclesiastical jurisdiction of the archdeacon, did not affect his common law jurisdiction. I cannot find a shadow of authority for such a proposition. The only authority cited in support of it, *Rex* v. *Simpson*, 1 Stra. 609, is, upon examination, no authority at all for the proposition. It is said that that case goes to the root of the matter because it shows that the bishop's inhibition, so far as concerns the admission of churchwardens, is mere waste-paper. That would be a strange conclusion bearing in view the law laid down long before in *Lunne* v. *Dodson*. But the case of *Rex* v. *Simpson* is not even a *primâ facie* authority for the proposition for which it is cited. In the first place it appears from the case that the bishop had no jurisdiction to deal with the archdeacon at all because the place in question was not within the diocese of the bishop. Another ground for the decision was added, and this is the ground relied upon in the present case. The report goes on to say that "the archdeacon is but a ministerial officer, and is obliged to do the act whether it be of any validity or not." It seems to me that that proposition was laid down on the assumption that the archdeacon had not come under any incapacity owing to the presence of the bishop, but was still an officer charged with the duty of doing ministerial acts, and as such could not be prevented by a special inhibition going *ad hoc* from admitting a particular person as churchwarden. In other words, he could not by a special inhibition be deprived of the right of doing an act which by his office he was charged with the duty of doing. That case pointed to a suggested prohibitory jurisdiction alleged to exist in the bishop similar to that exercised by a superior court over an inferior one; and whether the decision is right or wrong it has no reference to a general inhibition by the bishop during his visitation. Therefore, even if that case is good law, it does not affect the question before us. In my opinion the archdeacon was not the proper person, at the time when the rule *nisi* for a *mandamus* was obtained, to perform the duty of admitting churchwardens.

ROMER, L.J.—I agree. The sole point is whether the rule *nisi* for a *mandamus* has not been allowed to issue to the wrong person. Upon the authorities I feel no doubt that when a bishop during his visitation inhibits the archdeacon from performing certain duties, including the admission of churchwardens, the office and duties of the archdeacon in regard to those matters are, during the period covered by the inhibition, to be performed by the bishop, so that the archdeacon is not the proper person to admit churchwardens. During the period covered by the inhibition the bishop alone is entitled to admit. It follows that, in the circumstances existing at the time when the rule *nisi* for a *mandamus* in the present case was obtained, the archdeacon was not the proper person to admit churchwardens. The bishop at that time was the only person whose duty it was to admit. This point was not really dealt with in the judgment in the Divisional Court. The judgment proceeds upon the ground that the archdeacon was the proper person to admit, and that he could not refuse to admit a person as churchwarden merely because he had been inhibited by the bishop from admitting churchwardens. The judgment proceeded upon the authority of *Rex* v. *Simpson*. That case, it seems to me, is quite distinct from the present one and is no authority in support of the proposition for which it is cited. That was a case where the archdeacon was clearly the proper person to admit churchwardens, so that the *mandamus* was rightly issued against the archdeacon, though the bishop had purported to inhibit him. In the present case, assuming that the bishop was wrong as to the proper person to be admitted as churchwarden, the bishop was the only person whose duty it was to admit, and therefore the *mandamus*, if it issued at all, should have been directed to the bishop. The archdeacon was in law a stranger in the matter, and no application should have been made for a *mandamus* against him. The appeal therefore succeeds.

Appeal allowed.

Solicitors for the appellant, *Robins, Hay, Waters, & Hay.*

Solicitors for the respondent, *Jenkins, Baker, & Co.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Jan. 15.

UPPERTON v. RIDLEY AND ANOTHER. (a.)

Police—Pension—"Annual pay"—Special allowance—Police Act, 1890 (53 & 54 *Vict. c.* 45), *s.* 1; *Sched. I., Parts* 1, 3.

A constable in the metropolitan police was selected by the Commissioners of Police for permanent special duty at the House of Lords, and he received for that special duty a payment of 7s. a week in addition to his ordinary pay as a police constable. He performed this duty and received the payment for several years up to the date of his retirement.

Held, that the sum of 7s was not part of the constable's "annual pay" within the meaning of the Police Act, 1890, *so as to entitle him to have it taken into account in calculating the amount of his pension.*

Decision of the Queen's Bench Division (48 *W. R.* 494, [1900] 1 *Q. B.* 680) *affirmed.*

Appeal from a decision of a Divisional Court (Channell and Bucknill, JJ.), on a case stated by the London Quarter Sessions: reported 48 W. R. 494, [1900] 1 Q. B. 680.

The appellant, Upperton (a constable of the metropolitan police), appealed to quarter sessions against the decision of the police authority for the metropolitan police district (the Secretary of State for the Home Department) refusing to reconsider his claim for an increased amount of pension.

The quarter sessions dismissed the appeal subject to a case.

The appellant joined the police force on the 30th of December, 1872, and on the 1st of January, 1899, he had completed more than twenty-five years' approved service as a police constable.

Upon joining the force he signed a document containing a scale of pay, approved by the Secretary of State, for police constables, the scale being 24s. a week for constables in the 3rd class, 27s. for constables in the 2nd class, and 30s. for constables in the 1st class. These rates of pay were subsequently increased, constables in the 1st class receiving 32s. a week.

The appellant, who was then in the 1st class, gave notice to retire, and was entitled as of right by the Police Act, 1890 (an acceptance of whose provisions he had previously signed), to retire and receive a pension for life of two-thirds of his annual pay at the date of his retirement.

In May, 1894, the appellant, having already served for nine years as a police constable at the Houses of Parliament, was selected by the Commissioners of Police for permanent duty as a police constable at the House of Lords, and continued to serve in that capacity until his retirement in January, 1899.

He was paid for this special duty 7s. a week, and at the date of his retirement he was paid each week the sum of 39s. made up as follows: 32s. being the ordinary pay of a constable of his rank and service, and the above sum of 7s.

It was stated in evidence by the chief clerk to the Commissioners of Police that the commissioners were under no obligation to pay the appellant the additional sum of 7s., even while he remained on special service, though that was done partly as a recognition of the good conduct for which a constable was placed on special duty, and partly because by being withdrawn from ordinary duty he lost to some extent his chance of promotion.

The entire cost of the police employed on special duty was paid out of moneys provided by Parliament in each year. From the above sum of 32s. the sum of 7d. was deducted as a contribution towards the pension fund in accordance with section 15 of the Police Act, 1890, but no deduction was made from the 7s.

The appellant signed the weekly pay list, the sum of 32s. appearing therein in the column headed "Amount of pay," and the sum of 7s. in the column headed "Allowances for special duties."

By section 15 of the Police Act, 1890, the police authority of every police force was authorized and directed to deduct from the pay of every constable such stoppages during sickness as might be provided by the regulations respecting the force.

In the metropolitan police during absence owing to sickness 1s. a day was usually stopped from the ordinary pay of a constable, and in the case of a constable employed, as the appellant was, on special duty, and receiving special allowance, such allowance was usually stopped in addition to the 1s. a day, and the amount of this allowance would be paid to the constable who actually performed the special duty.

The appellant was awarded a pension calculated on two-thirds of 32s.

On behalf of the appellant it was contended that the 7s. a week was part of his "pay" within the meaning of Schedule I, Part I, to the Police Act, 1890, and that he was therefore entitled to a pension calculated on two-thirds of 39s. a week.

In the Divisional Court Channell, J. (Bucknill, J., dissenting), held that the special allowance of 7s. a week was not "pay," and could not be taken into account in computing the pension.

The appellant appealed to the Court of Appeal.

E. H. Pickersgill, for the appellant—The Police Act, 1890, by section 1, gives a police constable a right to a pension. By section 3 the pension is to be according to a scale adopted by the police authority within the maximum and minimum limits set forth in Part I. of the first schedule to the Act. By that schedule the scale is fixed according to the annual pay of the constable, but so that the pension shall not exceed two-thirds of his "annual pay." By Part III. of the schedule the pension is to be calculated according to the amount of his "annual pay" at the date of his retirement. The Metropolitan Police Act, 1829 (10 Geo. 4, c. 44), s. 12, provides that the Receiver for the Metropolitan Police District shall pay to the police "such salaries, wages, and allowances . . . as one of his Majesty's principal secretaries of state shall direct." The Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), s. 22 (which is repealed by the Police Act, 1890), authorized deductions to be made from the "pay" of every police constable for the purposes of the police superannuation fund. The word "pay," therefore, was intended to include "salaries, wages, and allowances." This 7s. a week for special duty was an "allowance," and was so designated in the weekly pay list. Pay is that which is given for services rendered, or for work and labour done. The 7s. was pay in the proper sense of the word. The judgment of Bucknill, J., that the 7s. ought to have been included in the "pay" of the appellant is correct, and the judgment of Channell, J., is wrong.

Macmorran, Q.C., and *J. P. Grain*, for the respondents—The 7s. is not part of the constable's "pay." It is a mere gratuity allowed to him for performing special duty. The constable may at any moment be taken off that special duty and sent elsewhere. There was no obligation upon the Commissioners of Police to give the police constable any part of the special allowance. When the police

(a.) Reported by W. F. BARRY, Esq., Barrister-Law.

constable joined the force he signed a document setting out the scale of pay, sanctioned by the Home Secretary, and the scale so set out did not mention any special allowance.

A. L. SMITH, M.R.—The question which we have to decide is what is the meaning of the words "annual pay" in the schedule to the Police Act, 1890, because the amount of the pension of a police constable is based on his annual pay. In order to ascertain what terms the appellant came under as regards pay it is necessary to look at the document which he signed when he joined the police force. That document clearly shows that the pay was to be according to a scale authorized and directed by the Home Secretary, the scale of pay being 24s. a week for a police constable when he was in the third class, 27s. when he was promoted to the second class, and 30s. when he reached the first class. Those sums were afterwards raised, the pay of a constable in the first class, in which the appellant was at the date of his retirement, being 32s. a week. In my opinion this document regulated the scale of pay, and if the appellant had not received the pay there set out he would have been entitled to sue for it by means of a petition of right. Was he entitled as of right to anything over and above the sums there mentioned? To my mind he was not. There was no contract by which a police constable could recover anything beyond those sums. There was nothing to entitle a constable to any "pay" over and above those sums. In support of this view there is a paragraph in the special case which states that the chief clerk to the Commissioners of Police gave evidence that the commissioners were under no obligation to pay the appellant the additional sum of 7s. even while he remained on special service, though that was done partly as a recognition of the good conduct for which a constable was placed on special duty, and partly because by being withdrawn from ordinary duty he lost to some extent his chance of promotion. Further than that, there is the pay list which the appellant signed each week, which distinctly states that the 7s. was received as an allowance for special duties, while the 32s. was received as pay. I do not wish to press this document too far against the appellant, but I cannot altogether shut it out in considering this question. If the 7s. were pay, then by section 15 of the Police Act, 1890, a deduction should have been made from it for the pension fund, whereas no deduction at all was made. In truth this 7s. was not pay within the meaning of the Act. I agree, therefore, in the judgment of Channell, J., and I cannot agree with that of Bucknill, J. The appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. The pension of a police constable is to be a certain proportion of the constable's "annual pay." The person who, by statute, has to determine what is to be the "pay" of a police constable is the Home Secretary. Section 12 of the Metropolitan Police Act, 1829, provides that the receiver shall pay to the police such salaries, wages, and allowances as one of his Majesty's principal secretaries of state shall direct. The only evidence before us upon this point is that of a document which the appellant signed on entering the police force and which sets out the scale of pay which the Home Secretary has directed to be paid. That is the scale applicable to the appellant, and it states that his "pay" is to be a certain sum per week according to the class he may happen to be in. Therefore we have it on the highest authority that his pay is that set out in that document. That document under the hand of the secretary of state defines the pay, and by the Act of 1890 the pension is to be a certain proportion of the pay. By section 11 of the Police Act, 1890, where a police constable claims a pension and the police authority do not admit the claim, the constable may apply to the police authority (that is, in the case of the Metropolitan Police, the Home Secretary) for a reconsideration of the claim, and the police constable, if aggrieved by the decision upon such reconsideration, may appeal to quarter sessions. The appeal, therefore, necessarily presupposes and involves an expression of opinion by the Home Secretary himself as to what the scale of pay was—namely, that the scale of pay was that set out in the document. Therefore, the document under the hand of the Home Secretary which the appellant signed when he joined the force, the decision of the Home Secretary when the question of pension came up before him for reconsideration, and the whole course of practice and dealing while the appellant was a member of the police force clearly points to this, that the only pay of the appellant at the date of his retirement was the 32s. a week.

ROMER, L.J.—I agree. Upon the facts it seems to me to be clear that the 7s. a week was expressly paid to the appellant by the Commissioners of Police and was received by him upon the footing that it was not "pay," but was a voluntary and gratuitous allowance. That is shown by the paper which he signed when he joined the police force, by no deduction being made from the 7s. as a contribution towards the pension fund, by the fact that in the case of absence from sickness his ordinary pay would be paid to him less a deduction of 1s. a day, whereas the whole of the 7s. a week would be stopped, and also by the fact that, if the police constable had been removed to other duty, the 7s. a week would have been stopped. The only conclusion I can come to is that the 7s. a week was not part of the appellant's pay within the meaning of the Police Act, 1890.

Appeal dismissed.

Solicitors for the appellant, *Mann & Crimp.*

Solicitors for the respondents, *Wontner & Sons.*

High Court of Justice.

Chan. Div. Kekewich, J. — Jan. 16, 17.

BATH v. BATH. (a.)

Practice—Payment out—Fund in court—Payment to wrong parties—Stop order—Liability of Treasury to replace fund—Default of Paymaster-General—Court of Chancery (Funds) Act, 1872 (35 & 36 *Vict. c.* 44), *s.* 5.

"All" the property of a bankrupt was by an agreement—confirmed by an order of the court—vested in a company, and the bankruptcy annulled. The agreement contained a list of the bankrupt's properties, which did not, however, include a fund in court to which the bankrupt, unknown to any of the parties to the agreement or their solicitors, was then absolutely entitled. The late bankrupt subsequently obtained an order of the court for payment out to him of the fund upon affidavits that he had not incumbered. No stop order was ever obtained against the fund. The same solicitor acted for the bankrupt in both matters. Upon petition by the company claiming the fund and asking that the Treasury might be ordered to replace it,

(a.) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

Held, (1) *that the agreement and vesting order vested the fund in the company, and that the late bankrupt and his solicitor were severally liable to pay the amount of the fund to the company*; (2) *on the authority of an unreported case of* Jones *v.* Jones (*for which see below*), *that the Paymaster-General had not been "guilty of default" within section 5 of the Court of Chancery (Funds) Act*, 1872, *with respect to the payment out, and that the Treasury were not, therefore, bound to replace it.*

By an agreement dated the 20th of April, 1893, made between J. S. Bath, then a bankrupt, and the Creditors Assets Co. (Limited), it was agreed that in the event of an order of the court being obtained confirming a scheme of arrangement of J. S. Bath's affairs set out in Schedule I. thereto, and as soon as the property of J. S. Bath set out in Schedule II. thereto should have been vested in the company by an order of court, the company should manage and dispose of the property as described in Schedule II. in the manner therein set out.

Schedule I. provided that upon payment into court by the company of a sum sufficient to pay all J. S. Bath's debts in full, together with all costs, an order of the court should be made vesting "all" his property in the company.

By an order of the court, dated the 11th of July, 1893, the scheme was approved, and it was ordered that the adjudication of bankruptcy against J. S. Bath should be annulled, and that "all the property" of J. S. Bath should thenceforth become vested in the company.

At this time, unknown to any of the parties to the arrangement, there was a fund in court belonging to J. S. Bath, to which he had become absolutely entitled before his bankruptcy. This fund did not therefore appear in Schedule II. of the agreement, and no stop order was ever obtained upon it. Subsequently J. S. Bath was informed of the existence of this fund in court.

Upon application by him, supported by affidavits to the effect that he was absolutely entitled to and had not incumbered the fund, he obtained on the 29th of February, 1896, an order from Kekewich, J., directing payment out of the fund to him, and it was accordingly so paid out.

The same solicitor acted for J. S. Bath in both these matters.

This was a petition by the Creditors Assets Co., to which J. S. Bath, his solicitor, the Paymaster-General, and the Treasury Commissioners were made respondents, praying that the order for payment out might be discharged, that the Treasury might be ordered to replace the fund in court, and that the petitioners were entitled to payment out thereof, and for such order as to J. S. Bath and his solicitor as the court might think just.

Renshaw, Q.C., and *Pollard*, for the petitioners.—The fund in question was included in the scheme of arrangement and under the agreement and vesting order became vested in the company. It ought not, therefore, to have been paid out. The Paymaster-General has been guilty of default with respect to the payment out under section 5 of the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44), and the Treasury ought, therefore, to replace it.

Warrington, Q.C., and *Muir Mackenzie*, for J. S. Bath.—This fund was not vested in the company by the agreement or vesting order. Only the properties set out in Schedule II. were vested in them.

P. O. Lawrence, Q.C., *Micklem, Q.C.*, and *Harman*, for the solicitor.

Sir R. Finlay, A.G., and *R. J. Parker*, for the Paymaster-General and Treasury Commissioners.—If the fund ought not to have been paid out, the Treasury is nevertheless not liable to replace it, for as there was no stop order on it the Paymaster-General has not been guilty of default under section 5 of the Court of Chancery (Funds) Act, 1872.

They then referred to an unreported case of *Jones v. Jones*, before Cairns, L.C., in 1879, in his private room, where a petition was presented praying for a declaration that the Paymaster-General had been guilty of default under section 5 of the Court of Chancery (Funds) Act, 1872, with respect to the payment out of a fund to wrong parties, and that the same might be made good by the Treasury.

The judgment in this case was as follows: "Cairns, L.C.—The facts under which this application is made to me do not appear very perfectly on the petition, but I will state them as I understand them to be after hearing the admissions agreed to between the petitioner and the counsel for the Treasury. The estate of a testator named Lacy was being administered in the Court of Chancery. In a part of the estate there was an intestacy subject to the life interest of a Mrs. Hutchison. £1,278 9*s.* 4*d.* was carried over to a separate account representing this part of the estate, and it was entitled "The Account of the Share of the Testator's Residuary Estate Given to Mrs. Hutchison for Life." This fund, subject to Mrs. Hutchison's life interest, belonged to Elizabeth Harriet Lacy, the sole next-of-kin of the testator. She died in 1853, and her administrators were James Samuel Jones and John Des Champs Jones. Her next-of-kin were eight in number, and John Des Champs Jones was one of the eight. John Des Champs Jones by indenture of the 28th of February, 1862, mortgaged his one-eighth share to the petitioner Fielding with a power of sale, and on the 24th of March, 1862, the petitioner Fielding obtained the usual stop order on the fund. About eight years afterwards the petitioner Fielding, under the power of sale in the mortgage, sold this share of John Des Champs Jones to the petitioner Gibbons and assigned it by an indenture dated the 16th of July, 1870, and from that time the petitioner Fielding ceased to have any interest in the fund. Gibbons did not obtain any stop order on the fund. Then came the Chancery Funds Act, 1872, the office of the Accountant-General was abolished, and it was enacted that her Majesty's Paymaster-General should perform all the duties and exercise all the powers and authorities which were performed by or vested in or capable of being exercised by the Accountant-General. The funds of the Court of Chancery were taken over by the State, and the 5th section of the Act provided that the Consolidated Fund should be liable to make good to the suitors of the court all money and securities in court, and that if the Lord Chancellor should certify to the Treasury in writing that the Paymaster-General had failed to pay any money into court, or transfer or deliver any securities into court required by any order of the court to be paid, transferred, or delivered from his account, or should have been guilty of any default with respect to such money or securities, the Treasury should pay out of the Consolidated Fund the sum certified to be required to pay the money or release the securities or make good such default. It is under this section that the present application is made to me. It is said that the Paymaster-General has been guilty of a default with respect to the share of John Des Champs Jones in the share in question. This default is attempted to be made out in the following way: Mrs. Hutchison, the tenant for life, died on the 20th of June, 1872. John Des Champs Jones had died previously. It appears that in 1862, when the petitioner Fielding obtained his stop order, a note of the stop order

was made in the usual way against the account in question in the book at that time in use in the office of the Accountant-General in which the account of that fund was contained. In process of time, but before the office of Accountant-General was abolished, this book was filled up and ceased to be used, and the account of the fund in question was carried into a new book in which it was from that time kept. In carrying it into the new book the notice of the stop order was inadvertently omitted, and in the new book it stood without any notice of the stop order. In February, 1873, after the duties of the Paymaster-General had commenced, those who were then the personal representatives of Elizabeth Harriet Lacy applied to the Court of Chancery to distribute the fund, and a certificate of the fund was given in the usual way by the Paymaster-General, and no mention was made in the certificate of any stop order. The court thereupon ordered the fund to be paid to the personal representative of Elizabeth Harriet Lacy. It is said upon this state of facts that I should certify that the Paymaster-General has been guilty of default with respect to the money. It is said that he ought to have known of the stop order and ought to have taken care that the fund was not paid out without notice having been given according to the stop order. I should have very great difficulty in holding that the Paymaster-General had under these circumstances been "guilty of default." These words appear to me to point to some act of misfeasance or carelessness attributable to the Paymaster-General himself or to those under his direction and superintendence at the time when the act occurs. I incline to think that the negligence in this case occurred in the time of the Accountant-General when the account of the fund was carried into the new book, but it is not necessary that I should decide this, and I do not desire to do more than to intimate a doubt with regard to it. But it seems to me impossible upon another ground that I can give the certificate which the petitioners ask for. The stop order was obtained by the petitioner Fielding and it required notice to be given to Fielding. But Fielding ceased, as I have said, in 1870 to have any interest in the fund and he is not in any way damnified by the fund having been paid to the representative of Elizabeth Harriet Lacy. On the other hand, Gibbons, who is interested in the fund, never obtained any stop order and never required any notice to be given to him, and he therefore cannot complain of any default as against him on the part of the Paymaster-General. It was indeed stated before me by the petitioners, and apparently not denied, that the solicitor for Fielding was also solicitor for Gibbons, and it was said that if notice had been given to Fielding his solicitor would have known it and would have communicated the notice to Gibbons. But this was an accident which might or might not have led to the result supposed, and which cannot give to either of the petitioners any right which they would not otherwise have had. The security provided by the court was a security for Fielding only, and it is necessary, in my opinion, that Fielding should be able to show me that he, Fielding, has been in some way injured by the manner in which the court has dealt with the funds. I must therefore decline to make an order upon the petition."

KEKEWICH, J., said that there could be no reasonable doubt that the scheme of arrangement provided that everything which J. S. Bath possessed at the date of his adjudication of bankruptcy should be vested in the company, and that the vesting order vested in the company everything whether known or unknown which by the force of the bankruptcy was vested in J. S. Bath's trustee for the benefit of his creditors. The fund in question was therefore under the agreement of the 20th of April, 1893 and the vesting order, vested in the company, and although properly ordered to be paid out on the 29th of February, 1896, on the facts then before the court, ought not in the light of the facts subsequently ascertained to have been paid out to J. S. Bath.

On the question of the liability of the Treasury to replace the fund in court his lordship, on the authority of *Jones* v. *Jones*, dismissed the petition as against the Paymaster-General and Treasury Commissioners with costs to be paid by the petitioners. And declared that on the true construction of the agreement of the 20th of April, 1893, and the vesting order the fund belonged at the date of the order for payment out to the company, but that they must account for it under the agreement. And declared that J. S. Bath and his solicitor were each liable to pay to the company the amount of the fund paid out to J. S. Bath together with interest thereon at 4 per cent. from the date of payment out. And ordered J. S. Bath and his solicitor to pay the costs of the petitioners, including the costs of the Paymaster-General and Treasury Commissioners.

Solicitors, *Ranger, Burton, & Frost; Payne, Shaw, Mackenzie, & Lake; Armitage & Strouts; Solicitor to the Treasury.*

Chan. Div. Buckley, J. — Jan. 25, 29.

In re BEVERLEY.
WATSON *v.* WATSON. (*a.*)

Executor—Administration—Trust for sale and conversion — Appropriation — Leaseholds — Reversionary interest in stock—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 4.

The power of executors and trustees holding residuary estate upon trust for sale and conversion to appropriate unconverted parts of the personal estate in respect of legacies and shares of residue extends to all personal estate, including chattels real and reversionary interests in stock in a company; and this power has not been taken away or modified by the Land Transfer Act, 1897.

Semble, *that this power of appropriation extended —previously to the said Act, and still extends—to real estate, where there is a trust for sale and conversion.*

Semble, *that, where there is no trust for sale and conversion, the executors had, and have, the same power over the whole personal estate.*

Section 4 *of the Land Transfer Act,* 1897, *applies to all the residuary estate, whether personal or real.*

Adjourned originating summons.

The question in this summons was whether executors and trustees with a trust for sale and conversion could lawfully appropriate parts of the estate of their deceased testator, particularly chattels real and a reversionary interest in stock, in part satisfaction of the shares of residue given by the will.

Mrs. Beverley, a widow, by her will made in 1898, appointed her sister, Miss Euphemia Watson, and Mr. Holme the executors and trustees of her will, and after bequeathing certain specific and pecuniary legacies and annuities, she recited that under the will of her late husband she had a general power of appointment over certain property and that under her marriage settlement she had a general power of appointment over certain funds subject thereto, and in exercise of these powers she appointed the said property and funds to her trustees, whom she directed

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

to hold the same and all her other property (which she thereby devised and bequeathed to them) upon trust for sale and conversion, with power to postpone the sale and conversion of the whole or any part thereof for such period as they should think proper, and out of the money to arise therefrom to pay her funeral and testamentary expenses, and debts and legacies, and to make provision for the annuities bequeathed by her, and subject thereto to hold the net residue upon trust to divide the same into nine equal parts, and to pay two of such parts to her sister Euphemia Watson, one of the plaintiffs and trustees, other two of such parts to her sister the defendant Grace Watson, other two parts to her sister the defendant Emily Jane Watson, and as to the other three parts to hold one for her brother the defendant John Watson for life and then for his children as mentioned, another part for her sister-in-law, Mabel Watson, for her life or widowhood, and then for her children as mentioned, and the remaining part for her sister the defendant Elizabeth Sophia Annesley for her life, then for her husband for life, and then for her children as mentioned. The will gave the trustees power to appropriate a sufficient part of the estate for answering the annuities thereby bequeathed, but contained no power to appropriate part of the estate in respect of the nine shares of residue.

The testatrix died in July, 1899, and the will was proved by both executors. All the debts, funeral and testamentary expenses and liabilities (so far as known), except the said annuities and another annuity (secured by her late husband's covenant), and the legacies bequeathed by the will, were stated to have been paid or provided for. The residue of the estate, including the property subject to the powers of appointment, was stated to exceed £110,000, and comprised in April, 1900, among other things, (1) a leasehold house in St. John's Wood, London, held for a term of ninety-five years, from 1844, at a rent of £25, and sub-let for £200 a year; (2) a licensed public-house in Paddington, held for a term of ninety-nine years, from 1847, at a rent of £10 15s., and sub-let for £50 a year; (3) three leasehold houses in Porchester-terrace, held for long terms, and sub-let at rents higher than the ground-rents; and (4) a sum of £1,180 Great Indian Peninsula Railway Guaranteed 5 per cent. Stock, subject to a life interest therein of a lady sixty-eight years old. The leasehold properties had been valued by a surveyor at the following sums: No. 1 at £2,300, No. 2 at £650, and No. 3 at £2,400, and the reversionary interest (No. 4) had been valued by an actuary at £1,222.

It was proposed to appropriate to Miss Euphemia Watson the public-house (No. 2) and the three houses (No. 3); to Miss Grace Watson the house No. 1; and to Miss E. J. Watson the reversionary interest in the stock, at their respective valuations, in part satisfaction of their shares, with the consent of these beneficiaries.

This summons was therefore taken out by the executors and trustees against the defendants already mentioned, and against the husband of Mrs. Annesley and her infant children, asking (1) whether the trustees might lawfully appropriate the leasehold houses and the reversionary interest in the manner proposed, and (2) whether they might appropriate the assets of the testatrix being of a nature authorized by the will or by law as trust investments towards satisfaction, so far as they would extend, at a proper valuation, of the shares of other beneficiaries in the residuary estate.

Mr. John Watson's wife and children, and Mrs. Mabel Watson and her husband and children, who resided in the Colonies, were not made defendants.

Yardley, for the plaintiffs and the defendants who were absolutely entitled.—Executors and trustees may always appropriate the personal estate to a legatee or beneficiary if they do so fairly: *Elliott* v. *Kemp*, 7 M. & W. 306; *Barclay* v. *Owen*, 60 L. T. Rep. 220, 37 W. R. Dig. 111; *In re Lepine*, [1892] 1 Ch. 210, 40 W. R. Dig. 89; *In re Brookes*, 76 L. T. Rep. 771; *In re Richardson*, 44 W. R. 279, [1896] 1 Ch. 512; *In re Nickels*, 46 W. R. 422, [1898] 1 Ch. 630. There appears to be no reported case of an appropriation of a leasehold, but it falls under the general principle. A valuation can be made, and it is like the case of an appropriation of furniture, as in *Elliott* v. *Kemp*. The Land Transfer Act, 1897, has made no difference. It is true the definition of land does not include chattels real (see Land Transfer Act, 1875, s. 4), but section 4 of the Act of 1897 includes all the residuary estate whether personal or real. There is no necessity for following the "prescribed conditions," for in fact none have been prescribed. If section 4 is confined to real estate, the previous power as regards personal estate is not affected. In any case the provisions are cumulative and not substitutionary.

Stanley Gibbons, for the other defendants

Cur. adv. vult.

Jan. 29.—BUCKLEY, J.—The cases are numerous where it has been held that executors and trustees have power to appropriate pure personal estate under the circumstances of this case. Thus in *Elliott* v. *Kemp* appropriation of furniture, in *Barclay* v. *Owen* and in *In re Lepine* of mortgage debts, in *In re Richardson* of shares in a brewery, and in *In re Nickels* of stock, were held to be valid. In some of these cases there was a trust for sale and conversion, in others none. There was no such trust in the case of *In re Waters*, (1889) W. N. 39, and in *In re Richardson*. In the others there was (except in the cases of intestacy). No case has been found of appropriation of chattels real. I have to determine whether such appropriation is valid.

Now, where there is no trust to sell and convert, but simply to divide the property amongst certain parties, appropriation seems easy; you are directed to divide the property unconverted, and you must get equality as best you can. Where there is a trust for sale and conversion, the principle is, I apprehend, that it must be competent for the trustee to agree to give the property to a beneficiary against the money he has to receive, and that it cannot be necessary for the trustee to go through the form of first converting the property into money, and then giving the beneficiary the money which he may desire to immediately reinvest in the property sold. This principle is found plainly, I think, in the judgments of the court in *In re Lepine*. [His lordship read passages from each judgment, and continued:] That is, it is competent for the executor and trustee to say to the person entitled to the proceeds of the conversion, "I will agree to give you this estate without converting it in satisfaction *pro tanto* of the money which would be coming to you if I converted it."

This principle would not be necessarily confined to the case where there was a trust for sale and conversion, for the circumstances might be such that the executor would be bound to turn the assets of the testator into money, and apply it to the payment of a legacy in ordinary course of administration. Now if that is the principle it is obviously not confined to pure personal estate, but extends to chattels real; and also, I conceive, to real estate which was subject to a trust for sale and conversion. There is no difference in principle between personal estate and real estate. The only question would be whether under the old law, in a case where the executor was not a trustee, he would have such control over the

real estate as to be able to hand it over. In the case before me there is a trust for sale and conversion, and it appears to me competent for the executors and trustees to agree with the *cestui que trust* to appropriate the unconverted leaseholds to their shares of the residuary estate. But the question has been raised whether the law has been altered by the fourth section of the Land Transfer Act, 1897. It has been argued that, having regard to the connection in which that section is found, it is to be read as confined to real estate, and that it does not extend to chattels real. I do not think so. The language is "That the personal representatives may in the absence of express provision to the contrary in the will, with the consent of any person entitled to any legacy given by the deceased person, or to a share in his residuary estate"—that must mean residuary estate whether it be personal or real—"appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy." It seems to me that "the residuary estate" there must mean what it meant before—namely, any residuary estate, whether personal or real, and that the section applies, so far as it is applicable at all, to the case before me. Then it is said that the power of appropriation which existed before is done away with by this section, and that now its provisions as to giving notice and the like must be followed, otherwise you cannot appropriate at all. I do not agree. If the principle of appropriation be as I have stated it I do not see that the Act affects the power in cases where there is a trust for conversion. The Act may have some application to cases where there is no such trust. As to those I say nothing.

The second question of the summons relates to the three ninth shares which are settled. The *cestui que trusts* of these shares can only take in satisfaction of what is given them such investments as are authorized by the will which creates the settlement. Subject to that condition I think those appropriations may be made. That disposes of the whole matter, except as regards the appropriation of the particular houses at the particular valuations referred to in the first question. No evidence has been read except an affidavit of the plaintiffs saying that there have been valuations of the property, and exhibiting them. Upon that I cannot proceed. If I am to approve of these particular appropriations I must know what the whole estate amounts to, so as to know that the shares of residue are in excess of the property proposed to be appropriated in respect of them; and I must have in support of this the evidence of the valuers. All I can do is this. I can declare that the plaintiffs can lawfully appropriate the properties of the kind in question, and let them act upon their own responsibility in making these particular appropriations at the amounts named; or I can direct an inquiry as to whether these particular appropriations are right and proper. [At the request of the plaintiff his lordship took the former course.]

Solicitors, *Holme, Son, & Godden.*

K. B. Div. (Div. Court.)
(Darling and Channell, JJ.)

March 5.

GLOUCESTER MUNICIPAL ELECTION PETITION, *In the Matter of.*

FORD AND OTHERS (*Petitioners*) *v.* NEWTH (*Respondent*). (*a.*)

Election law—Municipal corporation—Town councillor—Disqualification—Contract with council—Release by committee—Ratification by council—Municipal Corporations Act, 1882 (45 & 46 *Vict.* c. 50), *s.* 12, *sub-section* 1 (c).

The respondent, in answer to an advertisement, sent in a tender offering to supply to a city council certain goods at specified prices for the period of twelve months certain. This tender was accepted, and the respondent supplied goods from time to time. Shortly before the completion of the twelve months the respondent, wishing to stand as a candidate at the forthcoming election of councillors, applied to a committee of the council to be released from his contract. The committee resolved, subject to approval by the council, to release the respondent as from that date. He was then nominated, and after his nomination the council ratified the resolution of the committee. A petition was presented against him, alleging that his election was void on the ground that, at the date of his nomination, he had an interest in a contract with the council.

Held, that the advertisement, tender, and acceptance constituted a contract in which the respondent had an interest, and that the ratification of the committee's resolution by the council after the nomination of the respondent did not relate back to the date of the resolution because the interests of persons other than the parties to the contract might be affected; and therefore the respondent having an interest in a contract with the council at the date of his nomination, was disqualified and his election void.

Argument of questions of law reserved for the opinion of the court.

This was a petition under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), against the return of the respondent to the office of town councillor for the Tuffley Ward of the City of Gloucester, which was tried before H. R. Mansel Jones, Esq., a commissioner for the trial of municipal election petitions.

The election was held on the 1st day of November, 1900, when the respondent was declared to be elected.

The petition alleged that William James Newth, the respondent, was disqualified for being elected and for being a councillor, on the ground that at the time of his nomination and election he had an interest in a contract with, by, or on behalf of the council of the said city, and prayed that it might be determined that the respondent was not duly elected and that his election was void.

It was proved that the council of the city of Gloucester upon the 5th of December, 1899, advertised for certain articles for the use of the corporation during the ensuing year and invited tenders.

On the 13th of December, 1899, the respondent tendered for certain goods in the following form, which he had obtained from the council's office:

"City of Gloucester."

"To the Street Committee."

"Gentlemen,—I hereby offer to supply for the twelve months ending the 31st of December, 1900, the undermentioned goods as required, the best of their respective kinds and to the entire satisfaction of the city surveyor, delivered at the Corporation Depôt, Stroud-road, Gloucester, in guaranteed makers' drums or barrels sealed down."

Then followed a long list of articles and prices.

It was signed by the respondent.

On the 22nd of December, 1899, the Street Committee resolved that it be recommended that certain tenders be accepted at the several prices therein respectively mentioned, among them being that of the respondent for oil and colours.

On the same date a letter was sent to him informing him that his tender was accepted.

On the 30th of January, 1900, at a quarterly

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

meeting of the council, it was resolved that the minute of the Street Committee of the 22nd of December, 1899, be approved, adopted, and confirmed.

From the 22nd of December, 1899, up to and including the 20th of October, 1900, the respondent supplied from time to time goods according to the said tender when and as required by the council, and received payments for the same from time to time to a considerable amount.

On the 19th of October, 1900, there were various accounts amounting to over £54 due to him which were not all paid until the 19th of December.

On the 19th of October, 1900, the respondent, being anxious to stand as a candidate at the forthcoming election of councillors in November, applied to the Finance, Estates, and Waterworks Committee (and not to the Street Committee, who had risen for the day) to be relieved from his tender or contract, when the following minute and resolution of that committee was passed:

"It was reported that Mr. W. J. Newth intended to offer himself as a candidate at the following elections if not prejudiced by the fact that he had given an estimate for supplying certain articles that may be required by the corporation up to the end of the year.

"Resolved: That subject to this minute being approved by the council, Mr. Newth be released from the estimate or contract referred to as from this date."

On the 24th of October the respondent was nominated, and on the 1st of November declared to be elected to the office of councillor.

On the 30th of October the council resolved that the minute of the Finance, Estates, and Waterworks Committee of the 19th of October, 1900, be approved, adopted, and confirmed.

On the above facts being proved it was contended by the respondent's counsel that he was not disqualified for being elected and for being a councillor under section 12, sub-section 1 (c), of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), on the ground that:

(1) There was no contract.

(2) That if there was a contract it was rescinded before the 24th of October.

(3) That the existence of a debt for goods supplied before the 24th of October, and not paid for until December, was not an interest in any contract within the meaning of the said section.

The learned commissioner determined that the respondent was not duly elected and that his election was void, but postponed granting his certificate until the following question which he submitted for the consideration of the High Court of Justice had been determined by them.

The question for the opinion of the court was whether the said William James Newth was disqualified for being nominated and elected and for being a councillor.

Section 12, sub-section 1 (c), of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), provides that "A person shall be disqualified for being elected and for being a councillor it and while he . . . (c) has, directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council."

H. Terrell, K.C., (*Lewis Coward, K.C.*, with him), for the respondent.—This petition should be dismissed. In the first place there was no contract. There was merely an offer by the respondent to supply certain goods during the year. There was nothing binding the corporation. The corporation need not buy any goods from the respondent. The case of *Sykes* v. *Dixon*, 9 A. & E. 693, supported this contention. In that case a servant agreed to serve one person as directed, but that person never bound himself to employ the servant and therefore it was held there was no contract. In *Burton* v. *Great Northern Railway*, 2 W. R. 257, 9 Exch. 507, the plaintiff agreed to provide all horses, waggons, &c., and to convey all grain and merchandize which might be presented to him for that purpose, from Hatfield to Ware, it being mutually agreed that the agreement should continue for twelve months. In the middle of the year the agent of the Great Northern Railway Co. wrote a letter to the plaintiff informing him that the arrangement would cease. Thereupon Burton brought his action for breach of contract, and it was held that there was no contract. There was no undertaking by the company to supply anything whatever; it was merely an undertaking on the part of Burton that he would carry goods that the company supplied him with. The position was this: That so long as that tender existed as a tender, the moment the corporation ordered anything from the person who made the tender, that immediately became a contract for the goods so ordered. If in this case the corporation, having received the tender, ordered a quart of oil, immediately they had given that order, before the tender was withdrawn, there was a contract for the quart of oil, and no more. The next day they might order some paint, and there was a contract for the paint, and so it continued until the tender was withdrawn. The case of *Burton* v. *The Great Northern Railway* was very much like the present one, because there, before the expiration of the year, the railway company withdrew from agreement; and it was held that they were not bound. The case of the *Great Northern Railway* v. *Witham*, 22 W. R. 48, L. R. 9 C. P. 16, is on all fours with the present case. In the present case there was only a continuing offer which when accepted is a contract, but as a continuing offer it can be withdrawn. It is the same principle in the three cases referred to. In the first case, employment of a servant—no binding contract on the part of the master; in the second case—no binding contract on the part of the railway company to send any goods whatever by the carrier; and, in the third case—no binding contract on the part of the railway company to order any goods. In the last two cases, however, the moment that an order was given there was, to the extent of those particular goods, an acceptance of the continuing offer, and that made a contract, but no further. In the second place, if there was a contract it was put an end to on the 19th of October when the respondent withdrew his tender. The committee accepted the withdrawal and agreed to release him from it before the election, subject to the confirmation of the council. The council confirmed that after the day of nomination but before the date of the election. The ratification by the council related back to the 19th of October: *Bolton Partners* v. *Lambert*, 37 W. R. 236 and 434, 41 Ch. D. 295. In the third place, the existence and mere continuance of a debt—the relationship of debtor and creditor—after the date of nomination is not an interest in a contract within the meaning of the section. In the present case goods were ordered by the corporation and supplied by the respondent in October and the accounts were payable at some subsequent date. Payment was not made until December—that fact ought not to disqualify the respondent. Wills, J., in *Royse* v. *Birley*, 17 W. R. 827, L. R. 4 C. P. 296, said, at p. 311: "It appears to me very clear, when the terms of the Act come to be examined, that it was not the intention of the Legislature that the mere relation of debtor and creditor subsisting should of itself create a disqualifi-

cation." Holding and enjoying a contract, it was held in that case, means "holding or enjoying a contract which a man might be called on to execute." In the present case the respondent did not enjoy a contract or any benefit arising therefrom within the meaning of the statute.

Counsel also referred to *In re Portuguese Consolidated Copper Mines*, 39 W. R. 25, 45 Ch. D. 16.

Asquith, K.C., *Ruegg, K.C.*, and *S. H. Day*, for the petitioners.—The transactions between the Streets Committee and the council on the one hand and the respondent on the other, in the months of December and January, constituted a contract within the meaning of the section. There was an obligation on the part of the corporation after accepting the respondent's tender not to go elsewhere for the articles specified in it. The respondent was therefore disqualified at the time of his nomination. As regards the withdrawal of his tender and the acceptance of the withdrawal by the committee, the ratification of that withdrawal by the council did not take place until after the date of the nomination. That ratification would not in this case date back to the acceptance by the committee of the council, and therefore the contract was in existence on the date of the nomination. Although ratification went back to the date when the act ratified was done, ratification could not affect prejudicially or otherwise the situation or status of third parties. Ratification acted *inter partes*. An arrangement come to between two persons could not retrospectively invalidate or alter the status of other people. The position of Mr. Newth was a matter in which the public and the electors in that particular ward were interested; and could it be said it was in the power of a chance majority in the town council, perhaps six months afterwards, to pass a resolution—when a petition might have been presented—to retrospectively give a status to a person who did not possess it at the time, and thereby cause votes which were invalid because given by a disqualified person to be valid? Such a proposition could not be accepted, for it would enable a chance majority in the town council to alter the position of the whole body. The committee had no power to bind the council. Unless at the time of the ratification the ratifying party could himself have validly done the act the ratification is no good: *Harford* v. *Linskey*, 47 W. R. 653 [1899] 1 Q. B. 852. In *Bird* v. *Brown*, 4 Ex. Ch. 786, Rolfe, B., said at pp. 798-9: "The doctrine *omnis ratihabitio retrotrahitur et mandato æquiparatur* is one intelligible in principle and easy in its application when applied to cases of contract; . . . but this doctrine must be taken with the qualification that the act of ratification must take place at a time and under circumstances when the ratifying party might himself have lawfully done the act which he ratifies."

Counsel was not required to argue as to the third point.

H. Terrell, K.C., replied.

DARLING, J.—This case arises out of a municipal election for the city of Gloucester. A Mr. Newth was nominated and elected, and it was objected that he is disqualified from being elected and from being a councillor by reason of the Municipal Corporations Act, 1882, s. 12, sub-section 1 (*c*), which says: "A person shall be disqualified for being elected and for being a councillor if and while he has, directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of the council." Mr. Newth seems to be a person who deals in oils and colours. On the 5th of December, 1899, an advertisement was put into the papers as follows: "City of Gloucester. The Streets Committee of the Gloucester Corporation are prepared to receive tenders for the supply of the following materials for the twelve months ending the 31st of December, 1900, namely:" Then follows a long list of things required. In reply to that advertisement Mr. Newth wrote this answer: "Gentlemen, I hereby offer to supply for the twelve months ending the 31st of December, 1900, the undermentioned goods as required, the best of their respective kinds, to the entire satisfaction of the city surveyor, delivered at the Corporation Depôt, Stroud-road, Gloucester." Upon that, tenders were considered by the committee, and it was resolved: "That it be recommended that the following tenders be accepted at the several prices therein respectively mentioned. . . . Oil and colours, Mr. W. J. Newth." Then that minute was approved, adopted, and confirmed at the quarterly meeting of the council on the 30th of January, 1900. Before the confirmation a letter was written on the 22nd of December, 1899, by the city surveyor to Mr. Newth: "Dear Sir,—I have to inform you that your tender has been accepted." Upon that it is said on the one side that Mr. Newth was disqualified from being elected, because he had a share or interest in a contract with the corporation; and if that is a contract undoubtedly he had such share and is disqualified. But then it is said on behalf of Mr. Newth that it is not a contract at all: that it is a mere statement that if called upon to supply certain quantities of oils or colours he would supply them at a certain price; that he was not open to supply them unless he was called upon; and that the corporation were under no kind of obligation to buy colours from him. I agree that if there is no obligation on the part of the corporation it is not a contract at all—if the corporation are not bound to anything on their side, it seems to me there is no consideration, and it would not amount to a contract. The question, however, is, is that so? Now I do not think there is any direct authority upon this point. Of the cases which have been cited, the one which throws most light upon it is that of the *Great Northern Railway Co.* v. *Witham*. In that case there was a tender like this one, which was accepted just as this one has been; but there was something more: there was an order signed, and the question was whether the order which had been signed should be executed—whether the court should enforce the execution of that order. I think the judges in deciding the case distinctly left that question open. Keating, J., said: "If, before the order was given, the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing." Of course, if there had been a binding contract, the defendant in the case referred to would not have been justified in doing anything of the kind, because it would mean a breach of contract. Therefore, I think that learned judge purposely refrained from deciding that point. The same thing occurred in the judgment of Brett, J., who said: "I agree with this judgment. It is not deciding the question whether the defendant might have absolved himself from the further performance of the contract by giving notice." That is another way of expressing the same thing. Therefore, it seems to me that so far as cases have been cited to us, we are left without any definite authority on the question. I think we must look at the documents themselves. What do they say? The advertisement says: "The Streets Committee of the Gloucester Corporation are prepared to receive tenders for the supply of the following materials, for the twelve months ending the 31st of December, 1900." I think that amounts to this: "We are prepared to receive tenders for what goods of the specified kinds we

want during the period of a year, ending the 31st of December, 1900." The supply of the materials for the twelve months is the definite thing which the Streets Committee said they wanted to have the tender for. Thereupon, Mr. Newth said: "I offer to supply the undermentioned goods as required." That is to say, he would supply such articles as he dealt in—oil and colour—as were included in the supply for the twelve months, whenever he was required to do so by the corporation, and he would supply them "at the following prices." As required means "as intimated to me by order that they are wanted." Upon that, passing by the minute, comes this letter, written on behalf of the corporation: "I have to inform you that your tender has been accepted." What does that mean? I think it means: "We accept your offer to supply such articles as we intimate to you are a part of the supply wanted during the twelve months at the price you have stated." I think there was an obligation on the part of the corporation to buy those articles from Mr. Newth. I do not think that the corporation would have been justified in simply treating that tender of Mr. Newth's as a mere price list and going where they pleased to buy what they wanted. If that be so, that is a contract. I do not say I feel certain about that, because I cannot see that we have any real authority upon such a point, and because the question was expressly reserved and left open by the two judges who decided the case of the *Great Northern Railway Co.* v. *Witham*. But still, reading the present case for myself, I come to the conclusion that it is a contract. There is an obligation on both sides, and it is clearly a contract in which Mr. Newth has an interest.

But, it is said, the contract was put an end to. Mr. Newth was nominated as a candidate for the council on the 24th of October; but on the 19th, he being anxious to stand as a candidate, applied to the Finance, Estates, and Waterworks Committee to be relieved from his tender or contract; and the following minute and resolution of that committee was passed: "It was reported that Mr. Newth intended to offer himself as a candidate at the forthcoming election, if not prejudiced by the fact that he had given an estimate for supplying certain articles that may be required by the corporation up to the end of the year. Resolved: 'That subject to this minute being approved by the council, Mr. Newth be released from the estimate or contract referred to as from this date'" That would be as from the 19th of October, 1900. On the 30th of October the council resolved that the foregoing minute be approved, adopted, and confirmed. Upon that it was argued that that is a contract; and it must be taken, after what I have said, that it is a contract. On the other hand it was argued that the contract was put an end to; that it was put an end to on the 30th of October as from the 19th of October, because the ratification by the council on the 30th of what was done on the 19th relates back to the 19th; that the contract absolutely ceased and determined on the 19th of October; and that, therefore, when Mr. Newth was nominated on the 24th he was not interested in any contract because there was not one. Now, a good deal has been cited to us with regard to how far the ratification by one party of what has been done by another will relate back. I am not going to say if that were simply a matter—if Mr. Newth were not a candidate at all—between the man who had undertaken to supply oil, and the corporation, that that might not be a perfectly good putting an end to the contract on the 19th of October, by reason of what was done on the 19th and ratified by what was done on the 30th. But I think that in this case there are considerations which make that different from a mere ratification of something which was done between the parties to the contract themselves. The question in this case is as to whether there was a contract subsisting so as to produce a disqualification in Mr. Newth on the 24th of October. As between the parties it might possibly have been put an end to so that neither could sue the other after the 19th of October. Supposing one or the other had been sued between the 19th and the 30th—before the ratification took place—I do not think it is necessary to attempt to decide what would have been the consequences, but it is quite clear that difficulties would have arisen. But in this case, it seems to me, we are not dealing with a mere contract between two traders; we are dealing with a question which has received judicial interpretation in the case of *Harford* v. *Linskey*. In that case Wright, J., said the nomination was, for that purpose, an essential part of the election, and if there were no competitors it did constitute the election, by virtue of the express words of section 56. A different construction might produce much confusion, that learned judge added, and he indicated what. On the 24th of October, when Mr. Newth was nominated, it was entirely uncertain whether that contract was put an end to or not as between the parties. Supposing that on the 30th the council had said, "We do not ratify what has been done by the Finance Committee?" It could not be contended then that the contract was put an end to, for it would have been an enduring contract and nobody could say on the 24th of October whether Mr. Newth was or was not a person interested in a contract; that was not decided, even as between him and the corporation, until six days later. It appears to me, therefore, that that matter as between Mr. Newth and the corporation cannot put an end to the contract to this extent: that it cannot affect the rights of third parties, such as are the electors of the city of Gloucester, and such as are any other candidates who might be nominated for the seat for which Mr. Newth was a candidate. It might very well indeed be that there is only one other candidate as in the case of *Harford* v. *Linskey*; and if Mr. Newth were disqualified he (the other candidate) would be entitled to election at once without a poll being taken. Therefore, it seems to me, we cannot hold that the resolution of the 19th of October by the Finance Committee, and the ratification on the 30th of October by the corporation, put an end to the contract so as to qualify Mr. Newth on the 24th of October, when, if they had not ratified as they did on the 30th, Mr. Newth would have been disqualified. I do not think it necessary to go into the general law about ratification and consider whether the case of *Bolton Partners* v. *Lambert* is really as good an authority as it has been represented to us or whether it is not. It seems to me that that point is provided for in the case of *Bird* v. *Brown*, and also is practically provided for in the definition of what ratification can do and how it affects the rights of third parties in certain instances in the case of *Bolton Partners* v. *Lambert* and in the judgment delivered by Cotton, L.J.

There is one other point, and it is this: It seems that Mr. Newth supplied some oil which was not paid for—it was supplied before the 19th of October, before the time when he desired to become a candidate, and up to December it had not been paid for. No doubt there was an existing debt due from the corporation to Mr. Newth, and it is contended that that in itself amounts to such a contract as to be a disqualification within the words of the section. But in the view I take of the case, holding as I have done on the first and second points, it is not necessary to decide the third point which I have just mentioned. I think any judgment one gives on that

point ought to be very carefully considered, because contingent difficulties on holding either way are many. Anyway, taking the view I have done on the first and second points, my expressions on the third would be something like an *obiter dictum*, and under the circumstances I prefer not to indicate any opinion as to how the third point should be decided.

CHANNELL, J.—I am of the same opinion. As to the first point, whether at any time prior to the supposed determination of it, there was a contract, I confess I entertain no doubt at all. I quite agree that it depends upon the words of the documents used in a particular case, and that there might be documents somewhat similar to the one in question which do not amount to a contract—that there might be what has been called a unilateral contract only; or, on the other hand, it might simply show that which becomes a contract only as an order is given for particular goods needed. All that might exist in such documents. On the other hand, it seems to me that applying one's knowledge of business to what one knows is the function of the parties in such a case as this, a very little indeed in such documents is quite sufficient to turn the transaction into a contract; and in the present case I think there is quite enough. There was a proposal first of all by the Corporation of Gloucester for certain things to be sent to them, and there was an offer made in response to that. Then there was an acceptance which made a contract, subject only to the question of what was the subject-matter of it. It seems to me equally clear that the subject-matter of this contract was to continue for the year—to supply for that period at the orders of the corporation their requirements in respect of a particular article. Consequently there was an order or a contract between the parties for the supply for a year of that oil and colour which Mr. Newth tendered for.

Then the second point is the one which, to my mind, is a very real difficulty in the case, and it depends almost entirely, as it seems to me, upon the case of *Bolton Partners* v. *Lambert*. That case was considered recently in the Privy Council in the case of *Fleming* v. *The Bank of New Zealand*, [1900] A. C. 577, and in the view that the Privy Council ultimately took of the facts of the case it was not necessary to give any decision on the point whether the decision in *Bolton Partners* v. *Lambert* is a binding authority. There is, however, quite enough in the judgment to show that a good deal of doubt was entertained about the case. Judgment was delivered by Lindley, L.J., who himself was one of the judges in the *Bolton Partners* case. What Lindley, L.J., said in the case of *Fleming* v. *The Bank of New Zealand* was this: "The above view renders it unnecessary to consider any question of ratification, or to deal with the decision of *Bolton Partners* v. *Lambert*, and its application to the facts in this case. The decision referred to presents difficulties, and their lordships reserve their liberty to reconsider it if on some future occasion it should become necessary to do so." It is quite clear, therefore, that the Privy Council were not thoroughly satisfied with the case, and that they saw that it presented great difficulties if it were to be treated as of general application. What, it seems to me, the case of *Bolton Partners* established is this, and this only: That after there has been a ratification, then the rights of the parties to the contract, or the supposed contract, are to be adjusted between those parties as if there had been the prior authority. Consequently, as between these parties, when the question arises after the confirmation, everything must be decided then as if there had been the prior authority. That is to say: If in this particular case, any question arose between the parties after the 30th of October, whether any reference was between them to acts as between the 19th and the 30th or not, any such question arising between them on the 30th of October must be decided upon the footing that the contract was put an end to on the 19th of October—because it had been in a sort of preliminary way put an end to as from that date, subject to the confirmation. That is as between the parties. But it is quite clear there are exceptions to the rule. If anybody has acquired rights in the meanwhile, it is apparent from the case of *Bolton Partners* that is part of the exceptions which are there referred to. Consequently, it seems to me that when as between any other parties than the immediate parties to the contract, or in any question in which anybody else is interested, the question has to be considered—and has to be considered prior to the confirmation — it is then quite clear that we must look at the real facts. Now, in the present case the question is whether or not on the 24th of October the respondent was qualified or disqualified. At that date there had been a resolution passed—an act done by the committee —which might or might not be confirmed; and, as the case which my learned brother has referred to (*Harford* v. *Linskey*) shows, a man must be either qualified or disqualified. At that time it seems impossible to say that Mr. Newth was not disqualified. Still, after that particular time Mr. Newth had in fact—indirectly at all events—a share or interest in it, because his rights might or might not be governed by something which was done. That being so, it seems to me, in any view of the case the respondent was disqualified by being a party to a contract, which contract was in existence, so far as was necessary to preserve a kind of interest, namely on the 24th of October, at the time of his election.

I agree that it is not necessary to decide the third point, and on the whole it is better not to. It does seem to me there is a substantial difference between the words of this Act of Parliament and those of the Act of Parliament which were considered in the case of *Royse* v. *Bailey*. There is a substantial difference; conclusions possibly might be drawn both ways, and on the whole, therefore, it is better not to decide it. Therefore I say no more about it.

Appeal dismissed.

Solicitor for petitioners, *C. T. Courtney Lewis*, for *W. Langley-Smith*, Gloucester.

Solicitors for respondent, *Ayrton, Biscoe, & Barclay.*

K. B. Div.
(Wills and Channell, JJ.) } Feb. 7.

KEETON v. SHEFFIELD COAL CO. (LIMITED). (a.)

Poor Law—Rating—General district rate—Appeal—Reduction of valuation—Demand note—Summons—Matter of complaint arising within six months of issue of summons—Public Health Act, 1875—*Jervis' Act* (11 & 12 *Vict. c.* 43), *s.* 1.

Where, on appeal against an assessment for the poor rate, the rateable value of premises is reduced and the amount of the general district rate is in consequence altered so as to agree with such reduced valuation, a summons may be issued to enforce a demand made for the payment of arrears of the amended district rate if the demand for such amended rate has been made within six months of the issue of the summons.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The right to demand the reduced amount of the amended rate comes into operation for the first time when the amended rate is made in accordance with the reduced valuation, and the fact that a demand for the payment of arrears of the district rate on the higher valuation had been made more than six months previous to the issue of the summons does not cause the claim, in respect of which the summons was issued, to be barred by virtue of section 11 *of Jervis' Act* (11 & 12 *Vict. c.* 43).

This was a case stated by justices of the peace for the West Riding of the county of York for the opinion of the High Court upon their determination of a claim made by the appellant on behalf of the Handsworth Urban District Council for the payment by the respondents to the said council of the sum of £869 3s

The facts proved or admitted at the hearing of the claim are as follows:

1. The appellant is the duly-appointed collector of rates of the Handsworth Urban District Council, and was duly authorized by the said council to make the above-mentioned claim and to institute summary proceedings in support of such claim.

2. The respondents are the rateable occupiers of certain premises situate within the said council's district, and comprising the coal mine shafts and the land, buildings, machinery, fixed plant, and sidings connected with the Birley Collieries (hereinafter referred to as "the said premises").

3. In a supplemental valuation list made for the said parish on the 6th of November, 1897, and included in the valuation list in force for the said parish on the 28th of December, 1897, the said premises were valued and assessed at a rateable value of £10,137.

4. On the 28th of December, 1897, a poor rate was made by the overseers of the poor of the said parish in and by which the respondents were assessed and rated in respect of the said premises upon the said rateable value of £10,137.

5. On the 23rd of March, 1898, a general district rate of three shillings in the pound, payable in two instalments, was made by the said council, to which the respondents were rated in respect of the said premises upon the said rateable value of £10,137 at the sum of £1,520 11s.

6. On the 21st of June, 1898, a second poor rate was duly made, by which the respondents in respect of the said premises were assessed on the same rateable value.

7. On the 28th of July, 1898, payment of the first instalment of the said sum of £1,520 11s. was demanded by the council from the respondents by serving upon them a written demand note of that date; and on the 23rd of September, 1898, the respondents paid the sum of £356 8s. 6d., which last-mentioned sum was accepted by the council on account of the first half of the said district rate; and on the 25th of October, 1898, payment of the second instalment was likewise demanded as aforesaid; and on the 27th of March, 1899, the respondents paid a like sum of £356 8s. 6d., which was accepted by the said council on account of the said rate.

8. On the 22nd of November, 1898, a third poor rate was made for the said parish by the overseers of the poor, by which the respondents were rated in respect of the said premises upon the said rateable value of £10,137.

9. On the 22nd of March, 1899, a general district rate of 3s. 4d. in the pound, payable in two instalments, was made by the council, to which the respondents were rated in respect of the said premises upon the said rateable value of £10,137 at the sum of £1,689 10s.

10. On the 21st of April, 1899, the respondents gave notice of appeal against the hereinbefore-mentioned poor rates, but not against either of the said district rates.

11. Payment of the first and second instalments of the said last-mentioned district rate was demanded by the council from the respondents on the 10th of May, 1899, and on the 17th of October, 1899, respectively, by service upon them of written demand notes on these dates, and the respondents paid the sums of £475 9s. 10d. and £450 on the 29th of September, 1899, and the 5th of April, 1900, respectively, which said sums the council accepted on account of the said district rate.

12. On the 4th of January, 1900, the arbitrator (to whom the said appeals against the said poor rates had been referred by agreement) awarded that the rateable value of the said premises was for the several periods relating to the two first-mentioned poor rates of the 28th of December, 1897, and the 21st of June, 1898, respectively, the sum of £7,517 9s. 9d., and for the period relating to the last-mentioned poor rate of the 22nd of November, 1898, the sum of £8,279 4s. 1d.

13. In accordance with the said award, alterations and amendments were duly made in the valuation lists upon which the said poor rates were based, and on the 19th of March, 1900, the council altered the figures of the said general district rates of the 23rd of March, 1898, and the 22nd of March, 1899, so as accord with the alterations so made in the valuation lists, that is to say: The rateable value of the said premises in the said general district rate of the 23rd of March, 1898, from the said sum of £10,137 to the sum of £7,517 9s. 9d., and the amount due in respect of the said premises from £1,520 11s. to the sum of £1,127 12s. 6d., and the rateable value of the said premises in the general district rate of the 22nd of March, 1899, from the said sum of £10,137 to the sum of £8,279 4s. 1d., and the amount due in respect of the said premises from the sum of £1,689 10s. to the sum of £1.379 17s. 4d.

14. The council on the 30th of May, 1900, and again on the 14th of June, 1900, demanded payment by the respondents of the sum of £869 3s., such last-mentioned sum being made up as follows: 1898, March 23rd. — General district rate £1,520 11s., altered to £1,127 12s. 6d.; September 23rd.—Amount paid by the respondents on account of the said rate, £356 8s. 6d. 1899, March 27th.—Amount paid by the respondents on like account £356 8s. 6d., making together £712 17s., leaving balance claimed £414 15s. 6d. 1900, March 22nd —General district rate £1,689 10s, altered to £1,379 17s. 4d. 1899, September 29th.—Amount paid on account of the said rate, £475 9s. 10d. 1900, April 5th.—Amount paid on like account £450, making together £925 9s. 10d., and leaving balance claimed £454 7s. 6d. Total amount claimed, £869 3s.

15. The respondents having refused to pay the said sum of £869 3s., complaint was duly made on behalf of the said council, and a summons dated the 24th of July, 1900, was issued calling upon the respondents to answer the appellant's said claim.

16. On behalf of the respondents it was contended that the matter of the complaint, in support of which the summons was issued, arose more than six months previously to the issue of such summons, and that the recovery of the amount claimed was barred by 11 & 12 Vict. c. 43, s. 11.

17. On behalf of the appellants it was contended that until the said general district rates had respectively been altered so as to agree with the valuation lists, as amended in accordance with the award, no valid demand could be made upon the respondents by

the council in respect of either of the said rates, and that payment of the amount claimed had not been demanded until within six months of the issue of the summons, and that therefore the matter of the complaint in respect of which the summons was issued arose within such six months and the claim was not barred by 11 & 12 Vict. c. 43, s. 11.

The justices were of opinion that the recovery of the amount claimed by the council was, under the circumstances, barred by 11 & 12 Vict. c. 43, s. 11, and they accordingly dismissed the summons. The question for the opinion of the court was whether or not the justices were right in so doing.

Hugo Young, K.C., and *R. C. Glen*, for the appellant.—The justices were wrong. The claim was not barred by section 11 of 11 & 12 Vict. c 43. The right to demand the reduced amount did not come into operation until the reduced rate was made in accordance with the reduced valuation. If the summons had been taken out before the amendment, the respondents would have been ordered to pay an excessive amount, and it may be that the excess could not have been recovered by them.

Counsel referred to the case of *Sheffield Waterworks Co.* v. *Mayor of Sheffield*, 34 W. R. 153, 55 L. J. M. C. 40.

Tindal Atkinson, K.C., and *T. E. Ellison*, for the respondents.—The claim is now barred. If a man owes a sum of money and the Statute of Limitation has begun to run with regard to it, the creditor cannot recover half or any portion of that sum after the period of limitation has expired. There is no authority for saying that in this case the time runs from the date when the amended demand is made.

Hugo Young, K.C., replied.

WILLS, J.—I am of opinion that the decision of the justices was wrong, and that the amount of the amended rate is, under the circumstances of this case, recoverable. What was demanded, and what was the subject of the summons, was the amount of the amended and reduced rate. Until the amount of the assessment had been reduced, and until the rate had been amended in accordance therewith, there never was any right to demand that smaller sum. There was only a right to demand the larger sum. It is not necessary to decide it, but I am very much of the opinion that if the demand for the larger sum had been proceeded with and a summons taken out, there would have been no answer to it as things now stand. In my opinion, also, the rate having been reduced, the excess might have been afterwards recovered by a ratepayer who had paid too much. I cannot believe that any such injustice as has been suggested—namely, that the rating authority would have been allowed to keep that rate which had turned out to be excessive—would result. It seems to me that there are ample reasons, consonant with both statute and general law, why that excess amount would have been recoverable. However, it is not necessary now to decide that point.

I base my judgment in this case upon the fact that the moment the rate was reduced by the process pointed out by Act of Parliament there came into operation, for the first time, a right to demand the reduced sum. Mr. Tindal Atkinson has said that if a man owes a large debt or owes a definite sum, and the Statute of Limitations runs with regard to that sum, the creditor certainly cannot recover half of such sum beyond the period of limitation. That is so as regards that simple proposition. But if you add to that proposition the fact that a new right altogether is created by the effect of legislation after that period of limitation, which right makes the smaller sum, for the first time, a debt, then the matter might stand very differently. But here it seems to me we have to look at the words of Jervis' Act, and also to the time when the cause of complaint first arises. The complaint here is that the respondents have not paid the amended rate. Now the amended rate is to follow the valuation list in force at the time being; but the valuation list as amended never was the valuation list in force until the amendment was made, and, therefore, the rate which is amended according to the amended valuation list becomes for the first time the instrument which makes it the duty of the ratepayer to pay a smaller amount. I am clearly of opinion, therefore, that the appeal must be allowed, and that this case must go back to the justices to make the proper order—namely, for the payment of the arrears of the reduced rate.

CHANNELL, J.—I am of the same opinion for the same reasons.

Appeal allowed with costs; leave to appeal given.

Solicitors for the appellant, *Crowder, Vizard, & Oldham*, for *Creswick & Son, Sheffield.*

Solicitors for the respondents, *Dollman & Pritchard*, for *H. & A. Maxfield*, Sheffield.

Q. B. Div.
(Bruce and Phillimore, JJ.) Jan. 22.

HOARE v. W. RITCHIE & SON. (a.)

Factory Acts—Ventilation—"Dust generated and inhaled by the workers to an injurious extent"—Direction by factory inspector requiring a fan to be provided—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), s. 36.

By section 36 of the Factory and Workshop Act, 1878, *it is provided that where in a factory any process is carried on by which dust is generated and inhaled by the workers to an injurious extent, an inspector of factories may direct a fan or other mechanical means of a proper construction for the prevention of such inhalation to be provided.*

Held, that, in ascertaining whether dust was generated or inhaled to an injurious extent, it is not necessary to prove that the health of any of the workers was actually injured; it is sufficient if the inhalation of the dust has a tendency to injure health.

Case stated by the police magistrate for West Ham.

An information was preferred by the appellant, one of her Majesty's inspectors of factories, charging that the respondents, being the occupiers of a jute mill, the same being a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895, wherein an impurity—to wit, dust—was generated and inhaled by the workers to an injurious extent, did fail to comply with a notice served on him by the appellant requiring him to provide a fan or other mechanical means for preventing such inhalation.

The facts proved before the magistrate were as follows:

The respondents were the owners of a jute mill, which was a factory within the meaning of the above Acts.

In the "preparing" and "batching" rooms in the factory, dust in large quantities was generated by the processes there carried on. This dust consisted of jute fibre mixed with a small quantity of common dust. There was nothing of a poisonous character in

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the dust. The use of fans as recommended by the appellant would reduce the amount of dust in the atmosphere inhaled by the workers.

Notice to provide such fans within one month was duly served on the respondents by the appellant, but the respondents failed to comply therewith.

Some 120 persons were employed in the rooms in question. Of these, several, selected by the appellant, were medically examined on his behalf. Several more, also selected by the appellant, were called as witnesses. The evidence, however, failed to prove that any of the workers had suffered an injury to their health from inhaling the dust generated by the processes there carried on. The learned magistrate dismissed the information on the ground that it had not been proved that the dust generated by the process had been inhaled by the workers to an injurious extent.

Section 36 of the Factory and Workshop Act, 1878, provides as follows: "If in a factory where grinding, glazing, or polishing on a wheel, or any process is carried on by which dust is generated and inhaled by the workers to an injurious extent, it appears to an inspector that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may direct a fan or other mechanical means of a proper construction for the prevention of such inhalation to be provided within a reasonable time; and if the same is not provided, maintained, and used, the factory or workshop shall be deemed not to be kept in conformity with this Act."

Section 33 of the Factory and Workshop Act, 1895, provides that section 36 of the Factory and Workshop Act, 1878, shall extend to "any factory or workshop where any process is carried on by which any gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent."

Daldy (*H. Sutton* with him), for the appellant.—The case ought to go back to the learned magistrate, because he in effect held that to sustain the charge in the information it was necessary to prove that actual injury to the health of the workers occurred. That is not necessary; all that it is necessary to prove is that the dust or other impurity existed in such intensity as to be injurious. The object of the Act was to prevent injury to the health of the workers. It is common knowledge that the inhalation of dust is not usually a direct cause of illness but that it often lays the seeds for phthisis and other lung troubles. Moreover, it frequently happens, as in the present case, that workers who are known to have suffered from the impurity of the atmosphere are reticent when summoned to give evidence before a magistrate. There was positive evidence before the magistrate that dust was generated and inhaled to an injurious extent which he ought to have taken into consideration.

The respondent did not appear.

BRUCE, J.—The question for the decision of the magistrate is whether dust was generated and inhaled by the workers in the factory to an injurious extent. It is sufficient if the dust has a tendency to injure health. It may be that injury to health would result only after long exposure to the impure atmosphere. If the air is so impure as necessarily to cause injury to health it is not necessary to prove injury to the health of any particular workman. It is enough if in the long run injury to health would result. If the magistrate finds, as here, that the dusty atmosphere has not in fact injured any of the workers, that is not enough. He must find whether or not it is injurious.

PHILLIMORE, J.—The case must go back for the magistrate to find whether the inhalation of the dust was in fact injurious, with an intimation from us that for that purpose it is not necessary to find that any one was actually injured.

Case remitted.

Solicitor for the appellant, *Treasury Solicitor.*

Prob. Div. & Adm. Div. Admiralty. } Feb. 15, 16; March 4.

"THE HEATHER BELL."
HORTON v. WARD (*a*.)

Ship—Charter-party—Right of mortgagee of ship to repudiate considered.

Although there are certain kinds of charter-parties which may be repudiated by the mortgagee of a ship, on the ground that his security is thereby impaired, nevertheless a mortgagee cannot challenge or repudiate a charter-party merely on the ground that its terms are unfavourable to the interests of the mortgagor, and therefore of himself.

This was an action brought by Mr. William Horton to recover damages for the alleged wrongful taking possession of a vessel by the defendant Mr. William Ward at a time when the vessel was, as was alleged, under a charter to the plaintiff.

The facts were as follows: The plaintiff was the proprietor of the Rhos Abbey Hotel and pier at Colwyn Bay, North Wales.

Being anxious to secure a service of passenger boats between Rhos and Liverpool during the summer season, the steamship *Heather Bell* was put upon the service, and the plaintiff partly financed her.

The vessel was the property of the defendant, but in July, 1900, he sold her to the South Coast and Continental Service Co. (Limited) for £2,500, £625 being paid in cash and the balance by three bills at two, four, and six months respectively.

On the 29th of August the South Coast and Continental Service Co. entered into a contract with the plaintiff, the material terms of which are set out in the judgment.

The South Coast and Continental Service Co. mortgaged the ship to the defendant to secure the payment of the amounts due under these bills, the first of which fell due on the 4th of September. On that day she was taken in execution by the sheriff under a judgment which had been obtained against her owners.

On the 8th of September the sheriff, having learnt of the existence of the agreement of the 29th of August, withdrew.

The defendant thereupon straightway seized her under the power contained in his mortgage, one of his aforesaid bills, which fell due on the 4th of September, having been dishonoured by the Continental Service Co.

Carver, K.C., and *Leslie Scott*, for the plaintiff, contended that the agreement amounted to a charter-party, and inasmuch as the defendant had had notice of it he was not entitled to seize the ship.

They cited *Cory Brothers* v. *Stewart*, 2 Times L. R. 508.

Robson, K.C., and *E. M. Pollock*, for the defendant, argued that the agreement did not amount to a charter-party, but alternatively, if it did, it was intended to, and actually did, impair the security of

(*a*.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

the mortgage inasmuch as it rendered the vessel less available for immediate sale and interfered with her ability to earn freight.

They cited *Collins* v. *Lamport*, 34 L. J. Ch. 196; *Brown* v. *Tanner*, 16 W. R. 882, L. R. 3 Ch. App. 597; *Keith* v. *Burrows*, 25 W. R. 831, 2 App. Cas. 636; *The Celtic King*, [1894] P. 175.

JEUNE, P., in delivering a considered judgment, said: The question in this case is whether the defendant, Mr. Thomas William Ward, was justified in taking possession of *The Heather Bell* by virtue of a mortgage to him of that vessel notwithstanding a contract (I purposely use a general term) which had been entered into between the owners and the plaintiff in regard to her. The mortgage to the defendant was registered on the 13th of July, 1900, and, after reciting that the South Coast and Continental Service (Limited) had purchased *The Heather Bell* from Mr. Thomas William Ward, mortgaged the vessel to Mr. Ward to secure the instalments of the purchase-money with interest. On the 4th of September, 1900, default was made in the payment of one of these instalments, and thereafter the defendant was unquestionably entitled to exercise his rights as mortgagee and take possession of the vessel unless he was prevented from doing so by the operation of the contract to which I have referred. That contract was made on the 29th of August, 1900, between the South Coast and Continental Service (Limited) and was in the following terms: "Memorandum, whereby the South Coast and Continental Service (Limited), the owners of the s.s. *Heather Bell* . . . agree to charter her to William Horton, of Bryn Dinarth, Colwyn Bay, from the 29th of August until the 15th of October, 1900, on the following terms: (1) The boat shall be delivered to W. Horton at Liverpool forthwith as she now is. . . . The vessel shall be used for passenger and merchandize traffic between Liverpool, Rhos-on-Sea, Llandudno, Menai Straits, Colwyn Bay, and Rhyl, and not otherwise without the consent in writing of the owners. (2) It is admitted that at the present time part of the machinery of the boat is held as a lien for repairs thereto, and it has been agreed that the said W. Horton will advance such amount as may be necessary to liberate such machinery and shall add same to what is already due to him thereon. (3) The owners also admit that W. Horton has advanced certain other sums in connection with the boat, for which sums it is agreed that the said W. Horton shall have a charge and lien on the boat ranking in the highest position the owners are able to fix the same, having regard to the existing circumstances. (4) The said W. Horton is hereby authorized to sell such of the effects on board the boat as may not be requisite or necessary for the use of the boat and the service aforesaid, but shall bring the proceeds into the accounts hereinafter mentioned. (5) The said W. Horton shall be in no way responsible . . . for any repairs which may from time to time be necessary or desirable, but any repairs he thinks fit to execute shall be added to his charge and lien. (7) The charterer shall keep true and exact accounts of all receipts . . . and of all payments and expenses of the service. The before-mentioned expenses shall be paid out of the before-mentioned receipts . . . and accounts shall be made up weekly. (8) The profits of the venture (if any) shall belong to and be divided in equal shares and proportions between the owners and the charterer at the expiration of the charter. (10) In case the mortgagees of the said vessel shall exercise their rights (if any) and thereby the charter hereby granted shall be affected, the owners shall not be responsible to the charterer in damages or otherwise in respect thereof."

It was alleged by the plaintiff that this contract was a charter-party, and by the defendant that it was an agreement. In fact it was both. It provided for the terms on which the plaintiff should use the vessel on the service between Liverpool and Rhos and other places, and it also gave the plaintiff a charge on the vessel in respect of the advances and payments made, or to be made, by him, and referred to in clauses 2 and 3. The law with regard to the rights of the mortgagor of a ship to deal with it so long as the mortgagee abstains from taking possession is, in general, well recognized. The 70th section of the Merchant Shipping Act, 1854, which enacted that "a mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be the owner of such mortgaged ship or share, except in so far as may be necessary for making such ship or share available as a security for the mortgage debt," received an authoritative exposition by Lord Westbury in the case of *Collins* v. *Lamport*, decided in 1865. It was there laid down that "as long as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice or detract from or impair the sufficiency of the security of the vessel, as comprised in the mortgage, so long is there Parliamentary authority given to the mortgagor to act in all respects as owner of the vessel, and if he has authority to act as owner he has of necessity authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and full benefit of his property." This case, therefore, asserts in the clearest terms the right of a mortgagor to deal with his property, provided that his dealings do not materially impair the security of the mortgagee, and his right so to deal is not limited to doing so by any particular form of contract, whether that of a charter-party or any other. The case of *Keith* v. *Burrows* shows that the mortgagor is by no means bound to employ the ship in a way profitable to himself or of advantage to the mortgagee as providing earnings of which the mortgagee might take possession. Lord Cairns in that case laid it down in the broadest terms: "The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or indeed to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own, or for his own benefit."

The principles of these cases was followed in the case of *Cory Brothers* v. *Stewart* In that case it would appear that by the terms of the charter-party the whole, or nearly the whole, of the freight was payable at or before the time of the sailing of the vessel, so that the mortgagee could not by taking possession obtain any or any substantial advantage out of the operation of the charter-party. "The security," said the Master of the Rolls, "was of course a freight-earning ship, but a particular charter-party was not part of the security. That was not what was mortgaged. The ship must be capable of earning freight, but not necessarily within a week or a month, or any particular period. If anything had been done in the present case which had prevented the ship from being a freight-earning ship, that would no

doubt have impaired the security, but what had in fact happened had not impaired the security. The mortgagee so long as he kept possession could not throw over the charter-party, but must fulfil it in all its terms." It is not, to my mind, easy to reconcile the principles laid down in these cases with the principle which governed the case of *Brown* v. *Tanner* in the Court of Appeal. There the mortgagor, after making a charter-party under which freight was payable, during the voyage assigned the freight to a third person. It was held that the mortgagee, having taken possession before the freight became due, was entitled to it notwithstanding its assignment by the mortgagor. Page Wood, L.J., in delivering the judgment of the court, said: "The mortgagor can bind the mortgagee by a charter-party, being to that extent in a different position from the mortgagor of real property, who cannot bind his mortgagee by a lease. This was decided by Lord Westbury in *Collins* v. *Lamport*. But we cannot accept the inference drawn from that case by Mr. Druce, that the mortgagor, having so effected a charter-party, can also mortgage the freight before it becomes due so as to prevent the mortgagee of the ship on taking possession before the freight is due from receiving it. So to hold would enable the mortgagor to deprive the mortgagee of the whole benefit of the security. The ship might be chartered for several years, and the freight immediately assigned behind the back of the mortgagee." I am not aware whether Lord Cairns (who was Lord Chancellor at the time, and who appears to have sat in the case decided before *Brown* v. *Tanner*) was party to the decision in *Brown* v. *Tanner*. The report is silent on the point. If he was, the decision in *Brown* v. *Tanner* clearly cannot be at variance with his lordship's previous decision in *Keith* v. *Burrows*. But I confess it is not to me easy to understand why, if the freight under a charter-party is no part of the mortgagee's security, and if the mortgagor may make a charter-party which yields no freight, or may make a charter-party under which the freight is made payable to a third party before the voyage commences, he may not assign the freight during the continuance of the voyage. It certainly can make no practical difference to the mortgagee whether the freight is alienated by the charter-party itself or by a subsequent document, his power of obtaining it being equally in both cases destroyed. However, for the purposes of the present case, it is sufficient for me to say that whether the freight created by a charter-party can or cannot be assigned subsequently so as to defeat the prospect of the mortgagee obtaining it by taking possession, the mortgagee cannot challenge or repudiate a charter-party merely on the ground that its terms are unfavourable to the interests of the mortgagor and therefore of himself. I may add that the case of *The Celtic King*, decided by Barnes, J., illustrates the kind of charter-party which does impair the security of the mortgagee, and may therefore be repudiated by him. In that case there was an agreement by which a shipowner whilst a steamer was being built for him bound himself to fit her for a particular trade—that is to say, the trade in frozen meat, and run her for five years as one of a particular line, and it was held that this agreement would have a depreciatory effect upon the security of the mortgagee. "It seems to me," said the learned judge, "that where there is a contract of this particular character it would be prejudicial to the security if the mortgagee were to be obliged to admit that he could not sell the ship to realize his security in an open market without that restrictive contract. It is not like an ordinary contract for the ordinary employment of a ship which is made from time to time as things are good and as things are bad, but it is a contract which binds the vessel for a very long period and has various clauses in it which might make it extremely difficult for anybody to purchase a ship of this kind if they were bound by its terms." While, therefore, it would seem clear on the earlier authorities that the mortgagee, as I have said, cannot repudiate a contract made by the mortgagor on the ground that it is unfavourable, that must be understood with the limitation that the contract must not be such as by reason of the length of time during which it binds the ship, or by reason of unusual provisions in it, to injuriously affect the power of sale by the mortgagee.

To apply these principles to the present case. Can it be said that the contract in question impairs the security which *The Heather Bell* constituted for the defendant by reason of his mortgage? During the argument I had some doubt whether the security was not impaired by the provisions in section 7, which appeared by the term "before-mentioned expenses" to make the sum advanced or to be advanced by the plaintiff under clauses 2 and 3 payable out of the gross receipts of the vessel. This would have been in effect an assignment of the earnings of the ship during the period of the contract, and, notwithstanding the case of *Cory Brothers* v. *Stewart*, I should have thought it difficult, having regard to the decision in *Brown* v. *Tanner*, to hold that such a contract did not impair the security and render the sale of the vessel difficult, if not impossible, according to the view taken in *The Celtic King*, unless, indeed, it could be said that the comparatively short time during which the contract in the present case was to be in force—viz., till the 15th of October, 1900—made a material distinction with the facts in the case of *The Celtic King*. But, on considering the present contract, I come clearly to the conclusion that the "before-mentioned expenses" in clause 7 do not include the sums referred to in clauses 2 and 3. This difficulty being cleared away, there remains, I think, no other. It is true that clauses 2 and 3 give the plaintiff a charge and lien on *The Heather Bell* for his advances, but this charge is clearly subordinated to that of the defendant, and, therefore, in no way impairs his security. The right conferred by section 4 to sell certain articles of equipment appears to relate to some matters of very trifling importance. The rest of the contract provides for the terms on which the boat was to be run. I do not think I have to inquire whether these terms were unduly favourable to the plaintiff. They were not likely to be so, as the plaintiff had interests in the steamer running apart from her earnings. I do not think that they were unusual terms for the employment of such a vessel as *The Heather Bell*, constructed as she was, for exactly such employment as is contemplated by the contract. I doubt if they would render the vessel less saleable during the currency of the contract; certainly they would not at its termination, which was only some five weeks after the defendant took possession. It results, therefore, that in my opinion the defendant had no right to interfere with the execution of the contract; and there must be judgment for the plaintiff, with costs, and an inquiry as to the amount of damages.

Solicitors for the plaintiff, *Whiteley & Co.*

Solicitors for the defendant, *Forshaw & Hawkins.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Feb. 19.

PARSONS v. THE NEW ZEALAND SHIPPING CO. (a.)

Ship—Bill of lading—Goods marked as in margin—Delivery of goods otherwise marked—Mistake in bill of lading—Identification marks—Liability of shipowner—Exemption in case of incorrectness in marking—Bills of Lading Act, 1855 (18 & 19 *Vict. c.* 111), *s.* 3.

A bill of lading, signed by the defendants' manager, described the goods comprised in it as "being marked and numbered as in margin," and contained the following clause: "The ship will not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark or number and address." Delivery was offered to the plaintiff, who was the indorsee of the bill of lading, of goods which were marked and numbered otherwise than as in the margin of the bill of lading. It appeared that these goods had been intended by the shippers to form part of the consignment represented by the plaintiff's bill of lading, but that they had by some mistake been incorrectly described in the bill of lading. The plaintiff refused to take delivery of the goods in question, and brought an action for damages for short delivery.

Held, that the plaintiff could not maintain the action.

Per Collins *and* Romer, L.JJ.—*The defendants were not precluded by section* 3 *of the Bills of Lading Act,* 1855, *from showing that the goods had in fact been shipped under the bill of lading, and that there was a mistake in the margin of the bill of lading.*

Per A. L. Smith, M.R.—*The defendants were relieved from liability by the exemption clause in the bill of lading as to correctness of marking.*

Appeal from the judgment of Kennedy, J., on the trial of the action without a jury: reported [1900] 1 Q. B. 714, 48 W. R. Dig. 170.

The plaintiff was the indorsee of two bills of lading for a quantity of lambs' carcases shipped from New Zealand on board the steamship *Fifeshire* by the Christchurch Meat Co. The defendants were the agents in New Zealand of the owners of *The Fifeshire.* The bills of lading were signed by the defendants' manager, and described the goods comprised in them as "being marked and numbered as in margin."

The bills of lading contained the following clause: "The ship will not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark or number and address."

On the arrival of the ship in London delivery was offered to the plaintiff of certain carcases which were not marked and numbered as in the bills of lading. The plaintiff refused to take delivery of these carcases, and brought this action for damages for short delivery.

It appeared that the carcases in question had been intended by the shippers to form part of the consignment represented by the plaintiff's bills of lading, but that they had by some mistake been incorrectly described in the bills of lading.

Kennedy, J., gave judgment for the defendants, being of opinion that they were not prevented by section 3 of the Bills of Lading Act, 1855, from showing that there had been a mistake in the description in the bills of lading, and that the carcases had in fact been shipped as part of the plaintiff's consignment.

The plaintiff appealed.

Danckwerts, K.C., and *Loehnis,* for the plaintiff.

Carver, K.C., and *Leck,* for the defendants.

The following cases besides those referred to in the judgment of Collins, L.J., were cited: *Jessel* v. *Bath,* 15 W. R. 1041, L. R. 2 Ex. 267; *Brown* v. *Powell Coal Co.,* 23 W. R. 549, L. R. 10 C. P. 562; *Hopkins* v. *Hitchcock,* 11 W. R. 597, 32 L. J. C. P. 154.

Cur. adv. vult.

Feb. 19.—A. L. SMITH, M.R., read the following judgment: This is an action by an indorsee for valuable consideration of two bills of lading signed by the defendants to recover the sum of £124 19s. 1d. for short delivery thereunder in the Port of London of 154 carcasses of frozen lambs ex steamship *Fifeshire,* and the question is whether the plaintiff was bound to accept in fulfilment of the contract contained in these bills of lading carcases of frozen lambs which not only did not bear the marks and numbers upon the bills of lading of which he was the indorsee for value, but bore marks and numbers which were different from, and not those upon, the bills of lading. It is sufficient to trace what took place in respect of one of these bills of lading, for by so doing the case will be freed of many details, and the point will thus become more conspicuous.

On the 30th of March, 1899, the defendants signed a bill of lading, which, so far as material, is as follows: "Shipped in good order by the Christchurch Meat Co. (Limited), on board the steamship *Fifeshire,* now lying in Timaru, 1,076 carcases frozen lambs, being marked and numbered as in margin, to be delivered in like good order and condition" (subject to exceptions not material to this case) "at the Port of London unto order or assigns." The marks and numbers in the margin of the bill of lading were as follows: The Sun Brand, Canterbury, N.Z., Lamb 622 X, 608 carcases, 722 X, 468 carcases, weighing 35,806lb. The meaning of these marks and numbers, apart from special meanings unknown to the plaintiff, was that 608 carcases of Sun Brand, Canterbury, New Zealand, lambs marked 622 X, and also 468 carcases of similar lambs marked 722 X—*i.e.,* 1,076 carcases in all, and so marked and numbered, had been shipped under the bill of lading upon the steamship *Fifeshire,* which carcases so marked and numbered, and not, in my judgment, carcases marked and numbered with other and different marks and numbers, were contracted to be delivered in like good order and condition, subject to exceptions, at the port of discharge. Before dealing with what these marks and numbers further indicated I will state what took place.

On the 16th of June, 1899, the plaintiff purchased the lambs covered by this bill of lading from the agents of the shippers, the Christchurch Meat Co., and upon such purchase received an invoice from them. By this invoice the plaintiff was debited with 1,076 carcases marked 622 X and 722 X, and for these carcases he paid the sum of £820 11d. 1d. Upon the purchase the bill of lading was indorsed and handed to the plaintiff, and he also then received from the vendors a certificate of insurance which covered 608 carcases marked 622 X and 468 carcases marked 722 X, for two months from the date of the arrival of the steamship *Fifeshire* in dock, when lying at the premises of the Leadenhall Market Storage Co. and other places. It will thus be seen that these carcases were shipped under specific marks and numbers. They were taken on board by the ship as being carcases so marked and numbered, and were to be, in

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

my judgment, as I have said before, delivered, subject to exceptions not material to the point in hand, under these marks and numbers, and certainly not under different marks and numbers, at the port of discharge. There is no question in this case of marks and numbers being obliterated by sea perils or otherwise. These carcases were purchased by the plaintiff from the shippers under the specific marks and numbers, and, as before stated, the plaintiff held a certificate of insurance covering carcases so specifically marked and numbered and none other. Upon the plaintiff having thus become indorsee of the bill of lading and purchaser of the carcases above mentioned, application was made on his behalf for delivery, together with others, of the 608 carcases marked 622 X and of the 468 carcases marked 722 X, when delivery of the 468 carcases marked 722 X was duly made, but delivery of the whole of the 608 carcases marked 622 X was refused upon the ground that the defendants could not deliver the whole of these 608 carcases, for, it was said, they had not all been shipped on board; but the defendants were willing to deliver to the plaintiff 507 of the 608 carcases marked 622 X, as in my judgment they were bound to do, but this was 101 carcases short of the bill of lading quantity, and in respect of this shortage of 101 carcases they subsequently tendered 101 carcases not marked 622X but carcases marked 522 X. These the plaintiff refused to accept in fulfilment of his contract with the defendants, and Kennedy, J., has held that he could not refuse and was bound to take these 101 carcases not marked according to his bill of lading, but marked in an altogether different way: for 622 X is certainly not the same mark and number as 522 X; and the plaintiff appeals.

Before I come to section 3 of the Bills of Lading Act, 1855, I wish to consider whether the marks and numbers 622 X, which are the marks and numbers whereby to identify the plaintiff's carcases and without which they could not be identified, were marks and numbers which were material to the plaintiff either as regards the identity of the carcases which the plaintiff was entitled to receive under his bill of lading or as regards his dealing with the carcases after he had received them; for if material to the plaintiff I cannot agree with Kennedy, J., that the plaintiff was bound to accept the carcases tendered in fulfilment of the contract contained in the bill of lading. If the marks and numbers were not material to the plaintiff other considerations would arise, and in my opinion that case would not be the present case.

Now, first of all, why are marks and numbers of identification placed in the ordinary course of business upon goods and also upon a bill of lading? In my opinion, in the first place to identify to the holder of the bill of lading, whoever he may be, the goods which that holder is entitled to demand and take delivery of *ex* ship upon its arrival. In the present case there were in the hold of *The Fifeshire* many thousands of carcases under different bills of lading with different marks and numbers. If a holder of a bill of lading has, for instance, a bill of lading for carcases or for other goods, say, for corn in sacks, in a ship containing different shipments of carcases or corn, with no marks at all thereon, a very improbable contingency, what is he to demand *ex* ship upon its arrival? It seems to me that he can demand nothing and he must wait until all the holders of other bills of lading with marks and numbers thereon have been satisfied and then take what happens to be left in the hold of the ship, and it may be thus lose the market in the meantime; and, again, if he has a bill of lading with marks and numbers on it and no goods with like marks and numbers come up out of the hold of the ship, the same thing must happen. Again, suppose a bill of lading holder were to take *ex* ship goods not marked in accordance with his bill of lading, say, goods marked as in this case 522 X, instead of goods marked 622 X according to his bill of lading, what would be his position if and when the holder of the bill of lading for goods marked 522 X came and demanded his goods from the bill of lading holder, who had taken the goods marked 522 X under a bill of lading only covering goods marked 622 X? The answer is obvious. The person who had thus taken these goods would have to give them up. Surely these matters have only to be stated to show the materiality of marks and numbers of identification in commerce and the importance necessarily attaching to them in the carrying on of daily business. In my judgment the marks of identification in this case are very material; although there may be some cases in which certain identification marks may be superfluous or for some other reason immaterial, but this remark has no place in the present case. Again, if in the present case the plaintiff could be forced to take the carcases marked 522 X, as Kennedy, J., has held that he can be, what becomes of his insurance which only covered carcases marked 622 X and not carcases marked 522 X? In my opinion, if the plaintiff had had to make a claim against the insurance company if the goods were burnt, the company, under a defence that their insurance covered carcases marked 622 X and not carcases marked 522 X, would stand well for judgment, or at the very least there would obviously be protracted litigation. With these remarks as to the materiality of marks and numbers of identification I come to the Bills of Lading Act, 1855.

In my opinion section 3 of this Act prevents a person who has signed the bill of lading from attempting to show in a case such as this that of the carcases marked 622 X 101 were not shipped, but that carcases marked 522 X were shipped in their place. In my opinion the Bills of Lading Act was passed to shut out a person who signs the bill of lading from a controversy such as this with a holder for value of a bill of lading. This section enacts that "every bill of lading in the hands of a consignee or indorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder or some person under whom the holder claims." No question arises upon the latter part of this section. What then are the goods in this case represented by the bill of lading to have been shipped on board the steamship *Fifeshire*? In my opinion the representation is not that 608 carcases not marked or numbered at all, nor that 608 carcases marked 522 X have been shipped, but that 608 carcases marked 622 X have been shipped. That being in my opinion the representation of the bill of lading, the Bills of Lading Act applies to this case and shuts out the present suggested defence from the defendants, and I do not think that the Bills of Lading Act is confined to marks of quality and quantity which are comparatively rare when compared with marks of identification, and which quality marks when used are usually coupled with a

statement in the bill of lading "weight, contents, and value unknown." In my opinion section 3 of the Bills of Lading Act applies to what is usual if not universal in commerce—viz, to goods as in the present case shipped under specific marks and numbers of identification, and so represented in the bill of lading. The above is my opinion independently of the special value proved in this case to be attached to the marks and numbers themselves. It was proved that "Sun Brand X" denotes the quality of the carcases; the number 6 denotes the date when the animal was killed and put into ice; the duplication of the numbers (2.2) show where the animal was killed and frozen; the final number 2 shows the grade. These numbers appear to me to be material, apart from identification, should disputes arise as to the freshness or otherwise of or about the quality of the carcases. Moreover, if the plaintiff is bound to take carcases marked 522 X, as Kennedy, J., holds he is, instead of carcases marked 622 X, he will be bound to take carcases killed and frozen at a date different from that at which carcases marked 622 X in his bill of lading, which he has purchased, were killed and frozen. Can this be? I think not. Kennedy, J., embarked upon the inquiry as to whether a carcase marked 522 X had any different value in the market for meat from a carcase marked 622 X, and as a commercial article he found that it was absolutely unaffected in its character or value; but, with submission, it is not merely a question as to whether the carcases under the different marks were of the same value in the market, but whether the marks and numbers were material or immaterial to the plaintiff. If I purchase cases of champagne identified by marks A B C, what answer is it, when I claim my goods so marked and identified, to say that the goods tendered, which are marked X Y Z, are of the same value in the market, or even of greater value than those marked A B C? For the reasons above I think that the marks of identification in this case were of materiality to the plaintiff, and that the tender was not a good tender. Kennedy, J., also investigated the question whether 101 carcases marked 622 X were put on board at Timaru, and he came to the conclusion that they were not, and that the 101 carcases marked 522 X were put on board in their place; but this, in my opinion, for the reasons above, he could not go into as a defence by a person who signed the bill of lading, and I think that the plaintiff could not be forced by the defendants in this case to take the 101 carcases not marked according to his bill of lading; and if this case had rested here I could not have found for the defendants. For the reasons hereafter appearing I need say nothing about the damages.

A very formidable point was next taken by Mr. Carver for the defendants, which was that even if the tender of the 101 carcases was a bad tender, the defendants were protected by a clause in the bill of lading from being sued in the circumstances of this case for incorrect delivery of 608 carcases marked 622 X. This clause is as follows: "The ship shall not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark and number or address." What is the meaning of each package being correctly marked with the mark and number before shipment? In my judgment it can only mean correctly marked with the mark and number according to the bill of lading; for with what else can the mark and number upon the packages mentioned in this clause be correct? These marks and numbers must also be distinct and permanent. In my opinion, this is the true meaning of this clause, and it was inserted to meet a case like the present, where the goods were not correctly marked according to the bill of lading. It must not be forgotten that the bill of lading is drawn by the shippers, who ought to make the marks and numbers in the bill of lading and on the goods correct with each other. Kennedy, J., has found, and I do not differ from his finding upon this issue, though he has not applied the clause, for it was not necessary for him to do so in the view he took of this case, that the 101 carcases marked 522 X were not correctly marked, and should have been marked 622 X, in which case, and in which alone, in my opinion, they would have been correctly marked within the meaning of the clause. As, therefore, these 101 carcases were not correctly marked, this clause comes into play and exempts the defendants from the present claim of the plaintiff. For this last reason I think this appeal should be dismissed.

COLLINS, L.J., read the following judgment: This case raises a point of some difficulty upon the meaning and effect of section 3 of the Bills of Lading Act, 1855. The case comes before us on appeal from Kennedy, J., in whose judgment the facts are fully set out. The plaintiff is the indorsee for value of two bills of lading signed by the defendants; and he sues for damages for non-delivery of certain carcases, part of a consignment of frozen lambs' carcases embraced in the said bills of lading. The same point arises on both the bills of lading, and it is not necessary to refer to more than one of them. This acknowledged the shipment of "1,076 carcases frozen lamb," "being marked and numbered as in margin." The marks in the margin are "Sun Brand. Canterbury, N.Z., Lamb, 622 X 608 carcases, 722 X 468 carcases, weighing 35,806lbs." The learned judge has found as a fact, and I think the evidence warrants his conclusion, that there were included among the 608 carcases described in the margin as having the marks 622 X 101 carcases marked 522 X, which by a mistake of the shippers were misdescribed in the margin of the bill of lading as marked 622 X instead of 522 X, but were in fact shipped under, and intended to be comprised in, the bill of lading. Those marked 522 X were, as he finds, of precisely the same character and value as a commercial article as those marked 622 X, so that a contract for sale of Sun Brand lambs, second quality, of the Christchurch Co.'s freezing might have been satisfied equally well out of either mark or out of both indiscriminately. In fact, the first two marginal figures have no significance whatever to the buyer, and convey to him no representation as to the character of the meat, The final figure does indicate the grade. In the words of Kennedy, J., "The meat as a commercial article is absolutely unaffected in its character or value, whether it is marked 522 or 622." The defendants tendered those carcases marked 522 X as being part of those shipped under the plaintiff's bill of lading, but, the price of frozen lamb having fallen since his purchase, the plaintiff refused to accept them, and brought this action for damages for non-delivery. His contention is that under section 3 of the Bills of Lading Act, 1855, the defendants are estopped from denying that the goods marked as described in the margin of the bill of lading were shipped, and that, as those they tendered did not bear identically the same marks, there has been a failure to deliver, which entitles the plaintiff to the damages fixed by the bill of lading in case of loss—viz., the invoice price of the goods. The defendants, on the other hand, contend that the goods tendered were in fact the goods shipped under and comprised in the bill of lading, although some of them were by mistake described as bearing a mark which they did not bear; that the existence and identity of the goods are unaltered in fact, though the identification may be more difficult by reason of

the misdescription. And this was the view taken by Kennedy, J. He was of opinion that the identity of the goods tendered with those shipped under the bill of lading was proved, and my judgment is based on that finding. If such identity could not be established, very different considerations would arise.

As the plaintiff's case is rested wholly on the estoppel of the Bills of Lading Act, it is desirable to see what was the mischief to which that Act was addressed in order to determine whether section 3 will bear the construction placed on it by the plaintiff. The preamble, so far as it relates to this matter, is as follows: "Whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bonâ fide* holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid, Be it therefore enacted," &c. The mischief, therefore, which it was thought desirable to remedy only arose where the goods in respect of which the bill of lading purported to be signed had not been put on board, and the master or person signing relied on that fact as an excuse for non-delivery. Here it is a fact that all the goods in respect of which the bill of lading was intended to be signed were put on board, though certain of the marks on some of them were miscopied in the bill of lading, and the person signing is not setting up that they have not been laden, but, on the contrary, is insisting that they have been laden, and is claiming to deliver them. Section 3 is as follows: [His lordship read the section, and continued:] The section therefore addresses itself to the mischief named in the preamble. It deals with persons who have acted on a misrepresentation in a bill of lading that goods have been shipped when they have not, and estops the person signing from denying the shipment. It is the identity of the goods shipped with those represented as shipped which is the pith of the matter; that is the subject of the misrepresentation referred to, and nothing which would not be material to such identity need be embraced in the estoppel. It is obvious that where marks have no market meaning and indicate nothing whatever to a buyer as to the nature, quality, or quantity of the goods which he is buying it is absolutely immaterial to him whether the goods bear one mark or another. These considerations throw a light on the interpretation of the section. It is only as to "such shipment" that the bill of lading is said to be conclusive, and such shipment refers back to the goods which the bill of lading represents to have been put on board. Now, the goods which the bill of lading represents as shipped continue to be the same goods, whichever out of any number of merely arbitrary marks are put on them, and will remain the same whether the marks were on them before shipment or are rubbed off or changed after shipment. In other words, they go to the identification only, and not the identity. The goods represented by the bill of lading to have been shipped have been shipped, and a mistaken statement as to marks of this class merely makes identification more difficult; it does not affect the existence or identity of the goods. It seems to me, therefore, that both on the strict wording of the section and having regard to the mischief to which it was addressed the plaintiff has failed to bring his case within the estoppel which it creates. It is not the fact and it would not be true to say that the 1,076 carcases which the bill of lading represented to have been shipped were not shipped because the bill of lading did not correctly describe the mark on some of their number. In my opinion, as I have already said, their identity was unaffected, and the property in them, marked as they were, passed to the plaintiff on the transfer of the bill of lading. The defendants are estopped from denying "such shipment," but nothing more, and the shipment is none the less the shipment represented by the bill of lading because some of the marks were misdescribed. The defendants are not here questioning the bill of lading on the ground of the goods not having been laden, and are not driven to asserting anything which they are estopped from asserting. I agree with Kennedy, J., that to adopt the construction contended for by the appellant would be to strain the fair meaning of the section and extend it beyond the mischief it was intended to meet. Moreover, if mere identification marks are within the estoppel, any discrepancy between the marks on the goods and the mark in the margin would equally destroy the identity. Every difference would be equally material, whether the result of accident or clerical error. To hold this would impose an enormous and, indeed, having regard to the practice of tallying, an impossible task on the shipowners. Marks which convey a meaning as to the character of the goods stand on a totally different footing. These, it seems to me, would be embraced in the estoppel, because the characteristics which they indicate are essential to the identity of the goods, and an article so marked is a different article in the market from one not so marked. They are material factors in the identity as distinguished from the identification of the goods sold, and therefore a discrepancy between the goods described and the goods shipped would mean a difference of identity, and the shipowner would therefore fail to prove that the goods which the bill of lading represented to have been shipped had been shipped, and being estopped from denying that the goods shipped were "such" as the bill of lading represented them to be he could not make a good delivery. On the other hand, suppose a mere arbitrary mark correctly described in the bill of lading had got rubbed off in transit, and that the package was, nevertheless, otherwise sufficiently identified, would not the indorsee of the bill of lading be bound to accept it? Would not the property in it have passed to him so that he could have maintained trover for it if the shipowner had on demand refused to deliver it, and though he might have his action for any delay in delivery through difficulty of identification, could he sue the carrier for non-delivery on the footing that it had been lost, though the carrier was pressing it on his acceptance? If not, it must be because the loss of the mark has not destroyed the identity. But the appellant's argument involves a right to sue for non-delivery in such a case, since the ground of rejection and of action would be precisely the same in both cases—viz., the want of correspondence in marks between the thing shipped and the thing tendered. Suppose the master had signed the bill of lading, and the price of the goods had gone up, and the action had been brought against the shipowner claiming delivery of the carcases in question, could he have defended himself on the ground that the master could not make him responsible for goods that had not been put on board, and that the undelivered balance of the bill of lading quantity had not been put on board? (See *Grant* v. *Norway*, 10 C. B. 665.) Or, on proof of the actual facts, would he not have been held liable on the ground that the goods were put on board and that the master's mistake in allowing a wrong mark of this class to get into the margin (not a quality mark, as in *Cox* v. *Bruce*, 35 W. R. 207, 18 Q. B. D. 147) was a mistake within the scope of his authority, and that all the 1,076 carcases were in fact shipped?

Or, to take a still simpler case, if this action had been brought before the Bills of Lading Act, and the same facts had been proved, would they have supported a defence that the goods had never been put on board, and that the defendant therefore never became liable to deliver them? I think the defendant would have been forced to admit that he had in fact received on board the goods intended to be described in the bill of lading. But, if this be so, this case is clearly not within the mischief at which the Bills of Lading Act was pointed. Indeed, it was not suggested in argument that the shippers could have maintained this action, and the plaintiff takes only the shippers' rights under the bill of lading by the transfer, except so far as the statutory estoppel alters them. That estoppel is, in my opinion, limited to the identity of the goods shipped.

An element of confusion, as it seems to me, has been introduced into this case based on the meaning which the first figure of the marks in question, the only one which did not correspond with the bill of lading, had for the manufacturers, indicating, as it did, to them the day of the week on which the carcase was put into the freezing process. But as it is found as a fact that these figures conveyed nothing whatever to dealers in these goods, and, further, that the first figure indicated in fact nothing which had any bearing on the quality of the goods, but was merely a private mark helping the manufacturers to trace them through their books, it seems to me that any considerations based on them can have no place in the discussion. The same remark applies to the insurance. The goods were equally covered under the floating policy, whether they were 522 or 622: see *Stephens* v. *Australasian Insurance Co.*, 21 W. R. 228, L. R. 8 C. P. 18. The result is that the right of action, if any, for loss or inconvenience caused by the mistake is untouched, but the plaintiff cannot maintain an action for non-delivery based on the estoppel.

The decided cases throw little light on the matter. They certainly do not favour the appellant's contention. *Bradley* v. *Dunipace*, 7 H. & N. 200, 1 H. & C. 521, 10 W. R. Dig. 82, merely decided that where two sets of bags of rye meal of two different sizes but with the same mark had been shipped promiscuously, but the master had signed two bills of lading for them, one of which was for 467 bags, with a statement of weight added which, if calculated, would have worked out to approximately twelve stone a bag, the master was not excused from delivering the right bags to the holder of the 467 bill of lading by the clause "not responsible for weight." It was his duty to deliver the right bags, and the statement of weight might have helped him to identify them. This does not seem to touch the point in discussion. *Cox* v. *Bruce* emphasizes the distinction between quality marks and other marks. *Blanchet* v. *Powell's Llantivit Collieries Co.*, 22 W. R 490, L. R. 9 Ex. 74, decided that a master who had signed a bill of lading for goods described as of a certain weight was not estopped in an action brought by him against the consignee for lump freight from asserting that the amount stated was a mistake, and that a less weight had been shipped, though he might have been, had the action been against him for non-delivery. The defendant by paying money into court had admitted liability for some freight, whereas the defence, if good, would have gone to the whole. The issue of amount shipped was therefore immaterial. The decision and the *dicta* do not touch the question of marks, going not to quantity or quality, but to identification only. The other cases cited come no nearer to the point.

It remains to consider the effect of the clause in the bill of lading: "The ship will not be responsible for correct delivery unless each package is distinctly, correctly, and permanently marked with a mark and number or address." The bill of lading is on the shippers' (the Christchurch Co. (Limited)) own form. One side of it has a printed statement of their address and different factories and an enumeration of various brands used by them. The practice with respect to them, as proved in evidence, is that a bill of lading is filled in at their factory with the marks and numbers supplied to them by their own servants, whose business it is to tally the goods into cold vans for carriage to the ship's side. They are thence shot rapidly—at the rate of about 1,000 an hour—into the cold chamber in the ship, and no attempt is made by the ship to do more than tally the number of carcases received. The marks and numbers filled in by the shippers in the margin are accepted by the person who signs the bill of lading without verification. Timaru, the port of loading, is an open roadstead and dangerous, and it is important that the loading should be done with the utmost despatch. What, then, is meant by "correctly marked" in the clause? The marks referred to seem in their context to be clearly identification marks, which which would get copied as such into the margin of the bill of lading. If so, it is difficult to see what standard of correctness could be applied to such a mark which did not include conformity to the mark in the margin of the bill of lading as tendered by the shippers. If the two coincide, it is difficult to see in what other respect the "correctness" of the mark could be material. At all events, the clause is clearly framed on the footing that but for the clause the reciprocal rights to give and take delivery would be unimpaired by the incorrectness of mere identification marks, the shipowner being left at his peril to deliver to the person entitled, the latter retaining his right to complain of "incorrect delivery" brought about by the difficulty of identification, but not excused from accepting if the identity of the goods were established. I regard it not so much as a separate ground of defence in itself as confirmatory of the main position above indicated that in the contract of the bill of lading mere identification marks are not regarded as affecting the central obligation to give and take delivery of the goods shipped, though incorrectness may furnish ground for a cross-claim if the consignee is thereby damnified.

As to the point that, if the estoppel is not extended to the identification marks, it will lead to great difficulty in practice, I think the difficulty is less formidable than it appears at first sight. It must be remembered that the difficulty, such as it is, exists in all cases where there is no estoppel. At the time when the Bills of Lading Act was passed bills of lading were much more rarely signed by persons other than the master than is the case now, and whenever the action was brought against the shipowner who had not signed, which would be the usual case, difficulty of identification would not have excused delivery or acceptance if identity were in fact established. The Legislature does not seem to have addressed itself to this matter at all, but to have left it to the ordinary law. I am of opinion, therefore, that the appeal should be dismissed.

ROMER, L.J., read the following judgment: On the evidence it has been found by Kennedy, J., that the carcases tendered by the defendants were part of those shipped under, and intended to be described in, the plaintiff's bill of lading I am not prepared to differ from that finding. The plaintiff, however, contends that the defendants are by section 3 of the Bills of Lading Act, 1855, precluded from going into evidence in order to establish the identity of the

carcases tendered with those described in the bill of lading, by reason of the discrepancy between the marks on those carcases and the marks mentioned in the bill of lading. This contention raises a question of general importance as to the meaning and effect of the section, which speaks of a bill of lading "representing goods to have been shipped." Is every reference in a bill of lading to the marks on the goods of necessity part of the description of the goods within the meaning of the section? I think not. When it is remembered what the state of the law was at the time when the Act was passed, and what was the mischief intended to be remedied by the Act, it appears to me pushing the estoppel created by the section too far against the person signing the bill of lading to hold that he can in no case be permitted to go into evidence to prove a mistake in the bill of lading in reference to some of the marks on the goods. Suppose, by way of example, a bill of lading was dealing with five parcels of goods of the same size, quality, and value, and, after describing these goods accurately, it proceeded to state that the parcels were numbered consecutively 1 to 5. Could a purchaser refuse to accept delivery of one or two of the parcels, and hold the signer of the bill of lading estopped under the section, because it turned out that the two out of the five parcels which should have been respectively marked 3 and 4 were both marked 4? It appears to me that he could not, and that to hold the contrary would be to put a construction on the Act, and give an effect to its wording, which was never contemplated by the Legislature, and which the contents of the Act do not justify. In short, for the purposes of the Act a description in a bill of lading of marks on the goods is not of necessity part of the description of the goods themselves Of course difficult questions may arise on particular bills of lading, whether certain references to marks do or do not form part of the description of the goods within the meaning of section 3. Those questions will fall to be determined according to the circumstances of the particular cases in which they arise. But, speaking generally, when the section refers to the bill of lading as "representing goods to have been shipped" it is, in my opinion, only contemplating those statements which may be said to describe the goods in the ordinary mercantile sense—that is to say, statements which would substantially affect a purchaser relying on the bill of lading as to the quantity, quality, or value of the goods he was buying. Marks on the goods which, so far as the purchaser is concerned, have no meaning, and could only be referred to in the bill of lading in order to assist in the more sure or speedy identification or delivery of the goods, do not, in my opinion, form part of the description of the goods within the meaning of section 3, so as to bind the signer of the bill of lading by way of estoppel. If a bill of lading makes a mistake in describing some marks like those last mentioned, and thereby delivery of the goods is delayed or not effected, the purchaser will have all the remedies for any damage caused by the delay or non-delivery which he would have had if the Act had not been passed. In this point of view, no doubt, marks assisting identification are material to a purchaser. But I do not think he is entitled, merely because a mistake in the bill of lading as to the identification marks may cause trouble in delivery, to say that section 3 applies, and that the signer of the bill of lading is bound to admit that the goods exactly as mentioned in the bill of lading were shipped, and yet cannot be delivered.

Applying the above considerations to the case now before us, I come to the conclusion that the appellant fails. The differences in marking between the goods he refuses to take and the goods mentioned in the bill of lading are differences in respect of matters not relating to the quantity, quality, or value of the goods he bought on the faith of the bill of lading, and which in no wise influenced or affected him in his character of a person considering whether he should buy the goods referred to in the bill of lading. It is clear on the evidence that, so far as he is concerned, the differences in marking are wholly unsubstantial so far as they relate to the goods in themselves. All that can be said on his behalf is that, owing to the marks not being correctly described in the bill of lading as compared with the marks on the goods themselves, some delay in delivery would probably ensue, and in fact did ensue. But, as already pointed out, this will not justify him in contending that the defendants are estopped under section 3, whatever other rights it may give him. As to the insurance, I need not add anything to what has been said by Collins, L.J. For these reasons I think the appeal must be dismissed, and I have not to decide the further point that was raised upon the clause in the bill of lading which has been referred to by the Master of the Rolls and Collins, L.J. But, had I been obliged to take the view that the signer of the bill of lading was estopped as contended for by the appellant, I should have felt some difficulty in holding that a clause which was directed to "correct delivery" in case of packages not being "distinctly, correctly, and permanently marked by the merchant before shipment" freed the signer of the bill of lading from liability in a case where, *ex hypothesi*, he would be obliged to admit that goods of the appellant were shipped and are not delivered, and were not lost, injured, or altered in any way during the voyage.

Appeal dismissed.

Solicitor for the plaintiff, *Charles Butcher.*

Solicitors for the defendants, *William A. Crump & Son.*

From Chan. Div.
(Rigby, Vaughan Williams, and Stirling, L.JJ.) Feb. 5, 8, 18.

In re BRUTTON & BURNEY (LIMITED).
In re NEW CROSS BREWERY (LIMITED). (a.)

Company—Shares—Contract—Issue of fully-paid shares for consideration other than cash—Omission to file contract—Memorandum in lieu of contract—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act,* 1898 (61 & 62 *Vict. c.* 26), *s* 1 (4)—*Companies Act,* 1900 (63 & 64 *Vict. c.* 48), *ss.* 33, 36.

Shares of one company taken in exchange for shares of another company are not shares paid for in cash, and therefore an agreement to take such shares ought to have been filed under section 25 *of the Companies Act,* 1867.

Quære, *whether section* 25 *has been wholly repealed by the Companies Act,* 1900.

This was an appeal from a decision of Byrne, J., refusing an application for an order under the Companies Act, 1898, that a memorandum might be filed in lieu of a contract.

The facts were as follows: Brutton & Burney (Limited) were incorporated to purchase a business formerly carried on by Brutton & Burney.

It was intended that the business should be

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

amalgamated with the business of the New Cross Brewery Co. and that the latter company should acquire the shares of Brutton & Burney (Limited).

In August, 1899, Brutton & Burney (Limited) issued a prospectus inviting subscriptions for 1,200 5½ per cent. preference shares of £10 each.

The subscribers for the shares were to receive in exchange for each £10 share a share carrying the same rate of interest in the brewery company fully paid up.

Upon their receiving such shares the shares for which they applied in Brutton & Burney (Limited) were to be allotted by that company to the brewery company.

In November, 1899, applications for 646 shares in all were made to Brutton & Burney (Limited) on the prospectus and the sum of £10 per share was duly paid thereon to the company.

The applicants had allotted to them as fully paid an equivalent number of second preference shares of the brewery company and simultaneously the shares applied for in Brutton & Burney (Limited) were allotted to the brewery company.

No cash passed between the companies at the dates of the issue of the shares, but on the 2nd of February, 1900, each company paid to the other, by an exchange of cheques, the sum of £6,460.

The question raised was whether or not the preference shares of the brewery company had been paid for in cash, and consequently whether or not a contract in writing ought to have been filed under section 25 of the Companies Act, 1867. The brewery company therefore moved for an order under the Companies Act, 1898, that a memorandum might be filed in lieu of a contract. Byrne, J., refused to make the order, being of opinion that the shares had not been issued for a consideration other than cash.

From this decision J. W. & Co., allottees of shares, appealed.

Waggett, for the appellants, contended that the transaction was a contract to exchange shares, and that the arrangement did not create a cash payment.

He referred to *In re Johannesburg Hotel Co.*, 39 W. R. 260, [1891] 1 Ch. 119.

Elgood, for the brewery company.

T. Douglas, for Brutton & Burney (Limited).

RIGBY, L.J., said the application was made in order to render that clear which was otherwise doubtful—namely, whether these shares had been issued under a contract for a consideration other than cash. The shares were issued at a time when section 25 of the Companies Act, 1867, was in force, and were open to the objection that no contract was registered under that section. By the Companies Act, 1898, the court, though no contract had been registered, could make an order for registration of a contract, or, if there was any difficulty, of a memorandum of the contract. His lordship did not see that the power conferred on the court by the Act of 1898 had ever been taken away, and, indeed, there was some foundation for the suggestion that the power had been kept alive by the very terms of the recent Act. No doubt by the Companies Act, 1900, section 25 of the Act of 1867 had been repealed. Nevertheless, a plausible argument might be raised under the Interpretation Act, 1889, that section 25 was not absolutely repealed, but that it remained in force as to companies formed before the Act of 1900. The appellants, therefore, were not unduly pertinacious in urging that they do not know what their position is having regard to section 25. The Act of 1900 says that no proceedings under section 25 shall be commenced after the commencement of the Act. But that may not cover the entire case. Suppose there should hereafter be a winding up of the company and the appellants desired to have a due appropriation of the assets of the company, it was not clear that they would obtain their share of the assets even though no proceedings could be taken against them under section 25. This was not an unreasonable contention, whether well founded or not was another question. For years the position of shareholders who had obtained their shares without paying for them in cash might be seriously imperilled. Under the circumstances, therefore, it was neither unjust nor inequitable that that the court should make an order for the filing of the memorandum, the form of which their lordships had sanctioned. With regard to costs, his lordship thought the company failed to grasp the situation, and they must therefore pay them both here and below, which was not a serious fine for the security they obtained by the order.

VAUGHAN WILLIAMS, L.J., said if one might assume the facts to be as set forth in the memorandum, there could be no difficulty in making the order asked for. But apart from the memorandum he should have felt some difficulty, not as to whether such an order should be made, but whether there was any contract in existence which could be ordered to be filed. Looking, however, at the memorandum, there appeared to be such a contract.

STIRLING, L.J., agreed.

Appealed allowed.

Solicitors, *Laytons; Van Sandau & Co.*

From Q. B. Div. (A. L. Smith, M.R., and Collins and Romer, L.JJ.) — Jan. 29.

SION COLLEGE (*Appellants*) *v.* MAYOR, &c., OF LONDON (*Respondents*). (*a*.)

Local government—Rating—Exemption—Land reclaimed from the Thames—7 Geo. 3, c. 37, s. 51—City of London Sewers Act, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 169.

Section 51 *of* 7 *Geo* 3, *c.* 37, *which vested certain land in the City of London reclaimed from the River Thames in the owners of the land abutting thereon "free from all taxes and assessments whatsoever," only exempts the reclaimed land from rates and assessments that were in existence at the time of the passing of the Act, and therefore does not exempt the land from the consolidated rate imposed on the occupiers of land in the City of London under section* 169 *of the City of London Sewers Act*, 1848, *the consolidated rate being substantially a new rate imposed by that Act.*

Appeal from the judgment of the Divisional Court (Grantham and Channell, JJ.) upon a special case stated on an appeal to the Court of Quarter Sessions for the City of London from a rate made by the respondents: reported [1900] 2 Q. B. 581, 48 W. R. Dig. 121.

On the 23rd of April, 1899, the respondents, acting in pursuance of the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), the City of London Sewers Acts, 1848 (11 & 12 Vict. c. clxiii.) and 1851 (14 & 15 Vict. c. xci.), and the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and the Acts amending the same, duly made a consolidated rate for the year 1899 at 2s. 5d. in the pound (including 1s. 2d. for the school board).

(*a*.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The premises which the appellants occupied, and in respect of which they were assessed, were partly on land which was reclaimed under 7 Geo. 3, c. 37 (an Act for completing Blackfriars Bridge), the same having been previously, until so reclaimed, part of the foreshore of of the River Thames.

The residue of the appellants' premises was on land reclaimed under other Acts.

The questions arising on the appeal were solely concerned with the former portion.

The land and buildings in question, known as Sion College, were acquired by the appellants in 1886 by a conveyance to them dated the 8th of April of that year.

Since the conveyance to the appellants, and before the present rate, they had not been assessed in respect of the portion in question to the consolidated rate, owing, as the respondents alleged, to an error.

The appellants duly appealed against the rate to the Court of Quarter Sessions for the City of London on the ground that the portion of land reclaimed under the Act of 7 Geo. 3, c. 37, was exempt by that statute from all rates, taxes, and assessments whatsoever.

The question for the opinion of the court was whether the land was so exempt or not

By 7 Geo. 3, c. 37, s. 51, the ground and soil of the River Thames so to to be enclosed and embanked in the front of every such ground shall vest in the owners of such ground "free from all taxes and assessments whatsoever."

By the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), s. 169, every such rate (that is, the consolidated rate) shall be made upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the city (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or not by reason of any house or building being situate in any precinct or extra-parochial place or otherwise) according to the full net annual value thereof.

H. Avory, for the appellants.—The general words in section 169 of the City of London Sewers Act, 1848, do not impliedly repeal the special exemption contained in section 51 of 7 Geo. 3, c. 37. [He referred upon this point to *Garnett* v. *Bradley*, 26 W. R 698, 3 App. Cas. 944; *Liverpool Library* v. *Mayor, &c., of Liverpool*, 8 W. R. 498, 5 H. & N. 526; *Thorpe* v. *Adams*, 19 W. R. 352, L. R. 6 C. P. 125.] Assuming that the exemption is not repealed, this consolidated rate is not a new rate, but is merely a new name for an old rate that existed when the Act of George III. was passed. The decisions in *Williams* v. *Pritchard*, 4 T. R. 2; *Eddington* v. *Borman*, 4 T. R. 4; *Perchard* v. *Heywood*, 8 T. R. 468; *Rex* v. *London Gas Light and Coke Co.*, 8 B. & C. 54, are not therefore against the appellants.

Danckwerts, K.C., for the respondents, argued *contra*.

A. L. SMITH, M.R.—The question we have to determine is whether the appellants are liable to be assessed to this consolidated rate. To answer that question we must consider two statutes. It is clear that when the Act 7 Geo. 3, c. 37, was passed, the land upon which Sion College is now built formed part of the northern bed of the River Thames. It was deemed advisable to inclose and embank the north bed of the river, and by section 51 of that Act when that was done the ground so embanked was to vest in the owners of the wharves and grounds abutting on that side of the river "free from all taxes and assessments whatsoever." I come now to the City of London Sewers Act, 1848. By that Act the Commissioners of Sewers of the City of London were created, in whom was vested the sole power, so far as material to this case, of paving, cleansing, watering, lighting, and improving the streets in the city. Section 168 gave them power to make rates for the purposes of the Act, the rate covering the matters above specified being called the consolidated rate; and sections 207 and 208 gave them power to borrow money on the security of the rates. By section 169 the rates are to be made upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the city (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or not by reason of such house or building being situated in any precinct or extra-parochial place or otherwise) according to the full net annual value thereof. It cannot be doubted that, if section 169 stood alone, Sion College would be liable to be assessed to the consolidated rate. It is said, however, that by reason of section 51 of 7 Geo. 3, c. 37, Sion College is exempt. The question in this case depends upon the true meaning of the words in that section, "free from all taxes and assessments whatsoever." Do those words mean free from all taxes and assessments whether already created or to be created after the passing of that Act, or do they merely refer to taxes and assessments already created? We are not left without authority upon that point In the cases of *Williams* v. *Pritchard*, *Perchard* v. *Heywood*, and *Rex* v. *London Gas Light and Coke Co.* section 51 has been interpreted as exempting the land from taxes and assessments then in existence, but not from taxes and assessments that came into existence afterwards. This is made abundantly plain by the judgment of Bayley, J., in *Rex* v. *London Gas Light and Coke Co.* The effect of those decisions is that if the tax or assessment is substantially a new one created after the passing of the Act of George III., then that new tax or assessment does not fall within the exemption. In my judgment, when we consider what this consolidated rate is, it is substantially a new tax created by the City of London Sewers Act, 1848. I agree that it has some of the incidents of the old taxes. But looking at the circumstances in which and the purposes for which it is brought into existence, and the persons by whom it is to be administered, in my opinion it is a substantially new tax or rate. Therefore Sion College does not come within the exemption clause in section 51 of the Act of George III.

Another point was argued upon which I am not going to express any decided opinion—namely, whether, assuming that Sion College comes within the exemption in section 51, that exemption has not been impliedly repealed by section 169 of the Act of 1848. The inclination of my opinion is that it has not been repealed, but I desire to give no judgment upon that point. The appeal must therefore be dismissed.

COLLINS, L.J.—I am of the same opinion. It seems to me that the cases which have been referred to show that this particular exemption in section 51 of 7 Geo. 3, c. 37, only applies to the then existing taxes and assessments. In *Rex* v. *London Gas Light and Coke Co.* Bayley, J., in speaking of the exemption in section 51, says: "Besides, the house and window tax was a new one imposed after the exemption was given; and the exemption may be considered analogous to a covenant to pay taxes, which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation." That being so, we have to deal with the question whether the exemption covers this consolidated rate. It seems to me, looking at the numerous purposes for which the

consolidated rate is raised, many of which were not known or thought of at the time when the exemption was given, that the rate is substantially a new rate, and that it is none the less a new rate because it embraces some of the elements of the old tax. Though there is a certain hardship upon the appellants in this view, still I think that the only true inference is that this consolidated rate is so substantially a new tax as to bring it outside the area of the exemption as defined in the cases referred to. Taking this view of the matter it is not necessary to go into the question whether that exemption has been impliedly repealed by section 169 of the Act of 1848, and I desire to express no opinion upon that point.

ROMER, L.J.—I am of the same opinion. Having regard to the decisions to which our attention has been drawn, decisions which are of such long standing that it would not be becoming in us to review them, in my opinion the operation of the exemption in section 51 of 7 Geo. 3, c. 37, does not extend to any tax or assessment not in existence at the time of the passing of that Act; in other words, the exemption does not extend to any tax or assessment that is substantially new. In my judgment this consolidated rate is substantially a new rate. The purposes for which the rate is raised are various, and many of them are new. Though no doubt some are not new, still the rate is one and indivisible, and cannot be split up. It is substantially a new rate which was not in existence at the date of the passing of the Act of George III. I do not desire to say anything upon the other point referred to by the Master of the Rolls and my brother Collins.

Appeal dismissed.

Solicitors for the appellants, *Clarke, Rawlins, & Co.*

Solicitor for the respondents, *Sir H. H. Crawford.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) — Jan. 21.

LLANBADARNFAWR SCHOOL BOARD v. OFFICIAL TRUSTEES OF CHARITABLE FUNDS. (a.)

Charity—Administration—Action by school board to enforce trust—Consent of Charity Commissioners—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17.

The managers of a national school demised the school buildings and the income of the endowment of the school for the term of sixty years to a school board. During the term the school board brought an action in the county court against the Official Trustees of Charitable Funds, alleging that the income of the endowment had been paid to and received by the defendants, and claiming inquiries and payment of the income so received.

Held, that the action was one to which section 17 *of the Charitable Trusts Act,* 1853, *applied, and that it did not come within the proviso to that section; and that, therefore, it could not proceed without the consent of the Charity Commissioners.*

Appeal from the judgment of a Divisional Court (Lord Alverstone, L.C.J., and Kennedy, J.) on the hearing of an appeal from a judgment of the judge of the Cardiganshire County Court.

By an indenture dated the 16th of November, 1875, the managers of the Penyfron National School demised to the plaintiff school board for the term of sixty years all their interest in the school buildings and the income of all endowments belonging to the school.

The plaintiffs alleged that the vicar of Llanbadarnfawr, who was under the indenture of the 16th of November, 1875, trustee for them of the endowments, had refused to pay them the income of the endowments, and had transferred the endowments to the defendants, the Official Trustees of Charitable Funds.

The plaintiffs claimed inquiries as to what the endowments consisted of, and as to how much of the income thereof had been received by the defendants, and payment of what had been so received.

At the hearing before the county court judge the defendants took the objection that no order or certificate of the Charity Commissioners had been obtained as required by section 17 of the Administration of Charitable Trusts Act, 1853. That section enacts that before any proceedings shall be taken for obtaining any relief relating to any charity, notice of the proposed proceedings shall be given to the Charity Commissioners, who may, by order or certificate, authorize the proceedings to be taken, and give such directions as they may deem proper; and no proceedings for obtaining any such relief shall be entertained by any court except upon such order or certificate; "provided, always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

The county court judge upheld the objection, and gave judgment for the defendants.

The Divisional Court affirmed the judgment of the county court judge.

The plaintiffs appealed.

Bryn Roberts, for the plaintiffs.—This is a proceeding in which the plaintiffs are seeking relief adversely to the charity. The proviso to section 17 therefore applies, and the certificate of the Charity Commissioners is not necessary.

He cited *Holme* v. *Guy.* 25 W. R. 390, 547, 5 Ch. D. 901; *Rendall* v. *Blair,* 38 W. R. 689, 45 Ch. D. 139; *Benthall* v. *Earl of Kilmorey,* 32 W. R 26, 69, 25 Ch. D. 39; and *Rooke* v. *Dawson,* 43 W. R. 313, [1895] 1 Ch. 480.

Vaughan Hawkins, for the defendants, was not called upon to argue.

A. L. SMITH, M.R.—The point in this case is a small one—viz., whether this county court action was a proceeding in which relief was sought by the plaintiffs adversely to any charity. If it was not, then clearly the judgment of the county court judge and of the Queen's Bench Division was right. The action was brought by a school board against the Official Trustees of Charitable Funds, and in my opinion it was an action by *cestuis que trustent* claiming to ascertain what the trust funds consisted of, and to obtain payment of the income of those trust funds which was in the hands of the defendants. I think that the plaintiffs are, under the Elementary Education Acts, in the position of *cestuis que trustent,* and that this is not a claim made adversely to a charitable trust by an outsider, but is a claim by *cestuis que trustent* seeking to enforce a trust which exists in their favour. I therefore think that the appeal must be dismissed.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiffs, *W. R. Owen.*

Solicitor for the defendants, *Solicitor to the Treasury.*

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

From Q. B. Div.
(A. L. Smith M.R., and Collins, L.J.) Nov. 27.

SOLOMON v. MULLINER AND THE MOTOR CARRIAGE SUPPLY CO. (LIMITED). (a.)

Practice—Costs—Action "which could have been commenced in a county court"—Claim in tort exceeding £50—Less than £10 recovered—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 116.

The plaintiff in an action of trover claimed a sum exceeding £50. He recovered a sum less than £10.

Held, that the action was one "which could have been commenced in a county court" within the meaning of section 116 *of the County Courts Act,* 1888, *and therefore the plaintiff was not entitled to costs.*

Lovejoy *v.* Cole, 43 *W. R.* 48, [1894] 2 *Q. B.* 861, *approved.*

Goldhill *v.* Clarke, 68 *L. T. Rep.* 414, 41 *W. R. Dig.* 173, *disapproved.*

Appeal from an order of Day, J., at chambers.

The action was brought against the defendant Mulliner, and the defendants the Motor Carriage Supply Co. (Limited), to recover damages for conversion of a motor car.

The statement of claim alleged that in February, 1900, the motor car was stored for safe custody with the defendant Mulliner; that in May, 1900, Mulliner refused to deliver up the car, and wrongfully parted with it to the Motor Carriage Co.; and that the Motor Carriage Co. illegally retained possession and refused to deliver it up to the plaintiff.

The plaintiff claimed as against the defendants jointly and severally the return of the car or £500, its value, and damages for its conversion.

The plaintiff applied for an *interim* injunction against the Motor Carriage Co. to restrain them from parting with the possession of the car, when a judge at chambers, as the car had been sold, ordered the price (£440) to be paid into court.

The company in their defence admitted liability to the plaintiff for £340, and were willing to consent to an order for the payment out of court of this sum to him, and as to the balance of £100 set up a claim as against the plaintiff.

The plaintiff took the £340 out of court, and the action as against the company proceeded.

Mulliner in his defence with a denial of liability paid 40s. into court as sufficient to satisfy the plaintiffs' claim against him.

The plaintiff took out the 40s. in satisfaction of his claim against Mulliner.

Upon the plaintiff bringing in his bill of costs as against Mulliner for taxation, the master held that he could not allow any costs, as the plaintiff had recovered less than £10.

The plaintiff applied to the judge for an order directing the master to tax the costs upon the High Court scale upon the ground that the action could not have been commenced in the county court, or for a certificate that the action was fit to have been brought in the High Court.

Day, J., refused the application.

The plaintiff appealed.

Wheeler, Q.C., and *J. Todd*, for the plaintiff.—The plaintiff is entitled to his costs as against Mulliner. The action could not have been commenced in a county court within the meaning of section 116 of the County Courts Act, 1888. *Goldhill* v. *Clarke*, 68 L. T. Rep. 414, 41 W. R. Dig. 173, is an authority that, as the plaintiff sued for more than £50, the action was one which could not have been commenced in a county court. *Lovejoy* v. *Cole*, 43 W. R. 48, [1894] 2 Q. B. 861, is in no way contrary to that decision. [They also referred to *Chatfield* v. *Sedgwick*, 27 W. R. 790, 4 C. P. D. 459; *Millington* v. *Harwood*, 40 W. R. 481, [1892] 2 Q. B. 166.] If the plaintiff is wrong upon this point, the learned judge ought to have given a certificate for costs under section 116, as there was sufficient reason for bringing the action in the High Court. [They also argued that the tort was a joint tort, and that in the action the plaintiff had already recovered more than £340 against the joint tortfeasors; but the arguments on this point are omitted, as the court came to the conclusion that the action was for a separate tort against each of the defendants.]

E. Grimwood Mears, for the defendant Mulliner.—The amount recovered is the test whether an action can be commenced in a county court, and not the amount which the plaintiff may choose to indorse upon his writ. The plaintiff here only recovered 40s. against Mulliner, and is not entitled to costs.

Wheeler, Q.C., replied.

A. L. SMITH, M.R.—This is an appeal from an order of Day, J., at chambers refusing to allow the plaintiff costs as against the defendant Mulliner. The facts were these: the plaintiff brought an action of trover against two defendants. Mulliner and the Motor Carriage Supply Co. The plaintiff in his statement of claim alleged two separate and distinct conversions, one by Mulliner and the other by the company. Having alleged those two separate tortious acts he then no doubt went on to claim against them jointly and severally the return of the motor or £500, its value, and damages for its conversion. To that statement of claim the defendant Mulliner, in his statement of defence, with a denial of liability, paid 40s. into court as sufficient to satisfy the plaintiff's claim against him. The plaintiff took the 40s. out of court in satisfaction of his cause of action against Mulliner, and the action against him came to an end. The defendant company had paid into court, under an order of the judge, upon another application, the sum of £440, the price for which they had sold the car, and in their statement of defence they admitted their liability for £340, setting up as to the £100 balance a claim as against the plaintiff. The plaintiff took the £340 out of court, and the action as against the company proceeded. The plaintiff then brought in his bill of costs against Mulliner for taxation, when the master held that, as the plaintiff had recovered less than £10 against Mulliner, he was not entitled to any costs, under section 116 of the County Courts Act, 1888. The plaintiff applied to Day, J., at chambers for an order to the master to tax the costs upon the High Court scale, or for a certificate that the action was fit to be brought in the High Court. Day, J., refused the application.

The first question to consider is as to the meaning of section 116 of the County Courts Act, 1888. For that purpose I will refer to the case of *Chatfield* v. *Sedgwick*, which was a decision upon section 67 of the Judicature Act, 1873, a section which provided that "the provisions contained in the 5th, 7th, 8th, and 10th sections of the County Courts Act, 1867, shall apply to all actions commenced or pending in the said High Court of Justice, in which any relief is sought which can be given in a county court." In that case this court put a construction upon those words. Sir George Jessel said: "In my opinion this means when relief is sought of a kind which can be given by a county court, and does not mean where

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

relief is sought only of such an amount as could be given by a county court." Brett, L.J., said: "I am of opinion that the amount for which the writ was endorsed has nothing to do with the question." Cotton, L.J., agreed. Therefore, this court in 1879 placed a construction upon a section that was in operation at the time of the passing of section 116 of the County Courts Act, 1888. That was a decision that the character of the action must be looked at to see if it is capable of being brought in a county court. Then came the County Courts Act, 1888. It is a consolidating Act, but for some unknown reason the Legislature thought fit to alter the phraseology of the former section. Section 116 is *in pari materiâ* with section 57 of the Judicature Act, 1873, but its phraseology is different, the words being "which could have been commenced in a county court." I read those words as meaning properly commenced, both as to the character of the action and the amount, in a county court. When is an action, as regards amount, ascertained to be within the jurisdiction of the county court? Not when the action is commenced, but when the action has been tried and the amount recoverable has been ascertained. The amount which the plaintiff chooses to claim by his writ is not the material element. The plaintiff here has recovered forty shillings from one of the defendants as sufficient to satisfy his claim against that defendant. That was a claim which could properly have been brought in the county court. The action therefore as against the defendant Mulliner comes within section 116 of the Act of 1888. The learned judge was therefore right. Nor do I see any reason for interfering with his discretion in refusing a certificate under the section. With regard to the cases, there seems to be some confusion among them. I have already pointed out the applicability of the decision in *Chatfield* v. *Sedgwick*. If I have to choose between the decisions in the Queen's Bench, I prefer the decision of the Divisional Court in *Lovejoy* v. *Cole* to the decision of Charles, J., in *Goldhill* v. *Clarke*. In my opinion the amount which the plaintiff claims has nothing to do with the question; the amount recovered is the material amount. The appeal must therefore be dismissed.

COLLINS, L.J.—I am of the same opinion. I have had considerable difficulty in arriving at the result of the decisions on the subject. I should have thought that the rule in the matter would have been well settled, and it is curious that it should have remained indeterminate until now. Speaking for myself, I am unable to reconcile the decision of Charles, J., in *Goldhill* v. *Clarke* with the decision of the Divisional Court in *Lovejoy* v. *Cole*. Charles, J., seems to me to have held that the test whether an action could have been commenced in a county court is, what is the amount indorsed on the writ. *Lovejoy* v. *Cole* seems to me to be against that view, and it appears to me to involve, or at any rate to assume, that the test is, what is the amount recovered in the action. We have to choose between those two cases. When we look at the well-settled policy of the Legislature up to 1888, we see that it was that a plaintiff who recovered something less than a specified sum in an action of a class which could be tried in a county court should not recover High Court costs. That was declared in a most authoritative way in *Chatfield* v. *Sedgwick*. No doubt the words in section 67 of the Judicature Act, 1873, are not quite the same as the words in section 116 of the Act of 1888. Sir George Jessel, in answer to the same argument as was adduced to us to-day, said: "In my opinion this means where relief is sought of a kind which can be given by a county court, and does not mean where relief is sought only of such an amount as could be given by a county court." Is there any reason why the Legislature should have intended, in the later Act, to alter the law as there laid down? I do not see any such reason. In that attitude I approach section 116. A very slight modification of the words will suffice. The words would read "action which could properly have been commenced in a county court," describing the class of action and not the amount claimed. That brings this case within section 116. A question might have arisen of some complication. The plaintiff has not sued for a joint tort, as to which different considerations would have applied. The plaintiff has elected to base his claim against each of the defendants upon a distinct and independent tort. One of the defendants has paid into court a sum of 40s. as sufficient to satisfy the claim against him, and the plaintiff has taken that sum out in satisfaction of that cause of action. He has therefore recovered in that action 40s. as against that defendant, and he is not entitled to costs. Nor do I see any reason for interfering with the discretion of the learned judge in refusing a certificate.

Appeal dismissed.

Solicitor for the plaintiff, *T. Durant.*

Solicitor for the defendant Mulliner, *Piesse & Son.*

High Court of Justice.

Chan. Div. } Farwell, J. } Dec. 5, 6, 12, 13.

JACOBS v. MORRIS & MORRIS. (*a.*)

Principal and agent—Authority—Power of attorney—Construction — General power to borrow — Money applied by agent for his own purposes—Acceptance of bills "per pro"*—Action for money had and received — Application of equitable principles — Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *s.* 25.

A power of attorney which authorizes the agent in England of an Australian firm to purchase goods in connection with the business carried on by the principal, and either for cash or on credit, and, "where necessary, in connection with any purchases made on my behalf as aforesaid or in connection with my said business to make, draw, sign, accept, or indorse any bill or bills of exchange . . . and to sign my name, or my said trading name, to any cheques or orders for the payment of money on my banking account in London, England," does not confer a general borrowing power on the agent.

Money borrowed by such agent under the power from a lender who is fixed with notice of the contents of the power of attorney, and secured by bills of exchange accepted by him in the name of his principal and paid into the London banking account of the firm, and then drawn out by the agent and applied for his own purposes, cannot be recovered in an action for money had and received to the use of the lender in the absence of proof by the lender that the principal knew, or had the means of knowledge, that the money, whilst it remained on the banking account, was the money of the lender, and not of the agent, or else that the principal had the benefit of it.

Moses *v.* Macferlan, 2 *Burr.* 1005, *and* Marsh *v.* Keating, 1 *Bing. N. C.* 198, *discussed and applied.*

In this action the plaintiff, Louis Jacobs, was the sole representative of a business firm in Australia

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law

trading under the name of Jacobs, Hart, & Co., which had had an agency in London since 1882.

For two months in 1888 the plaintiff was the London agent, as his father had been before him.

In 1882 he became a partner in the firm, and in 1898 he became the sole owner of the business.

In 1893 or 1894 his brother Leslie Jacobs became the London agent, and on the 30th of January, 1899, the plaintiff executed a power of attorney appointing Leslie Jacobs attorney "in and throughout the United States and the Continents of America and Europe, and all other parts of the world other than Australasia and New Zealand, for me and in my name or in my said trading name to purchase and to make and enter into, sign, and execute any contract or agreement with any persons, firm, company, or companies for the purchase of any goods or merchandize in connection with the business carried on by me as aforesaid, or for the purchase or acquisition by me of any patent right or of the right to the exclusive or partial use of any patent or invention or for the purchase or acquisition of the right to act as the sole or partial agent of any person, firm, or company, and to make such purchase or acquisition either for cash or on credit or partly for cash and partly on credit as my said attorney shall in his discretion think advisable"; then there was a power to modify or vary the terms and conditions of such contracts or wholly cancel the same on such terms as he might deem advisable; then it went on, "And for me and on my behalf, and where necessary in connection with any purchases made on my behalf as aforesaid or in connection with my said business to make, draw, sign, accept, or indorse any bill or bills of exchange, promissory note or promissory notes, notes of hand, or bills of lading which shall be requisite or proper in the premises, and to sign my name or my said trading name to any cheques or orders for the payment of money on my banking account in London, England."

This banking account had been continuously since 1882 kept in the name of the firm, but since 1893 had been exclusively operated upon by Leslie Jacobs, and it appeared that he had used it partly for the plaintiff's purposes and partly for his own.

Messrs. Morris, the defendants, were a firm of cigar importers who had dealt with the plaintiff's firm since 1889.

In June, 1899, Leslie Jacobs, purporting to act on behalf of the firm, applied to Messrs. Morris for a loan of £4,000, which they agreed to grant on condition that a large order was placed with them.

Accordingly, on the 12th of June they handed to Leslie Jacobs two cheques for £2,000 each drawn to the order of Jacobs, Hart, & Co., and received from him four bills of exchange to that amount, accepted "Jacobs, Hart, & Co., *per pro* Leslie R. Jacobs." These cheques were paid into the plaintiff's firm's banking account in London. On the same day Leslie Jacobs, purporting to act as aforesaid, purchased from Messrs. Morris cigars to £1,070, in payment of which he gave two bills for £1,000 and £70 accepted in the same way. The whole of the £4,000 was drawn out by Leslie Jacobs, and used by him for his own purposes.

In July, 1899, Messrs. Morris repurchased the cigars, and gave their bills in payment.

The plaintiff commenced this action in November, 1899, seeking to restrain the defendants from negotiating these bills, on the ground of fraudulent conspiracy between Messrs. Morris and Leslie Jacobs, who was also made a defendant to the action.

Messrs. Morris counterclaimed against the plaintiff and Leslie Jacobs for payment of the sums due on all the bills, or, alternatively, for the £4,000 as money had and received by the plaintiff to their use, and also for the £1,070 for the price of goods sold and delivered to the plaintiff.

Upon the counterclaim of Messrs. Morris the argument was as follows:

Lawson Walton, Q.C., Butcher, Q.C., and *A. L. Morris*, for Messrs. Morris.—Louis Jacobs is liable on two grounds: (1) By reason of a power to borrow given to Leslie Jacobs by the power of attorney in the words "in connection with any such purchases as aforesaid or in connection with my said business"; under the first branch of this clause he is clearly liable for the two bills for £1,000 and £70 given in payment for the cigars; the second branch implies a power to borrow, else there is nothing to satisfy it, and the words would have no meaning; further, a power to buy "for cash or on credit" implies a power to borrow money under a practice which in fact Leslie Jacobs had adopted, for he had drawn bills on Louis Jacobs and discounted them with the bank, at the same time depositing the bills of lading; this was in effect a borrowing; Messrs. Morris dealt in good faith with Leslie Jacobs and are under no *onus* to show that the money was borrowed on behalf of Louis Jacobs (*Bank of Bengal* v. *McLeod*, 5 Moo. Ind. App. 1, 7 Moo. P. C. 35); if a power to borrow is once made out, it is not necessary for an innocent lender to show the necessity for the particular loan. [*Montaignac* v. *Shitta*, 15 App. Cas. 357; *Bryant* v. *La Banque du Peuple*, 41 W. R. 600, [1893] A. C. 170, was also referred to.] (2) Louis Jacobs is also liable, because the £4,000 went straight into his banking account and so passed into his possession and under his control; this account, having been started by his predecessors in 1882, was continued by him, and in the power of attorney is in fact described as "my banking account"; although Leslie Jacobs used it for his own purposes, his only power to draw on it was derived from the power of attorney given by Louis Jacobs; the control of Louis Jacobs over the account is shown by the fact that he did draw from it himself at a later date, and he could have drawn out the whole £4,000 had he come to London and desired to do so any day after the 12th of June; money thus paid into a man's banking account is "money had and received to the use" of the person paying it in: *Marsh* v. *Keating*, 1 Bing. N. C. 198, at p. 219; *Reid* v. *Rigby*, [1894] 2 Q. B. 40. We ask for an account, and, if the plaintiff is held not to be liable, for judgment against Leslie Jacobs on the implied warranty of authority for £4,000.

Ellis Griffiths, for Leslie Jacobs, submitted to such judgment.

Sir E. Clarke, Q.C., Upjohn, Q.C., and Johnston Edwards, for Louis Jacobs, admitted liability on the two bills for £1,000 and £70. As to the loan of £4,000, Messrs. Morris had notice of the limitation of the power expressly because they saw it, although they did not read it, and impliedly under section 25 of the Bills of Exchange Act, 1882. The power of attorney contains no power to borrow, express or implied, and a document of this nature must be construed strictly: *Bryant* v. *La Banque du Peuple*; *Attwood* v. *Munnings*, 7 B. & C. 278. As to the banking account, it was Leslie Jacobs' account, the only person who can draw upon such an account being he whose signature is deposited with the bank; and at any rate Messrs. Morris must show further that Louis Jacobs knew that the money was there, which he neither did nor could know; only statements showing shipments and not pass-books were sent to him; the *onus* is on Messrs. Morris to show that Louis Jacobs had the money. On the balance

of the account there is money due from Leslie Jacobs to Louis Jacobs; therefore no account ought to be directed, this being a case to which the rule laid down in *Clayton's case*, 1 Mer. 572, does not apply.

[FARWELL, J., referred to *Moses* v. *Macferlan*, 2 Burr. 1005, to show that equitable principles may be applied in this action "for money paid and received."]

FARWELL, J.—This is a case of some little difficulty. So far as regards the issue of fraudulent misrepresentation it is entirely unfounded, and so far as that issue is raised, the action will be dismissed with costs. So far as regards the bills for £1,000 and £70 given for the tobacco which was bought, those, subject to the various arithmetical calculations which have to be entered into for finding the exact balance, are not contested by the plaintiff. They were given under the power of attorney and there must be judgment for the amount.

Then there comes the question about the £4,000. [His lordship then stated the facts of the case, and continued as follows:] The transaction was of this nature: Leslie Jacobs had a meeting with Messrs. Morris; he told them that his firm was going to make cigarettes, and he wanted cash for machinery for this purpose and for buying leaf tobacco; he asked them to lend him the money to enable him to do that. They were willing to lend him the money because they had had dealings with the firm, because Leslie represented to them that they would get the benefit of the efforts of the Melbourne firm to push certain brands of cigars, of which they were the owners, in the colonies. I desire to say that as regards Messrs. Morris I think they are entirely free from any imputation of dishonesty, and that they acted quite honestly and openly, and believed what Leslie told them. They had known him for some years and they believed this was the true story. Then Leslie Jacobs gets the money and pays it into the banking account of Jacobs, Hart, & Co. That banking account was an old account which had been open for years, since 1882; and it was operated upon by cheques drawn by Leslie Jacobs under the power of attorney. It stood in the name of the firm, but Leslie Jacobs used it for his own purposes as well. The only accounts rendered to the plaintiff did not show all the dealings on that account but only such dealings as were properly attributable to the business of Jacobs, Hart, & Co. Now, in the power of attorney there is not a word from the beginning to the end of borrowing money. To begin with, it seems to me that it would be most improbable that a principal should give his attorney power to borrow money if he did not expressly state it. It is laid down in one of the cases cited to me that you do not construe general terms in such a way as to give a power of borrowing if it is not expressly stated; the general words are confined to matters *ejusdem generis* with the specific matters already stated. The specific matters stated there are simply purchases. Now stress was laid by the defendants' counsel on the words "or in connection with my said business," and it is said, with some force, that that points to something other than the purchases which have just been mentioned, which are the only matters specifically mentioned in the body of the power. In my opinion those words are not enough to give a general power of borrowing. I think they are satisfied by attributing them to such transactions as may be necessary to give effect to the modification or variation of the terms of the contract or the cancellation of the same, and I point to them in this very case as an illustration of it because the contract for the sale of cigars, which I have already decided in favour of Messrs. Morris, was varied by a selling back and giving bills of exchange to carry that out. That is, to my mind, within the power; it is not in connection with a purchase, but it is in connection with selling. It is a re-selling which is a part of the powers given to the attorney by way of cancelling the contract of purchase on terms, and practically that is within the terms of the power. It was not contested that that must be within the terms and that there are other matters of that kind which would be sufficient to give effect to those particular words "or in connection with my said business" without giving them the extraordinarily wide signification which the defendants desire now to attribute to them of a general borrowing power.

I do not think I need refer to the cases beyond perhaps the case of *Bryant* v. *La Banque du Peuple*, where Lord Macnaghten, delivering the judgment of the Privy Council, says at p. 177: "Nor was it disputed that powers of attorney are to be construed strictly—that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in the express terms or by necessary implication." That accords really with the case of *Attwood* v. *Munnings*, and also with the other case in which Lord Blackburn pointed out that a power of borrowing was not to be inferred from general words which were to be restricted to matters *ejusdem generis* with those already stated. In *Montaignac* v. *Shitta* the point was a different one, because there was there admittedly authority to borrow, and the question was as to the extent and private quality of that particular power of borrowing. It was argued here that the power of attorney admittedly authorized some borrowing. I do not think that is the true view; the borrowings were described in Louis Jacobs' evidence where the mode of paying for goods bought was detailed by him. "If Leslie," that is, the attorney, "bought for use, the practice was to take the shipping documents to our Australian bank and get the cash from them under a letter of credit with which we furnished him and hypothecate the bills of lading." Now, that is not to my mind borrowing at all within the ordinary sense of the borrowing powers which it is desired to set up under this power of attorney. It was really a special mode of carrying out the power given to the attorney of buying goods and paying for them. It is one thing to give bills, and in that sense, if it be a borrowing, give the bills of lading in addition as security, assuming that is a borrowing. It is one thing to do that in exchange for, or in payment of, goods; it is quite another thing to do it in order to raise money generally for general purposes. A man may well intrust his attorney with power to give a bill of exchange for the specific goods that he purchases; it is quite another thing to say that he gives him a general power to borrow money on his mere statement that he is going to buy goods or is going to apply it in a particular fashion.

I hold, therefore, on construction, that there is no power to borrow under this power of attorney which would authorize the borrowing of the £4,000. That being so, so far as the counterclaim claims judgment on the bills of exchange, it fails.

Then it is said, "But the £4,000 was paid into the banking account of Jacobs, Hart, & Co., and therefore was received by the plaintiff, the sole owner of that title," and if the money had, in fact, ever come into his possession or was there

still, that no doubt would be so. It is claimed under the head of "money had and received." That is a very ancient form of common law action and it is explained by Lord Mansfield in *Moses* v. *Macpherlan*, 2 Burr., at p 1010. He points out that one of the distinc ions between it and an action for debt is that the debt implies contract, whereas this does not. "This brings the whole to the question saved at *nisi prius*, viz., 'whether the plaintiff may elect to sue by this form of action, for the money only, or must be turned round to bring an action upon the agreement.' One great benefit which arises to suitors from the nature of this action"—that is, for money had and received—"is that the plaintiff need not state the special circumstances from which he concludes 'that, *ex æquo et bono*, the money received by the defendant ought to be deemed as belonging to him.' He may declare generally 'that the money was received to his use'; and make out his case at the trial. This is equally beneficial to the defendant. It is the most favourable way in which he can be sued. He can be liable no further than the money he has received, and against that may go into any equitable defence upon the general issue. He may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or to any part of it." I have, therefore, got a case in which the money is paid into the plaintiff's account. If it stopped there, I should have this difficulty to contend with—that the evidence has been left in a somewhat uncertain condition as to whether the plaintiff could draw on that account or not. Mr. Upjohn has contended that it is not sufficient to show merely that the money was paid into the account of the plaintiff, but that it is necessary to go further and show that he could draw on that account. That seems to me to be a question, so far as that point is concerned, of the *onus* of proof. I find an account opened in the name of Jacobs, Hart, & Co. nearly twenty years ago; the account is in that name throughout, drawn upon under the power of attorney to draw cheques upon any London bank that the donor of the power may have, and an operating upon it under that power by Leslie Jacobs. If it were necessary for me to determine it, I should hold that the *onus* would be upon Louis Jacobs to show that he had not the power to draw, because *primâ facie* under those circumstances the man who owns the name in which the account is standing and has been standing for years has authority to draw upon it. But that is not the whole case. The point which I have to determine really goes a step further, and I take the facts necessary for me to find as questions of fact on which the point of law arises from the judgment of the court in *Marsh* v. *Keating*. "It is objected, thirdly, that the proceeds of the sale of the stock never came into the hands of the defendants so as to be money received by them to the use of the plaintiff." I should mention that in that case there was a firm of bankers, Marsh & Co., of which Fauntleroy was a member. Fauntleroy had forged the name of the plaintiff to a power of attorney, under which he realized a sum of £9,000 stock, and paid the proceeds of that sale into the account of Marsh & Co. with another banking firm of Martin & Co. The pass-book of Martin & Co. passed backwards and forwards between the house of Martin & Co. and the house of Marsh & Co. Fauntleroy took the precaution of getting hold of it and keeping it locked up, so that in fact his copartners never saw it and never discovered the particular transaction. There was no entry of this dealing in the house-book, as it was called, of Marsh & Co. The partners in that case did not in fact know, but they certainly had the means of knowing, if they had not somewhat blindly trusted Fauntleroy. The questions under those circumstances which the judges submit for the consideration of the court are: "First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff and not the money of Fauntleroy?" Now, the first question, I have already said, I shall have to answer in this case in the affirmative. I think the money did actually come into possession of Louis Jacobs, because I consider it went into his banking account on which he could have operated. I think if he had telegraphed or written a letter which reached the bankers the day after the £4,000 had been paid in, and before it was paid out again, he certainly could have effectually stopped it being paid out. In that case he certainly would now have the money in his hands, money belonging to Messrs. Morris, and I cannot see that he would have any defence to the action if the money were in fact in his hands. In that case it would have actually come into his possession, and it would be in his hands.

But then there comes the second question which the court considered it was necessary to answer in the plaintiff's favour before they could succeed: "Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff and not the money of Fauntleroy." Now I apprehend that this is really the application of those equitable principles which Lord Mansfield referred to in an action "for money had and received." It was not enough to show that the money merely went into the account of Louis Jacobs unless you also show that he also had the means of knowing it, or that he did know it. Now, in the present case the defendant, Messrs. Morris, necessarily from my construction of the power of attorney, knew that Leslie Jacobs had no power to borrow under the power of attorney. I do not say they actually knew it, because I accept their evidence that although the power was actually produced to Arthur Morris he did not in fact read it, but, unfortunately for him, relied on the assurance of Leslie Jacobs that he had the power of borrowing under it; but that Mr. Lawson Walton admitted he could not rely upon. Messrs. Morris are fixed with notice of the true contents of the power of attorney, and therefore they knew for this purpose that Leslie Jacobs had no power to borrow money. They therefore lend money not to him, but to Jacobs, Hart, & Co., knowing that Leslie had no power to borrow for Jacobs, Hart, & Co. It is not, therefore, sufficient for them to prove that they paid the money into Jacobs, Hart, & Co.'s account, on which they knew, or must have known, that Leslie Jacobs had the power to draw. I do not know whether that really was proved or not, nor do I think it material. It is not enough when they also knew that Louis Jacobs had not authorized that payment in by them by way of loan to him. They have to go further and show that he knew of it, either that he had the benefit of it, or that he knew of it and adopted it. He certainly never got the benefit of it. The account has been put in, and it is quite plain he never got the benefit of it, and he certainly never knew of it. His evidence on that is plain. He never knew this was borrowed, nor did he know of any borrowing at all (I find that as a fact) by Leslie Jacobs, or of any misdealing with the power of attorney except that which is stated in his re-examination. He says he had no knowledge of the

transaction in June, 1899. He first heard of the transaction after he revoked the power of attorney. He knew in 1896 that Leslie had misused his name and the power of attorney for the benefit of Jay Brothers, who were brothers of Leslie and of Louis Jacobs This was the only instance of misuse that he knew of. Then he says he never knew of any borrowing at all in his name under the power of attorney. That being so, I find an equity against Messrs. Morris, because they chose to lend to a man who had not authorized anybody to borrow for him. True, it went into his account, but he did not want it and never asked for it, and no doubt his agent had no authority to do that. On the other hand, I find no equity affecting Louis Jacobs to prevent him saying "I did not want any money borrowed; it was never paid for my benefit; I never got the smallest part of it, and so far as I am concerned it has nothing to do with me from beginning to end." In my opinion that is the meaning of the second point put in *Marsh* v. *Keating*, and on that issue I find in favour of Louis Jacobs. I think the case before Charles, J., and Collins, L.J., entirely bear this out, and, so far as I am aware, there is no authority to the contrary. The result is that, as regards the action, therefore, on the bills for £4,000, and the alternative claim "for money had and received," the claim fails.

Solicitors, *Robinson & Stannard; Hollams, Sons, Coward, & Hawkesley; Edwards & Cohen.*

Court of Appeal.

Appeal.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Feb. 22.

INMAN v. ACKROYD & BEST (LIMITED). (*a.*)

Company—Directors' remuneration—Yearly payment—Apportionment—Apportionment Act, 1870 (33 & 34 *Vict. c.* 35).

By the articles of association of a joint-stock company it was provided, inter alia, *that "the directors shall be paid out of the funds of the company by way of remuneration for their services, and exclusive of their travelling expenses, the sum of £125 per annum per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportions and manner as the directors by agreement may determine, and in default of such determination, equally."*

Held, that, according to the true construction of such article of association no director is entitled to remuneration except for service for a whole year, and therefore any director who retires before the end of the year cannot claim a proportionate remuneration.

Salton *v.* New Beeston Cycle Co., 47 *W. R.* 462, [1899] 1 *Ch.* 775, *approved.*

Swabey *v.* Port Darwin Gold Mining Co., 1 *Megone C. C.* 385, *distinguished.*

This was an appeal by the plaintiff from the judgment of Bruce, J., at the trial without a jury (82 L. T. Rep. 621).

The action was brought by James Inman against the defendant company, who carry on business at Hombrigg Works, Morley, Yorkshire, to recover remuneration for services rendered by him as a director of the defendant company.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The plaintiff claimed, firstly, the sum of £125, being one year's remuneration from the 1st of November, 1897, to the 1st of November, 1898.

This part of the claim the defendants admitted and paid into court, together with certain expenses incurred by the plaintiff.

Further, he claimed the sum of £72 18s. 4d. as being remuneration from the 1st of November, 1898, to the 30th of May, 1899, the date when he resigned his office as director.

As regards this part of the claim the defendants contended that under the articles of association the plaintiff was not entitled to claim remuneration for a period of less than a year's service.

Bruce, J., having taken time to consider his judgment, held that the plaintiff could not recover in respect of his services as director for any period less than a completed year.

By the articles of association of the company it is provided as follows:

81. "The directors shall be paid out of the funds of the company by way of remuneration for their services, and exclusive of their travelling expenses, the sum of £125 per annum per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportion and manner as the directors by agreement may determine, and in default of such determination, equally. The said sum of £125 per annum may be increased, but not diminished, by the company in general meeting."

82. "The office of director shall be vacated . . . (*d*) If by notice in writing to the company he resigns his office."

89. "The company may by extraordinary resolution remove any director before the expiration of his period of office, and may by ordinary resolution appoint another qualified person in his stead. The person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed."

E. Bray, for the appellant.—It was contended on behalf of the defendants in the court below that article 81 should be construed as meaning that a director is only entitled to remuneration for services for a complete year. That is a possible construction, but it is an unreasonable one. It would involve this, that a director who has served 364 days out of a year, and is then by extraordinary resolution removed under article 89, would have no claim to remuneration for his services during that period. The reasonable construction of article 81 is that each director is to be paid at the rate of £125 per annum, just as in speaking of interest at 5 per cent. per annum it is understood to be at the rate of 5 per cent. per annum. The case of *Swabey* v. *Port Darwin Gold Mining Co.*, 1 Megone C.C. 385, is an authority in support of this proposition. The article of association in dispute in that case is erroneously reported as stating that the directors were to be remunerated "at the rate of £200 per annum." The articles of association in that case have been examined, and it appears that the article in question provides that the directors should "each receive out of the funds of the company the sum of £200 per annum," and does not contain the words "at the rate of." This case shows that where there is a reciprocal right—as in the present case—to determine the services of a director before the whole year is completed there is an implication that he shall be paid a proportionate part of his salary. There is no stipulation here that a director is not to be paid any salary unless he completes the year's service, and therefore his salary must be considered as accruing from day

to day by virtue of section 1 of the Apportionment Act, 1870. Under that Act "annuities" includes "salaries."

Counsel also cited *Ellis* v. *Rowbotham*, 48 W. R. 423, [1900] 1 Q. B. 740.

A. Llewelyn Davies, for the respondents, was not called on.

A. L. SMITH, M.R.—This an appeal from a judgment of Bruce, J., in favour of the defendant company, in an action brought against them to recover directors' fees. The plaintiff had served as a director for a year and seven months. His claim in respect of the year's service was not disputed, and the amount was paid into court. The question we have to decide is whether he is entitled to any fees in respect of his services for the seven months. This depends upon the true construction of the company's articles of association. The article in particular which we have to construe in this case differs from that which was before the court in the case of *Swabey* v. *Port Darwin Gold Mining Co.*, as well from the version as it was assumed by the court there to be, as from what it now turns out was the actual version. In the report of that case it is assumed that by the articles there in question the remuneration to be paid to the directors was to be "at the rate of" £200 per annum. It now appears that the true version of the article was that the directors should "each receive by way of remuneration out of the funds of the company the sum of £200 per annum."

In my opinion the interpretation put by Bruce, J., in his clear and excellent judgment upon the article with which we have to deal in the present case is absolutely right. This article provides that "the directors"—that is, the whole body of the directors—"shall be paid out of the funds of the company, by way of remuneration for their services . . . the sum of £125 per annum per director . . . and the same shall be divided amongst them in such proportion as the directors by agreement may determine, and, in default of such determination, equally." Suppose, for instance, that there were four directors. At the end of the year there would be £500 to be divided amongst them in such proportions as the directors might by agreement determine, and in default of such determination equally. That is to say, the lump sum which is to be divided amongst the directors at the end of the year is to be made up of the several sums of £125 for each director who has served a whole year. On the plaintiff's behalf it is contended that the article should be read as meaning that each director shall be remunerated at the rate of £125 per annum. This is not what the article says. What it says is that the fund to be divided amongst the directors is to be made up of £125 for every director who has served a year. In my opinion the true construction of this article is that no director is entitled to remuneration except for service for a whole year. The two cases relied upon by Bruce, J.—namely, *Salton* v. *New Beeston Cycle Co.*, 47 W. R. 462, [1899] 1 Ch. 775, and *In re Central de Kaap Gold Mines*, 69 L. J. Ch. 18, 48 W. R. Dig. 42, are to the same effect. The case of *Swabey* v. *Port Darwin Gold Mining Co.*, in my opinion, is distinguishable. The article there, whether we take it to have been according to the true or the assumed version of it, differs from the article we are now construing.

As regards the Apportionment Act, it appears to me that as the directors had not served for a further whole year, there was no sum of money to be apportioned.

COLLINS, L.J.—I am of the same opinion. Whether the case of *Swabey* v. *Port Darwin Gold Mining Co.* was decided upon the article in the form as is stated in the report or upon the article as it was in reality, I think that decision does not cover this case. In the present case there is no fixed sum to be paid to any director. The article in fact negatives the right of any director to claim before the end of the year any specific sum. According to the article a fund is to be formed at the end of the year consisting of the several sums of £125 for every director who has served for that year, and such fund is to be divided amongst such directors in such proportion as they shall agree to determine, and in default of such determination it is to be divided amongst them in equal shares. *Ex hypothesi*, this division is only to be made at the end of the year, and therefore any director who retires before the end of the year is unable to participate in the division. He is not in a position to claim any sum as due to him up to the time of his retirement. I entirely agree with what the learned judge in the court below said upon this point.

But I prefer to say nothing as to the alternative suggested by him in that passage in his judgment where he says: "That, I think, means that the aggregate sum must depend upon the number of directors who have completed a year's service, or at least upon the number of directors who are serving at the time the annual sum is paid out of the funds of the company." I pronounce no opinion as to that alternative.

ROMER, L.J.—I entirely agree and have nothing to add.

Appeal dismissed.

Solicitors for the appellant, *Clements, Williams, & Co.*

Solicitors for respondents, *Walker & Rowe*, for *Wooler, Burrows, & Burton*, Leeds.

From Prob. Div. & Adm. Div. (Rigby and Stirling, L.JJ.) — Jan. 16, 17.

BARRY v. BARRY. (a.)

Divorce—Practice—Agreement for separation—Petition for alimony pendente lite—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.

Where an action has been brought for dissolution of a marriage, the inquiry as to alimony, on a petition for alimony pendente lite, *ought to proceed in the usual way, notwithstanding that the parties have entered into a separation agreement providing for an allowance to be paid by the husband to the wife.*

This was an appeal from an order of Jeune, P.

In July, 1900, the plaintiff Mrs. Barry filed a petition for the dissolution of her marriage with the defendant.

In October she filed a petition for an allowance by way of alimony *pendente lite*, and for the maintenance and education of the children of the marriage.

There were seven infant children, of whom the plaintiff had the custody.

In an affidavit filed in answer to the petition for alimony the husband alleged that in March, 1900, an agreement for separation had been entered into between himself and his wife, by which he had agreed to pay her an allowance of £600 a year for her maintenance and the maintenance and education of her children. And he submitted that it was neither just nor equitable that she should receive any sum by way

(a.) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

of alimony or for the maintenance and education of her children beyond what was provided by the agreement.

By his subsequent answer to the divorce petition he submitted that the wife was estopped by the separation agreement from seeking either a divorce or a separation on the grounds alleged by her.

The wife denied that she had executed the alleged agreement.

The wife had instituted an action in the Chancery Division to set aside the alleged agreement for separation, and the husband had instituted a cross-action in the same division for specific performance of the agreement.

On these facts Jeune, P., made an order staying the trial of the petition and all proceedings for alimony pending the hearing of the two Chancery actions.

On the 14th of November, 1900, that order was, by consent, discharged by the Court of Appeal, each party undertaking that the Chancery action and cross-action should be stayed until after the hearing of the divorce action or till further order.

The plaintiff then issued two summonses—one in the alimony proceedings, that the husband should give a further or better answer to the petition for alimony as to his means; the other to strike out so much of the answer to the petition for dissolution of the marriage as alleged that the separation agreement constituted a bar to the proceedings on that petition.

On the hearing of these summonses Jeune, P. ordered that (1) the question of the existence of the alleged separation agreement, and (2) the question whether by reason of that agreement (if existing) the wife was not entitled to any relief on her divorce petition should be tried before the other questions in the suit. In the meantime all other proceedings in the divorce action were stayed.

The wife appealed.

Beddall and *Grazebrook*, for the appellant.

Sir E. Clarke, Q.C., Bargrave Deane, Q.C., and *Priestley*, for the respondent.

RIGBY, L.J.—The plaintiff brings an appeal, with the leave of the court, against an order which directs, in substance, that two issues—one, whether there is in fact an agreement for separation, and the other, whether, if in fact there is that agreement, it would be a bar or an estoppel against proceedings for a divorce—shall be heard separately. In the first place the alimony proceedings were peremptorily stopped, because the practice of the Probate Division, as set up, is never to go out of an agreement entered into by the parties for a separation, and never to inquire, when there is such an agreement, as to the husband's means. Now, as regards that, Mr. Beddall agrees for the purposes of the alimony application, and that only, to admit that there is an agreement for a separation. But I hold that, notwithstanding any practice in the Divorce Division—a practice depending, I think, a great deal upon the circumstance that the proceedings are generally by no means of a lengthy kind in point of time—he has the opportunity and the right of urging upon this occasion any arguments that are properly to be brought forward under section 35 of the Matrimonial Causes Act, 1857, and section 4 of the Matrimonial Causes Act, 1859, on the part of the children of the marriage. And further, inasmuch as there is that submission on the part of the husband in his answer to the alimony proceedings, I am of opinion that he ought to give the proper particulars showing what his income is to enable the court of first instance, or the Court of Appeal if it ever should be necessary, to decide what the alimony *pendente lite*, including an allowance for the maintenance and education of the seven children, should be. [His lordship then went on to direct the issues to be tried together.]

STIRLING, L.J.—I agree with the conclusion which has been stated by Rigby, L.J. [His lordship then stated the facts in the case, and continued:] Now, having made these preliminary observations, I have to express my opinion as to how these pending summonses should be dealt with. First of all, as to the question of alimony. Mr. Beddall has expressly stated that, for the purpose of considering that application he does not propose to dispute the existence or binding nature of the agreement; for the purposes of the application for alimony the existence of a binding agreement is to be assumed. But he says that he is entitled, under the statutory provisions which have been referred to in section 35 of the Act of 1857 and section 4 of the Act of 1859, to make an application with reference to the maintenance and education of the children of the marriage. It seems to me that in that he is well founded. In my judgment, therefore, upon that submission of Mr. Beddall the inquiry as to alimony ought to proceed in the usual way.

Appeal allowed.

Solicitors, *Booth & Smee; Harcourt, Sons, & Rolt.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } Jan. 11, 12, 21.

NEW YORK SECURITY AND TRUST CO. v. KEYSER & CO. (a.)

Lunacy—Lunatic—Private international law—English domicil — Committee appointed by foreign court — Personal estate in England—Right to recover—Next friend—R. S. C., ord. 16, *r.* 17.

A lady of English domicil, confined in an asylum at New York, is adjudged by an order of the Supreme Court of New York to be of unsound mind, and committees are appointed authorized to take proceedings in England to recover and obtain payment of certain trust personal estate in this country to which she was entitled. In this action, brought by the committees and the lunatic lady suing by a "next friend" against the trustees,

Held, that the court had a discretion to order the moneys claimed to be paid to the committees; and, in the circumstances of this case, the proceedings being for the benefit of the lady, an order was made recognizing the title of the co-plaintiffs to recover the property.

This was an action brought by the committees appointed by a foreign court of a lunatic lady whose domicil was English but whose residence was within the jurisdiction of the foreign court by which she had been adjudged incompetent to manage herself or her affairs, and who was now suing by a "next friend" as co-plaintiff, against trustees for the recovery of certain personal estate in England to which she was entitled; and the question was whether the courts of this country could recognize the title of the co-plaintiffs to sue in this country.

The facts as taken from his lordship's considered judgment were as follows:

Mrs. Samuels, the widow of Mr. Robert Samuels, was entitled to a sum of cash in court to the credit of this action, and to further sums of cash repre-

(a.) Reported by A. GLYNNE-JONES, Esq., Barrister-at-Law.

senting dividends in the hands of trustees of a post-nuptial settlement, and of her father-in-law's will, and she would become entitled during the remainder of her life to the future income arising from those trust funds.

She was born in America, but for the purpose of this case it was assumed that her domicil became on her marriage and still was English.

She was now a person of unsound mind; she was, after her husband's death, confined in a private lunatic asylum in Brussels till November, 1899, when she was removed by her family to an asylum in the State of New York, where she was still remaining.

By an order of the Supreme Court of the State of New York she was adjudged incompetent to manage herself or her affairs, and the plaintiff company were appointed committees of her person or property, and by a subsequent order they were authorized and directed to take proceedings in this country to recover and obtain payment of the moneys and property above referred to.

According to the law of New York the property of a lunatic does not vest in the committees, but they have a right to receive and give good discharges for it.

It was admitted that the income of the above property was more than was required for the maintenance of the lunatic in the asylum.

In these circumstances the action was brought by the committees and Mrs. Samuels, "a person of unsound mind, by A. T. Tallent, her next friend," as co-plaintiffs, against the trustees.

Danckwerts, Q.C., and *Methold*, for the plaintiffs.—This case is within the principle of *Didisheim* v. *London and Westminster Bank*, 48 W. R. 501, [1900] 2 Ch. 15. The court has jurisdiction to make the order asked for in respect of the lunatic's personal estate: *Scott* v. *Bentley*, 3 W. R. 280, 1 K. & J. 281. The action is properly brought by the lunatic and her next friend, ord. 16, r. 17, and is for the lunatic's benefit. The domicil of the lunatic is not material to the question of jurisdiction, though it may affect the exercise of the discretion of the court: *In re Princess Bariatinski*, 1 Ph. 375.

They also referred to *In re Houstoun*, 1 Russ. 312, where a commission of lunacy was issued against a lunatic when he was in this country with one of his committees, though he was found lunatic, and his property was situated, abroad.

Hon. E. C. Macnaghten, Q.C., and *G. S. Alexander*, for the defendants.—The case is not covered by that of *Didisheim* v. *London and Westminster Bank*. In *In re Garnier*, 20 W. R. 288, L. R. 13 Eq. 532, an Englishman, while resident in France, was found a lunatic by the laws of that country, and a *curator bonis* was appointed by the French court; upon petition by the *curator bonis* for payment of a fund in this country as a matter of right, the court held it could exercise a discretion, and the lunatic appearing to be sufficiently provided for, an order was made for retaining the *corpus* of the fund in court and the payment of the dividend only to the curator. [They also referred to *Cooper* v. *Cooper*, 13 App. Cas. 88, 36 W. R. Dig. 98; *Sottomayor* v. *De Barros*, 26 W. R. 455, 3 P. D. 1.] In any event the defendants are justified in requiring the protection of an order of the court.

COZENS-HARDY, J., after stating the facts, continued: Now if the lady had been domiciled in New York, the decision of the Court of Appeal in *Didisheim* v. *London and Westminster Bank* would have been a direct authority. But Lindley, L.J., says: "If, as in *In re Garnier*, the lunatic were an Englishman temporarily abroad and confined as a lunatic abroad, we should feel considerable difficulty in holding that the courts of this country were bound to recognize the title of a foreign curator to sue in this country." The question thus left open now arises for my decision. Now, the lady sues by a next friend as provided by ord. 16, r. 17, which refers to the old practice of the Chancery Division. There is nothing in that order or in the established practice of the Court of Chancery prior to that order which entitles the next friend—who may be anybody—to receive and give a discharge for the lady's money. It is only on the footing that the action is for the benefit of the lady, and in so far as it is for her benefit, that the court allows such an action to proceed: see *Light* v. *Light*, 25 Beav. 248; *Beall* v. *Smith*, 22 W. R. 121, L. R. 9 Ch. App. 85, *Jones* v. *Lloyd*, 22 W. R. 785, L. R. 18 Eq. 265, *Porter* v. *Porter*, 36 W. R. 580, 37 Ch. Div. 420. I cannot regard the action as for all purposes the same as it would be if Mrs. Samuels were of sound mind and suing in her own right. But the lady joins as co-plaintiffs persons who are competent to receive and give a good discharge for the money, and she asks that payment may be made, not to Mr. Tallent, her next friend, but to them. I am not satisfied that this lady, suing by her next friend, can, as a matter of strict right, insist upon such payment; but in the exercise of my discretion I can see no reason why the order should not be made in the present case. The lady is by birth an American. Her relations reside there. The New York court has jurisdiction over her by reason of her residence in that state, and wholly irrespective of any question of domicil. I am satisfied that everything that is proper and kindly is being done for her custody and her comfort. *Scott* v. *Bentley*, as explained and corrected by the Court of Appeal in *Didisheim's case*, seems to me to warrant the view which, apart from authority, I should be prepared to adopt. The defendants are abundantly justified in the course they have taken of requiring the protection of an order of the court. The costs as between solicitor and client, including any charges and expenses properly incurred, must be paid out of the fund in court, and the balance of that fund, together with the sums of cash now in the hands of the trustees—the precise figures will doubtless be agreed—must be paid to the plaintiff company as committees. With regard to future income, I think it will be better simply to give liberty to the respective trustees to pay to the committees until further order, and, general liberty to apply will be reserved.

Solicitors, *R. S. Taylor, Son, & Humbert*; *Montagu, Mileham & Montagu*.

Chan. Div. } March 13.
Buckley, J. }

In re GASELEE AND THE LONDON COUNTY COUNCIL. (*a.*).

Lands Clauses Acts — Practice — Costs — R. S. C., ord. 22, *r.* 17—*Cost of* interim *investment—Lands Clauses Consolidation Act*, 1845, *ss.* 70, 80.

Where money has been paid into court under the Lands Clauses Consolidation Act, 1845, *and has been invested in securities authorized by R. S. C., ord.* 22, *r.* 17, *the whole of the costs of such investment must be paid by the promoters of the undertaking under section* 80 *of the said Act as though such securities had been expressly authorized by the Act.*

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

The applicant in this case was tenant for life of certain property which had been taken by the London County Council under compulsory powers conferred by the Lands Clauses Consolidation Act, 1845.

The money payable by the council under the Act in respect of the property had been paid into court and invested by way of *interim* investment in certain registered railway stocks authorized by R. S. C., ord. 22, r. 17.

The cost for brokerage in making this investment was more than would have been the case had the money been invested in Government securities authorized in terms by section 70 of the Lands Clauses Consolidation Act, 1845, and the point raised for the decision of the court was whether the council was liable to pay the difference between the brokerage which would have been charged had the *interim* investment been made in Consols and that chargeable for investments authorized by the enlarging ord. 22, r. 17.

At an early stage of the proceedings the objection was taken by the judge that the question was one which ought to come before the taxing-master in the first instance, and that inasmuch as there had not been any taxation as yet, the court was not in a position at this stage of the proceedings to decide the point. But, as both parties desired that the point should be decided at once, his lordship agreed to hear and determine the question.

Dickinson for the tenant for life.—The money paid into court under the Act of 1845 was cash under the control of the court within R. S. C., ord. 22, r. 17: *Ex parte St. John Baptist College, Oxford*, 31 W. R. 55, 22 Ch. D. 93, and *In re Brown*, 38 W. R. 529, 59 L. J. Ch. 530. The investment was therefore a proper one and ought to be treated for the purposes of section 80 of the Lands Clauses Act, 1845, as though it had been in terms authorized by that Act. Although the costs referred to in section 80 in terms only refer to the investments mentioned in the Act, yet the spirit of the Act and justice require that they should cover the case of investments authorized by an order enlarging the scope of section 70. The Act must be construed according to its spirit: *In re Bethlem Hospital*, 23 W. R. 644, L. R. 19 Eq. 457. The case of *In re Brown* does not decide the point expressly but does so by inference. The costs of *interim* investment must be treated as a whole and not divided or split up.

F. Thompson, for the London County Council.—We ask for a declaration that the council is not liable to pay for the costs of investment more than it would have had to pay if the investment had been in Consols. The liability of the council is limited strictly by section 80 of the Lands Clauses Act, and the reason why the tenant for life chose to invest in railway stock rather than in Consols is because the former yields more income. It is therefore only fair that the tenant for life rather than the council should bear the increased cost of investment.

BUCKLEY, J., in giving judgment, held that the investment actually made being authorized by ord. 22, r. 17, was a proper *interim* investment for money paid into court under the Lands Clauses Consolidation Act, 1845 (*Ex parte St. John Baptist College, Oxford*, and that in accordance with *In re Bethlem Hospital*, the spirit of the Act required that the council, having taken a person's land against his will in exercise of the powers conferred by the Act, should pay for the whole of the costs of the brokerage in making the *interim* investment which had been made, notwithstanding that the securities were authorized, not by the Act of 1845, but by the enlarging ord. 22, r. 17. This view was supported by the case of *In re Brown*.

Solicitors for the tenant for life, *Janson, Cobb, Pearson, & Co.*

Solicitor for the London County Council, *W. A. Blaxland*.

Chan. Div. Buckley, J. — Feb. 21.

In re MOORE.
MOORE *v.* MOORE. (*a.*)

Inland revenue—Estate duty—Incidence of estate duty as between an appointed fund and residuary estate—Property passing to the executor as such—Finance Act, 1894, *ss.* 6 (2), 9 (1).

A fund appointed by will pursuant to a general power of appointment is property which passes to the executor as such within the meaning of the Finance Act, 1894, *so that, apart from a direction to the contrary in the will, the estate duty payable in respect of the fund is payable out of the general residuary estate of the deceased rather than out of the appointed fund.*

In re Treasure, 48 *W. R.* 696, [1900] 2 *Ch.* 648, *not followed.*

Under her father's will a testatrix had a general power of testamentary appointment over a legacy bequeathed to her by the said will, and the question before the court was whether the estate duty payable on the death of the testatrix in respect of the fund which was the subject of the power, was payable out of the fund or out of the testatrix's general residuary estate.

The testatrix's father, Charles Moore, died on the 15th of August, 1869, and the testatrix died unmarried on the 26th of August, 1899, having by her will appointed the fund to persons other than her legal personal representatives or her residuary legatee. There was no direction in the will as to payment of duty.

Stokes, for the residuary legatee.—The fund was property of which the deceased was competent to dispose, but it was not property which passed to the executor as such within the meaning of the Act: *In re Treasure, Wild* v. *Stanham*, 48 W. R. 696, [1900] 2 Ch. 648. Strictly speaking, only legal assets pass to the executor as such. The appointed fund here was not legal assets, but equitable assets. The donee of the power appointed the fund over the heads, so to speak, of the executors. It is true that the executors could get at the fund for payment of debts of the deceased, but that is not material in this case.

Counsel also referred to *Cook* v. *Gregson*, 4 W. R. 581, 3 Drew. 547; *In re Philbrick's Settlement*, 13 W. R. 570, 34 L. J. Ch. 368; and *In re Hoskin's Trusts*, 25 W. R. 779, 6 Ch. D. 281.

Hon. Frank Russell, for the appointees of the fund.—The decision on this point in *In re Treasure* was not necessary for the proper disposal of that case. Further, it is inconsistent with *In re Philbrick's Settlement* and *In re Hoskin's Trusts*. The court is not bound by *In re Treasure*.

Dawnay, for the executors of the will.

BUCKLEY, J.—The question here is whether the sum of £740 estate duty payable in respect of the fund over which the deceased testatrix had a general power of appointment ought to be borne by the appointed fund or by the testatrix's general residuary

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

estate. The answer to this question depends upon sub-section 1 of section 9 of the Finance Act, 1894, which in turn raises the question whether the appointed fund passed to the executor as such.

Now, the substance of the case of *In re Philbrick's Settlement* is that as between the trustees of a deed and the executors of a will the latter take the place of the former for the purpose of distribution. But it does not say in what character the executors take as against creditors and the like.

The case of *In re Hoskin's Trusts* says that the executor gets such a fund *virtute officii*. When he gets the fund, his duty is to discharge the debts and then to hand over what is left to the appointee. The appointed fund comes to the executor because he has proved the will. He only becomes trustee when he has paid the debts of the deceased.

As to the case of *In re Treasure*, the decision on this point was not necessary for the proper disposal of that case, because there the will of the deceased directed testamentary expenses to be paid out of residue. In the present case there was no such direction. Moreover, the decision is inconsistent with *In re Hoskin's Trusts* and *In re Philbrick's Settlement*. I am therefore entitled to disregard *In re Treasure*, and I hold that the appointed fund passed to the executor as such, and that consequently the estate duty payable in respect of the appointed fund must be paid out of the general residuary estate.

Solicitors for all parties, *Parker, Garrett, & Holman.*

K. B. Div. (Div. Court). (Wills and Channell, JJ.) Feb. 6.

LUMLEY *v.* H. J. OSBORNE. (*a.*)

County court—Prohibition—Jurisdiction—Commitment—Judgment against firm in High Court of Justice—Judgment summons against alleged partner in county court—County Court Rules, ord. 25, *rr.* 14b, 17—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

The affidavit which the plaintiff is required to file under ord. 25, *r.* 14b, *of the County Court Rules must set out the sources of information and grounds of belief on which the plaintiff alleges the defendant is a partner in the firm against which he has recovered judgment, or there is no jurisdiction in the county court judge to try the case.*

Where a plaintiff has recovered judgment against a firm in the High Court, he can enforce such judgment against a partner by a judgment summons in the county court, and on the trial of such judgment summons the county court judge, if satisfied that the defendant is a partner in the firm, and that he has had means since the date of the judgment against the firm, may forthwith commit the defendant to prison.

Motion by the defendant for a writ of prohibition to the judge of the Croydon County Court to prohibit him from further proceeding upon an order of commitment made by the said judge on the 23rd of March, 1900, ordering the above-named defendant to be committed to prison for forty-two days.

On the 28th of November, 1899, the plaintiff issued a writ in the High Court of Justice against the firm of Osborne & Co. for £41 2s. 6d. (price of goods supplied), and served the writ on the defendant as manager of the said firm.

On the 21st of December, 1899, the plaintiff recovered judgment by default.

On the 5th of March, 1900, the plaintiff took out a judgment summons under ord. 25, r. 14*b*, of the County Court Rules in the Croydon County Court against the defendant as a partner in the firm of Osborne & Co. The summons was returnable on the 23rd of March, 1900, and on that day the summons was heard. Two witnesses were then called by the plaintiff, but the defendant did not appear. The judge held that the defendant was a partner in the firm, and that he had had means to pay, and made an order of which the following are the material parts:

"Whereas the plaintiff obtained a judgment against the defendant in the High Court of Justice on the 21st of December, 1899, for the sum of £41 2s. 6d., and there is now due and payable upon the said judgment the sum of £41 2s. 6d.

"And whereas a summons was at the instance of the plaintiff duly issued out of this court by which the defendant was required to appear personally at this court on the 23rd day of March, 1900, to be examined on oath touching the means he had then or had had since the date of judgment to satisfy the sum then due and payable in pursuance of the judgment, and to show cause why he should not be committed to prison for such default, which summons has been proved to this court to have been personally and duly served on the defendant.

"And, whereas, at the hearing of the said summons it has now been proved to the satisfaction of this court that the defendant has had since the date of the judgment the means to pay the sum then due and payable in pursuance of the judgment and had refused or neglected to pay the same, and the defendant had shown no cause why he should not be committed to prison.

"Now, therefore, it is ordered that for such default as aforesaid the defendant shall be committed to prison for forty-two days."

S. R. Earle, for the applicant, the defendant.—The judge had no jurisdiction to make the order because the plaintiff had not recovered judgment against the defendant in the High Court of Justice. The judgment recovered by the plaintiff was against the firm of Osborne & Co. A judgment recovered in the High Court against the firm could only be transferred into a judgment against an individual partner by proceedings in the High Court. The county court had no jurisdiction to try the question of partnership on a judgment obtained against the firm in the High Court. Ord. 25, r. 17, of the County Court Rules only deals with cases where judgment is recovered against an individual and not against a firm. Ord. 25, r. 14*b*, only applies to cases where judgment has been recovered in a county court. Further, the affidavit filed by the plaintiff was not in the form required by ord. 25, r. 14*b*, of the County Court Rules, being Form 52*c*, since it did not state the sources of information and grounds of belief: *McIntosh* v. *Simpkins*, *ante*, p. 241, 17 Times L. R. 195. Also there was no evidence of means given. There was no judgment against the defendant until the judge on the 23rd of March, 1900, found he was a partner in the firm of Osborne & Co., and since the committal order was made immediately there could have been no evidence adduced that between the time of judgment and the committal order the defendant had means to pay.

Whateley, for the plaintiff.—The judgment was properly removed to the county court under ord. 25, r. 17, of the County Court Rules, and the judgment summons was rightly taken out under ord. 25, r. 14*b*. The county court judge's power under the Debtors Act, 1869, s. 5, had been exercised in accordance

(*a.*) Reported by J. A. GREENE, Esq., Barrister-at-Law.

with the terms of that Act. As to the defect in the affidavit, it was not a substantial defect and had been waived by the defendant. There was evidence of means.

Earle replied.

Cur. adv. vult.

Feb. 9.—WILLS, J.—I think that the proceedings in the county court were rightly taken under the 5th section of the Debtors Act, 1869. At the time when that Act was passed it was not possible to sue a firm in the firm's name. Now that can be done, but it is necessary to show that any individual against whom it is sought to enforce a judgment recovered against the firm is a partner in that firm. In the present case the proceedings are governed by ord. 25, r. 14*b*, of the County Court Rules, and I have little doubt that, although in 1869 there was no power of applying a judgment against a firm against a member of that firm, the county court judge was right in this particular. Instead of having two summonses, one to ascertain whether the person is a member of a firm, and another to ascertain whether it is a proper case to commit the defendant, one summons is sufficient to do both. This is a reasonable procedure and diminishes expense, an important consideration. I think that, the defendant having been found to be a partner, the debt was due from him at the time when judgment was entered against the firm, although it could not be enforced against him until the fact of partnership was established. That being so, I think there was jurisdiction to commit under section 5 of the Debtors Act, 1869. If the judge came to the conclusion that he was a partner and took in consideration that he had had means to pay the judgment previously obtained, I think the judge was right. As to the point, however, that the affidavit under ord. 25, r. 14*b*, of the County Court Rules must show the grounds of belief that the defendant is a partner, I think the contention of the defendant is right. It is a matter of substance, and has been decided so to be. This being so, there was no jurisdiction, provided the objection was taken. There is contradictory evidence on this point, but on the whole I think that the objection was taken and not waived.

As to there being no evidence of means the evidence again conflicts. I am not satisfied that there was such evidence. I can't help thinking that the witnesses were only called to show defendant was a partner, and that such evidence was taken as being evidence of means to pay as well as of partnership. But I do not decide this point, as it is not necessary.

CHANNELL, J., concurred, and added that on the question of waiver it was for the plaintiff to show that the defendant had waived the objection to jurisdiction, and this, in his opinion, the plaintiff had failed to do.

Writ of prohibition issued.

Solicitors, *Croft & Mortimer*, for the applicant; *W. Hood*, Croydon, for the plaintiff.

K. B. Div.
(Bruce and Phillimore, JJ.) Jan. 28.

STOKES *v.* HILL. (*a.*)

Mine—Minerals—Coal mine—Abandonment of mine—Delivery of plan of abandoned mine to Secretary of State—Limitation of proceedings—Notice requiring compliance with the Act—Continuing offence—Coal Mines Regulation Act, 1887 (50 & 51 *Vict. c.* 46), *ss.* 38 (5), 59.

By section 38 *of the Coal Mines Regulation Act,* 1887, *it is enacted that, where a mine or seam of coal is abandoned, the owner shall, within three months after the abandonment, send a plan of the workings to a Secretary of State, and that, if an owner of a mine or seam fails to comply with the section, he shall be guilty of an offence; and it is further provided* (*sub-section* 5) *that "a complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens."*

Held, that an information could not be laid of an offence under the section after a period of six months had elapsed since the service of a notice to comply with the section.

Held, also, that section 59 (2) *of the Act did not apply to offences under section* 38.

Held, also, that a notice in the following terms: "I beg to point out to you that no plan of the abandoned workings in the seven-feet coal seam has yet been forwarded as required by section 38 *of the Mines Act. Will you please give the matter your early attention?" is a good notice under the section.*

Case stated by justices of Warwick.

On the 27th of July, 1900, an information was laid by the appellant, one of his Majesty's inspectors of mines, against the appellant charging him that, being the owner of Pooley Hall Mine, he did unlawfully fail to comply with section 38 of the Coal Mines Regulation Act, 1887, as amended by section 4 of the Coal Mines Regulation Act, 1896, in that he did not within three months after the abandonment of the seven-feet coal seam in such mine send to a Secretary of State an accurate plan of the said seam showing the boundaries of the workings thereof up to the time of abandonment, and the several other particulars specified in the last-mentioned Act.

When the information came on for hearing the preliminary objection was taken on behalf of the respondent that the justices had no jurisdiction to hear it, on the ground that the information was laid after the period of six months referred to in section 38 (5) had elapsed.

It was proved that the abandonment of the seam took place prior to the 25th of January, 1900, and that on that date the appellant wrote a letter to the Pooley Hall Colliery Co. in the following terms:

"Gentlemen,—I beg to point out to you that no plan of the abandoned workings in the seven-feet coal seam has yet been forwarded as required by section 38 of the Mines Act. Will you please give the matter your early attention.—Yours faithfully, A. H. STOKES."

This letter was received in due course on the following day.

On the 25th of May, 1900, the appellant gave a formal notice requiring the Pooley Hall Colliery Co. to comply with the requirements of section 38.

It was contended on behalf of the respondent that the letter of the 25th of January, 1900, constituted a notice under section 38 (5) of the Coal Mines Regulation Act, 1887, to the owner to comply with the requirements of that section; that the six months within which the information is required to be laid by that section and sub-section commenced to run from the service thereof—namely, the 26th of January, 1900; that it was not open to the appellant to extend the period of six months therefrom by giving one or more subsequent notices; and that the information having been laid on the 27th of July, 1900, was out of time.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The justices upheld the contention of the respondent and dismissed the information subject to a case for the opinion of the High Court.

H. Sutton, for the appellant.—The letter of the 25th of January, 1900, was not a notice to comply with the requirements of the section. It was merely a courteous reminder to the colliery company of their duty under the Act. The time for laying the information, assuming the time was limited, did not begin to run until the 25th of May. The true construction, however, of section 38 (5) is that where notice has been served there is no limitation of time for laying an information. The words "within six months" in the sub-section do not govern the words "after service, &c.," but only govern the words "after abandonment of the mine or seam." If the words "after service, &c.," were governed by the words "within six months," then the final words "whichever last happens" would be unintelligible. Failure to send in plans of an abandoned working in accordance with section 38 after notice by an inspector is a continuing offence punishable under section 59 (2), which provides that "every person who is guilty of an offence against this Act for which a penalty is not expressly prescribed, shall be liable to a fine not exceeding, if he is the owner, agent, or manager, or under-manger, twenty pounds, and if he is any other person, two pounds, for each offence; and if an inspector has given a written notice of any such offence, to a further fine not exceeding one pound for every day after such notice that such offence continues to be committed."

Simey, for the respondent.—The letter of the 25th of January, 1900, is a good notice under the section, and as the information was not laid within six months after it the proceedings must fail. The construction put upon section 38 (5) by the appellant does not make the words "whichever last happens" intelligible. The only use of the notice was to make a point of time from which the period of limitation should run.

BRUCE, J.—I think that the justices were right. The question turns upon section 38 (5) of the Coal Mines Regulation Act, 1887. I think that that section is a section of limitation. First, it limits the time for laying an information for offences against the section to a period of six months after the abandonment of the mine. Then the section proceeds "or after service on the aforesaid owner of a notice, &c." I think that those words mean within six months after the service of the notice referred to. It is true that a difficulty is created by the final words in the section—"whichever last happens," and if those words could be construed intelligibly effect ought to be given to them. But they are inconsistent with either of the constructions of the section which have been suggested, and they throw no light upon the question before us. They must therefore be disregarded. Next, was the information laid within six months after service of the notice. That depends upon whether the letter of the 25th of January, 1900, was a good notice under the section. The letter does not formally require compliance with the requirements of the section, but it does refer to the section and to the necessity for sending in a plan of the abandoned seam, and it calls upon the respondent to give his early attention to the matter. We ought not to be too strict in cases of this kind, and I, for my part, cannot say that the justices were wrong in holding that the letter of the 25th of January, 1900, constituted a good notice.

With regard to the argument that the offence was a continuing one which could be dealt with under section 59, I am clearly of opinion that that section does not apply to the offence. Section 59 only refers to cases where "a penalty is not expressly prescribed," and by section 38 (4) a penalty is expressly prescribed for offences against this section.

PHILLIMORE, J.—I am of the same opinion and for the same reasons.

Solicitor for the appellant, *Treasury Solicitor*.

Solicitor for the respondent, *Tarry, Sherlock, & King*.

Q. B. Div.
(Bruce and Phillimore, JJ.) } Jan. 21.

SOUTHALL NORWOOD URBAN DISTRICT COUNCIL (*Appellants*) v. MIDDLESEX COUNTY COUNCIL (*Respondents*). (a.)

Local government—Sewage—Sewage matter — Pollution of stream—Trade effluent—Pollution of river—Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c.* 75), *s.* 7—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55).

A district council, having taken over a sewage farm from a local board, their predecessors in title, collected and treated on such farm the sewage of the district and discharged the effluent therefrom into a river. By a contract between the board and the owner of a margarine factory it was agreed that the said owner should be entitled to discharge the liquids and effluents from the said factory into the sewers of the board, subject to the condition that the said owner before so doing should extract all solid fat or fatty matters in suspension from the said liquids and effluents. This condition was not efficiently fulfilled, and the result was that the effluents, containing fat and fatty matter, became mixed with the sewage on the farm and the land became clogged with the fat and was not capable of filtering the sewage. On a summons being taken out under the Middlesex County Council Act, 1898, *by the county council against the district council for "causing and suffering" sewage and other injurious and offensive matter to flow and pass from the said farm into the river the justices ordered the district council to discontinue such flow or passage.*

Held, on appeal, that such order was rightly made, and that the district council had "caused or suffered" the filthy effluent to pass into the river. The district council were not compelled to receive into their sewers liquid containing fat or fatty matters, and if they did receive it they were bound to adopt some process on their farm which would effectually purify the effluent therefrom.

Special case.

This was an appeal by the Southall Norwood Urban District Council on a case stated by justices of the peace for the county of Middlesex upon the hearing of a summons issued by the respondents charging the appellants with having, contrary to the Middlesex County Council Act, 1898, on the 26th day of July, 1899, and on other days caused and suffered sewage and other offensive and injurious matter to flow and pass from certain land and premises known as the Southall Norwood Sewage Farm, and owned and occupied by them, into the Grand Junction Canal after notice thereof.

In the case stated the following facts appeared:

Prior to the year 1891 the Rural Sanitary Authority of Hillingdon had acquired for the purposes of a sewage farm seventeen acres of land adjoining and abutting on a canalized portion of the River Brent at the junction of the parishes of Norwood, Isleworth,

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

and Hanwell, and had constructed thereon sewage works upon which the sewage of the precinct of Norwood was treated, the effluent therefrom being discharged into the said river.

In the year 1891, the said precinct was formed into an urban sanitary district, and a local board was constituted for such district, and the said farm and works were vested in the said board, which by operation of the Local Government Act, 1894, became known as the Southall and Norwood Urban District Council.

In 1894 the said local board, the predecessors in title of the appellants, was required by the owner of land, within its district, upon which it was intended to erect a margarine factory to afford facilities for carrying the liquids and effluent from the factory into the sewers, and an agreement, dated the 23rd of January, 1894, was entered into between the board and the said owner whereby it was agreed that, subject to the conditions therein mentioned, the owner for the time being of the factory should be entitled to discharge the liquids and effluents from the factory into the sewers of the board.

One of such conditions was that the owner should erect and maintain on part of the land upon which the factory was to be built settling tanks for the purpose of extracting, so far as might be practicable, all solid fat or fatty matters in suspension from the said liquids and effluent.

The factory having been erected, and disputes having arisen between the board and the owner of the factory as to his compliance with the aforesaid condition of the agreement, an action was commenced on the 14th of May, 1896, in the Chancery Division of the High Court of Justice, wherein the board claimed an injunction restraining the said owner, his servants, agents, and workmen, from discharging the effluent from the said works into the sewers of the board until such effluent had been properly purified, and from causing or permitting the liquids and effluents from the works to flow into or remain in the sewers or drains of the board so as to become or cause a nuisance, damage, or annoyance to the board, and from committing a breach of the aforesaid contract.

The action came on for trial upon the 1st of June, 1897, and an order by consent was made on the defendant in the action expressing his intention to execute further works, whereby in case the board should not be satisfied with what should be done the matter should be referred to an arbitrator to say whether there were settling tanks sufficient, when efficiently worked, for the purpose of extracting, so far as might be practicable, all solid fat or fatty matters in suspension from the liquid and effluent discharged from the factory into the sewers of the board.

The board not being satisfied with the further works executed pursuant to the aforesaid order, the above question was submitted to an arbitrator for his decision. The said arbitrator decided that the settling tanks and other alterations in the defendant's plant would be sufficient for the purpose of extracting, as far as might be practicable, all solid fat or fatty matters in suspension from the liquid and effluent referred to in the said order of the court.

Notwithstanding the award the liquid and effluent discharged from the factory into the sewers of the board still contained solid fat or fatty matter in suspension, which was, in itself, objectionable and difficult to treat, and such effluent when mixed with the sewage rendered it more difficult for the appellants to effectually purify the sewage and the effect was to so clog the land in the said farm that it became saturated with sewage and was rendered less capable of effectually filtering the sewage of the district.

On the 15th of August, 1899, the respondents, in pursuance of the provisions of the Middlesex County Council Act, 1898, gave to the appellants notice in writing requiring them within three months to discontinue the flow or passage into the stream, known as the River Brent, of sewage or any other offensive or injurious matter from the said sewage works.

In September, 1899, the appellants discovered that the drains of certain chemical works in their district had, without their knowledge or consent, been connected with a sewer belonging to them, whereby large quantities of effluent were discharged from the said chemical works into the appellants' sewer.

The effect of this discharge into the appellants' sewers being to render it still more difficult to purify the sewage discharge from such sewers upon the farm, notice was served by the appellants upon the owners of the said chemical works on the 10th of December, 1899, requiring them to disconnect from the appellants' sewers the drains by means of which the effluent was discharged from the chemical works into the sewers, and on the 12th of the same month the said drains were disconnected in accordance with such notice.

The justices found that sewage and other offensive matters had flowed or passed into the River Brent from the appellants' farm and works subsequently to the expiration of three months from the date of the said notice of the 15th of August, 1899, but they were satisfied that such flow or passage would contain sewage and other offensive and injurious matters so long as the reception of effluent from the margarine factory and from the chemical works into the appellants' sewers and the infusion of such effluent into their system continued.

On behalf of the appellants it was contended that they had not, under the circumstances, caused or suffered sewage or other offensive or injurious matter to flow or pass into the River Brent within the meaning of section 13 of the Middlesex County Council Act, 1898, and that the justices had, therefore, no power to require them under section 34 of that Act to abstain from carrying or suffering to flow or pass into the said river any sewage or any other offensive or injurious matter.

On behalf of the respondents it was contended that an offence had been committed by the appellant within the meaning of section 13 of the Act.

The justices were of opinion that the appellants were persons causing or suffering sewage and other offensive and injurious matter to flow or pass into the said river from the said farm and works, and they, accordingly, ordered the appellants to discontinue such flow or passage.

The question for the opinion of the court was whether or not the appellants were, under the circumstances, persons causing or suffering sewage or other offensive or injurious matter to flow or pass from their said farm and works into the said River Brent.

The Middlesex County Council Act, 1898, provides as follows:

13. "(1) Whenever any sewage or any other offensive or injurious matter is caused or suffered to flow or pass into any stream, then and in every such case, even though such sewage or matter aforesaid had been lawfully so caused or suffered to flow or pass before the passing of this Act, the council may under the hand of the clerk of the council give notice in writing to the person causing or suffering the same so to flow or pass requiring him within a time to be specified in such notice, but not being less than three months, to discontinue such flow or passage.

"(2) The council may in like manner if they think

fit at any time extend the time specified in such notice by another notice in writing."

"(4) Any person to whom any notice is under this section given by the council shall . . . discontinue the flow or passage of the sewage or matter to which the notice refers, and in default of so doing shall for every such offence be liable to a penalty not exceeding one hundred pounds and to a daily penalty not exceeding fifty pounds."

15. "Any notice given under the provisions of this part of the Act by the council to the owner or occupier of any land or premises shall continue in force notwithstanding any change in the ownership or occupation of such land or premises and shall affect the owners and occupiers of such land or premises in succession to the owner or occupier under whom such notice was served in like manner and in every respect and with the same obligations and consequences as though such successive owners were the owner or occupier upon whom such notice was served."

R. C. Glen, for the appellants.—The district council did not, under the circumstances of the case, cause or suffer the sewage or injurious matter to flow into the river. They were bound by section 7 of the Rivers Pollution Prevention Act, 1876, and section 15 of the Public Health Act, 1875, to receive the effluent from the margarine factory, and they did everything in their power to render such effluent pure. There is no finding in the case of any act of negligence or misfeasance on their part, and they cannot be held liable for a mere nonfeasance: *Reg.* v. *Staines Local Board*, 60 L. T. Rep. 261, 37 W. R. Dig. 131; *Attorney-General* v. *Guardians of Poor of Union of Dorking*, 30 W. R. 579, 20 Ch. D. 595; *Brown* v. *Mayor, &c., of Dunstable*, 47 W. R. 538, [1899] 2 Ch. 378; *Eastwood Brothers (Limited)* v. *Honley Urban District Council*, 48 W. R. 614, [1900] 1 Ch. 781; *Peebles* v. *Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 384 (reported on appeal 45 W. R. 454, [1897] 1 Q. B. 625); *Pasmore and Others* v. *Oswaldtwistle Urban District Council*, [1898] A. C. 387, 46 W. R. Dig. 106.

Lord Robert Cecil, Q.C., and *Herbert Smith*, for the respondents.—It is admitted on the special case that sewage does pass into the River Brent. Firstly, the appellants are not bound to receive this margarine refuse into their sewers. There is no obligation on their part to receive a liquid containing solids in suspension, and they have power to obtain an order prohibiting the margarine manufacturers from putting such liquid into the sewers: *St. Helens Chemical Co.* v. *Corporation of St. Helens*, 1 Ex. D. 196, 24 W. R. Dig. 165. The appellants should not have entered into the agreement with the manufacturers. A public body cannot make an agreement releasing them from the performance of a binding duty: *Ayr Harbour Trustees* v. *Oswald*, 8 App. Cas. 623, 32 W. R. Dig. 112. Even if the appellants are bound to receive this margarine refuse, they must effectually treat it. There is nothing to show here that they could not send it into the river as a perfectly pure liquid. If they receive the margarine refuse they must alter their treatment of it.

R. C. Glen replied.

PHILLIMORE, J.—My learned brother has asked me to deliver my judgment first. We both think this conviction should stand. The section of the special Act of Parliament, the Middlesex County Council Act, 1898, under which the proceedings are taken is section 13. [The learned judge here read the section.] The person who is given notice under this section has the power of demanding an extension of time, and if an extension of time is not assented to, he can go to arbitration before an arbitrator appointed by the Board of Trade in order to obtain such extension of time as the arbitrator may think proper. In this case there was a sewage farm constructed by the predecessors in title of the present district council, the appellants, to which the sewage of the district was led and on which it was treated, and from which it passed out by an effluent. An effluent, we know, is a modern word meaning the pure, or as near as possible the pure residuum, after some impure substance has been deposited; and we may take it that the effluent from this sewage farm was a pure effluent until the circumstances which I am now going to mention happened. Latterly the effluent is no longer pure; it carries sewage and other offensive matter into the River Brent, and if there is anybody who causes or suffers sewage or other offensive matter to flow or pass into the stream, then such person or body comes within the purview of section 13.

Now it is said by the Middlesex County Council that the Southall Norwood Urban District Council, who are the owners, occupiers, and managers of this sewage farm, are persons who "cause or suffer" this noxious matter to flow into the stream, and they have given them the proper notice provided under the section. The notice does not seem to have been appealed against, and after the lapse of time prescribed by the notice, the offensive matter continuing to pass into the stream, a summons was issued, and the county council obtained a conviction.

Now Mr. Glen has argued that you do not "cause or suffer" if you are merely acting ministerially; and he cited to us a number of cases of public bodies who had been held not to "cause or suffer" sewage to reach a river when all they have done has been not to interfere with the user of the pipes which they took over from some prior body, and into which pipes individuals have a right of passing their sewage. They do not use the pipes, but simply leave them there; they do not make the pipes, and, therefore, it was suggested, they do not "cause or suffer," because they could only stop the sewage passing through the pipes in one of two ways, either by a physical obstruction, which probably would be a breach of their statutory duty, and would create an intolerable nuisance, or by bringing actions against every individual who drained into their sewers, which would be an intolerable burden upon the local board, and a burden which is not imposed upon anyone without express words.

The courts have held they are not so bound to do; neither can an action lie against the persons draining into the sewer, nor can they be indicted.

In this case there is a channel sending clean water into the River Brent, and what the district council have done is that they collect all the sewage of the district upon a sewage farm and have then, when the sewage failed to be properly treated thereon, issued the filthy effluent into the river. It seems to me that is a case in which they may well be said to have "caused or suffered" it to pass; if not "caused" at any rate "suffered."

Here there is a margarine manufacturer who is entitled, under the Rivers Pollution Act, to require the local board of health or the district council to take into their sewers the liquid products of his factory. I do not think he is entitled to send large masses of solid matter in solution into the sewer. The appellants, instead of leaving the manufacturer to his legal rights, entered into an agreement with him under which he was given, in addition to those rights, certain contractual rights, and they were given certain contractural rights as against him. They say he has not fulfilled his duty according to his contract, and they brought an action against him,

and the matter was referred to an arbitrator, who held that he would be discharging his duty if he retained all the solids and sent down nothing except the liquid. The case as stated does not find that that award has been enforced nor that there has been any attempt to enforce it; I am not quite sure in a case like this there would not be a duty on the district council to attempt to enforce the award. Be that as it may, the fact remains that the fatty matter from the margarine factory comes upon the soil of the sewage farm, and the effect on the farm is that the latter gets coated with grease and the sewage does not sink into the soil, but passes down the effluent into the river, together with fatty matter. It seems to me that the district council are "suffering" the matter to come into the river. I think upon the true construction of the case as stated it would appear that even if the manufacturer continues to send, without filtration, the whole of his refuse, including the solids, into the sewers of the district council, there is nothing to show that the district council could not nevertheless, by some form of treatment at the sewage farm, prevent the effluent being otherwise than pure. It may be very expensive, or disagreeable, or hard on them that they should be put to further expense, but still there is nothing which compels them, firstly, to receive these solids, and, secondly, so to treat the sewage that the result is an impure instead of a pure effluent. I rest my judgment upon the fact that the district council, having taken over this place from its predecessors in title, collect and treat the sewage thereon and discharge it through an effluent, and *primâ facie* they have to excuse themselves from discharging a filthy effluent into the river. The excuse they offer is not sufficient. Either they ought not to have made an improvident contract, if it is improvident, or, having got a contract, should see that the contract is properly carried out, and either not receive the stuff which they are not bound to receive or take the trouble of enforcing their right under the award and have the stuff purified, or, finally, if they must receive the stuff in its present state, they ought to take other steps on the sewage farm to purify the effluent. I therefore think there must be judgment for the respondents.

BRUCE, J.—I agree with my learned brother in the conclusion at which he arrives. I also agree with the reasons he has given, and I have nothing to add.

Appeal dismissed with costs.

Solicitor for the appellants, *A. Lawrence Houlder.*

Solicitor for the respondents, *Sir Richard Nicholson.*

IN BANKRUPTCY.

Q. B. Div.
(Wright and Phillimore, JJ.) } Nov. 20; Dec. 1.

In re OWEN. (*a.*)

Bankruptcy—Practice—Bankruptcy notice—Final judgment—Order for revocation of patent—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (g) *—Patents, Designs, and Trade-Marks Act,* 1883 (46 *&* 47 *Vict. c.* 57), *s.* 26.

An order of the Chancery Division revoking a patent, with costs, under section 26 *of the Patents, Designs, and Trade-Marks Act,* 1883, *is not a final judgment within the meaning of section* 4, *sub-section* 1 (g), *of the Bankruptcy Act,* 1883, *and a bankruptcy notice cannot be founded thereon.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Appeal from the dismissal of a petition by the registrar of the county court at Guildford.

Upon the 28th of November, 1899, the petitioning creditor obtained an order upon a petition in the Chancery Division revoking certain letters patent granted to William Owen, and ordering the said William Owen to pay to the petitioner his costs to be taxed. The costs were taxed and certified on the 7th of May, 1900, at £858 14s. 9d.

Upon the 14th of May, 1900, the petitioning creditor issued a bankruptcy notice founded upon the order and certificate for the sum of £874 9s., the amount of the costs with interest, as being due upon a final judgment. The debtor failed to comply with the notice within the statutory period, and the creditor presented a bankruptcy petition against him upon the 23rd of May.

The petition came on for hearing upon the 2nd of October, when it was dismissed by the registrar, who held, on the authority of *In re Binstead, Ex parte Dale,* 41 W. R. 452, [1893] 1 Q. B. 199, that the order on which the bankruptcy notice was founded was not a "final judgment" within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883.

The petitioning creditor appealed.

Carrington and *G. G. Solomon,* for the appellant.—The registrar did not rightly understand the decision in *In re Binstead, Ex parte Dale;* the real principle is to be found in *Ex parte Moore, In re Faithfull,* 33 W. R. 438, 14 Q. B. D. 627, where an order for payment of costs was held to be a "final judgment" within the meaning of this sub-section. Further, *In re Gaulard & Gibb's Patent,* 35 W. R. 301, 34 Ch. D. 396, North, J., held that a petition for the revocation of a patent was to all intents and purposes an action. The meaning of the term is also discussed in *Bradlaugh v. Clarke,* 31 W. R. 677, 8 App. Cas. 354, and *In re A Bankruptcy Notice, Ex parte The Official Receiver,* 43 W. R. 305, [1895] 1 Q. B. 609.

R. Vaughan Williams, for the respondent, referred to *Ex parte Chinery, In re Chinery,* 32 W. R. 469, 12 Q. B. D. 342, and was stopped by the court.

WRIGHT, J.—The Court of Appeal in several cases, in particular in *Ex parte Chinery, In re Chinery, In re Binstead, Ex parte Dale,* and *In re A Bankruptcy Notice, Ex parte The Official Receiver,* have put upon section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, a construction which we are bound to follow, although the judgments of the Lords Justices may not have been altogether identical. According to those cases there must be a final judgment, a final judgment in an action—and the action, in the view of some at least of the Lords Justices, must be an action within the meaning of section 100 of the Judicature Act, 1873—that is, a "civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court."

In the present case the order of the court does not purport to be a judgment, but only a declaration. It is not made in an action, but on a petition, which is commenced, not by writ nor in any manner prescribed by Rules of Court, but in manner prescribed by section 26 of the Patents, Designs, and Trade-Marks Act, 1883.

On these grounds this appeal must be dismissed with costs.

PHILLIMORE, J., concurred.

Appeal dismissed; leave to appeal granted.

Solicitors for the appellant, *J. & M. Solomon.*

Solicitors for the respondent, *Ashurst, Morris, & Crisp.*

House of Lords.

From C. A. (England). Dec. 10.

HODDINOTT (PAUPER) v. NEWTON, CHAMBERS, & CO. (LIMITED). (a.)

Master and servant—Employers' liability—Accident—Compensation—Building exceeding thirty feet in height—Building being constructed or repaired by means of a scaffolding—Scaffolding inside building—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-section* 1.

A building over thirty feet high, measured to the top of the roof, was being stiffened with iron stays some months after its completion according to the original specifications. Planks supported on ledgers and trestles, inside the building and about eight feet from the ground, were used for the purposes of the work, and while lifting material on this platform one of the workmen was injured.

Held (Lord Shand *and* Lord Lindley *dissenting*), *that the building was being constructed by means of a scaffolding within the meaning of section* 7 *of the Workmen's Compensation Act,* 1897.

Decision of the Court of Appeal (47 *W. R.* 499, [1899] 1 *Q. B.* 1018) *reversed.*

The meaning of "building being constructed or repaired by means of a scaffolding" considered.

This was an appeal from the decision of the Court of Appeal (47 W. R. 499, [1899] 1 Q. B. 1018).

The facts are concisely summarized in Lord Macnaghten's judgment.

Ruegg, Q.C., and *Moyses* (*Holland Biggs* with them), for the appellant.

Bray, Q.C., and *Spencer Bower*, for respondents.

THE HOUSE took time for consideration.

Lord MACNAGHTEN.—The claim in this case as presented to your lordships is a claim under the Workmen's Compensation Act, 1897, for compensation in respect of an accident to a workman. It seems that about six months before the date of the accident the London General Omnibus Co. took over a building which had been erected for them. They have used it as stables ever since. It may be assumed, I think, that the building was erected in accordance with the specifications prepared on behalf of the company, and that at the time when it was taken over nobody contemplated that anything further in the way of construction would be required. However, when the stables came to be used it was found that there was some vibration, and the company determined to have the building stiffened. Accordingly, they engaged the respondents, who are ironwork contractors, to put in some heavy iron stays, weighing about 1cwt. apiece, between the girders and the pillars which supported the building. The appellant's husband was employed by the respondents on the work. In the course of his employment he met with an accident. He slipped and fell off a temporary staging while helping another workman to lift one of these iron stays. The stay fell upon him and he was crushed to death. The learned judges of the Court of Appeal agreed with the county court judge in holding that the building exceeded thirty feet in height. They were not agreed on the question whether the staging erected for the purpose of the work in hand was a "scaffolding" within the meaning of the Act. A. L. Smith, L.J., without expressing any opinion of his own, thought there was evidence sufficient to justify the finding of the county court judge to that effect. Collins, L.J., took a different view. Romer, L.J., did not attempt to determine the point. All the learned judges, however, concurred in holding that the building in which the accident happened was not at the time being constructed or being repaired, and that the respondents were not undertakers within the meaning of the Act. The ground of their decision is stated very clearly by A. L. Smith, L.J.: "Were the iron-founders," he asked, "who put in these stays constructing the building? That cannot be," says his lordship, "for it had already been constructed, and what was then done was only an addition to that which it had originally been contemplated would be wanted. How can it be said that the deceased was employed in a building which was being constructed? The construction was at an end, but some strengthening was afterwards needed to be done." Collins, L.J., as it seems to me, went rather further, following out the views expressed by the other members of the court to their logical conclusion. He thought that the only work contemplated by the Act in the case of a building besides demolition was construction or repair of the building "as a whole."

The argument addressed to your lordships by the learned counsel for the respondents followed the same lines. The building, they said, when it was handed over, was complete according to the original design. Construction, therefore, necessarily was at an end. What was done afterwards, whether it was the result of caprice on the part of the company's engineer, as they suggested, or a *bonâ fide* attempt to make the building more suitable for the purpose for which it was intended, was only an alteration, or at the most an addition, and perhaps an improvement. It was not either construction or repair.

I do not think it advances the argument to call the work an alteration, or an addition, or an improvement. I should suppose that any one of those terms might be applied to it properly enough. The question, as it seems to me, is this: Was the work—the thing that was actually being done—a work of construction or a work of repair, or something which was neither the one nor the other, neither construction nor repair? It seems a strong thing to say that when a building is once completed according to the original design you cannot have anything further in the way of construction unless the work be of such a character as to make the building practically a new building. That, however, was the argument. But the Act, it will be observed, uses the word "construction," not the word "erection." It speaks of a building "being constructed," not of a building "being erected." And it couples "construction" with "repair." Now repair, as the word is commonly understood, is repair whether much is done or little. Repair for the most part is occasional and partial. A man does not usually wait to repair his house until it is altogether ruinous and on the point of falling to pieces. Why may not construction be partial just as repair is partial?

Many cases were put in argument, and many others may be suggested. Is a man who adds a storey or a new room to a house constructing a building? Is a man constructing a building if he strips off a coating of stucco and faces his house with red brick or cut stone? In one sense he is; in another sense he is not. It depends upon what is meant by "constructing," and whether reference is made to the building as it was, or to the building as it will be when the proposed alteration is complete. These and such-like questions may be very interesting puzzles, but I do not think they help one

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

much. The question, after all, must be what is construction and what is repair in this Act of Parliament, where construction and repair are associated together. I do not think that "construction" can be limited to the original construction. That would be in effect substituting "erection" for "construction." Nor do I think that "construction" and "repair" can be limited to the construction and repair of a building "as a whole." Neither the word "original," which the learned counsel for the respondents so continually interpolated, nor the words "as a whole," which Collins, L.J., would introduce, are to be found in the Act. They are glosses, and I think misleading. It seems to me that whenever new material is put into a building so that it becomes an integral part of the structure, you have something in the nature of construction; and that a building which is being so treated is being constructed within the meaning of the Act. You are putting together the old materials and the new. Now, if this be "construction," I do not think it can matter in the least whether the work is taken in hand immediately after the erection of the building, or not commenced until months or even years later. Nor do I think it is of importance to inquire why the work has been undertaken. It cannot, as it seems to me, make any difference whether the person who gave the order for it was moved by a reasonable apprehension of danger or prompted by some idle fancy. What has to be looked to is the thing done, not the motive for doing it or the relative dates of the erection of the building and its subsequent alteration. Construction, repair, demolition—these three operations cover, I think, every varying phase in the life of a building from its beginning to its end.

I prefer to rest my judgment on this broad ground. But I cannot help thinking that something narrower would lead to the same result in the present case. May one not say with the strictest propriety that a building is in course of construction when it is being reconstructed in order to make it what it was intended to be—a firm and substantial structure, capable of resisting the action of wind? Reconstruction is but construction over again.

The learned counsel for the respondents sought to draw an inference in their favour from the circumstance that the word "alteration" occurs in connection with engineering work, but not in connection with buildings. I should suppose that in the latter case it was omitted designedly, because it is impossible to conceive any alteration in a building—that is, of course, any substantial alteration—which does not involve construction. In the case of engineering work it is very different. If you look at the definition of engineering work, that may include shifting of rails, alteration of points, change of levels, and many other things which no one would ordinarily call construction or repair.

There was one point made by the learned counsel for the respondents which ought, I think, to be noticed. The learned counsel did not contend that the arrangement of boards and ledgers and trestles, which for want of a better word I have called a staging, was not a scaffolding in the common acceptation of the word. Everybody called it a scaffolding. But they argued that it was not such a scaffolding as was contemplated by the Act. Taking the view which commended itself to Collins, L.J., both in the present case and in *Maude* v. *Brook*, 48 W. R. 290, [1900] 1 Q. B. 575, they said that the scaffolding "must have some relation to the height of the building." And when pressed to submit a more definite proposition they proceeded to contend that it must be a scaffolding adequate for the construction or repair of a building exceeding thirty feet in height "as a whole," or to use the language of the Lord Justice in *Maude* v. *Brook*, "One system of scaffolding for the whole building which is capable of being used for its construction or repair as a whole." That might have been a reasonable provision if the accidents to which the Act applies had been confined to accidents in some way connected with the use of the scaffolding. But it is not suggested that anything of the sort is to be found in the Act. All that the Act requires is that there should be a building exceeding thirty feet in height which is being constructed or repaired by means of a scaffolding. It says nothing about the height or position or extent of the scaffolding. It is not, I think, for the court to lay down conditions which Parliament has not thought fit to impose.

I ought perhaps to add that I agree with my noble and learned friend Lord Brampton and with Collins, L.J., in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the county court judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion.

The provision as to the height of the building, and the provision with reference to a scaffolding, serve roughly to draw a line of demarcation between employments with which the Act is not concerned and those to which it is intended to apply. They were intended to exempt a certain class of buildings, and perhaps a certain class of builders of the humbler sort, from the operation of the Act. They are obviously copied from the Factory and Workshop Act, 1895, where the same provisions serve a somewhat similar purpose. I do not think they throw any light on the construction of the Act.

I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be. But I think that in the present case the learned judges of the Court of Appeal have taken too narrow a view. If you construe the words of the Act so narrowly as to exclude one of the commonest operations of the builder, the alteration of buildings once completed, and so debar workmen engaged in that operation from all benefit of the Act, you are, I venture to think, violating the letter as well as the spirit of the enactment.

I think that the appeal ought to be allowed with costs in the Court of Appeal, and with such costs in this House as are allowed in pauper cases, and that the order of the county court judge ought to be restored. And I move your lordships accordingly.

Lord MORRIS AND KILLANIN.—I agree in the judgment of my noble and learned friend in the chair, and in the reasons he has given.

That the building exceeded thirty feet in height and had some operations performed on it by means of scaffolding are questions of fact mainly, and were found in the affirmative by the county court judge, and not dissented from by the majority of the Court of Appeal. Nothing, in my opinion, remains but the question, Was the operation being performed on the building at the time of the accident either constructing or repairing the building? In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing or repairing or demolishing—alteration in its construction is, in my opinion, constructing. I can find no reference

in the statute to what is called, in the judgment of A. L. Smith, L.J., a completed building.

In my opinion, whether completed or not completed, if work of the nature of construction goes on, that is constructing, and if work in the nature of repair, that is repairing, and there is no room for any third operation of so-called alteration, as distinct from constructing or repairing.

Lord SHAND.—The question for the decision of the House in this appeal is whether, when the deceased Benjamin Hoddinott lost his life, the respondents were engaged in the construction or repair of the building in which the accident occurred, or whether the work then being done was of the nature of an addition or alteration of a building, the construction of which had been completed about six months previously, the addition or alteration not being construction or repair as referred to in section 7 of the Workmen's Compensation Act, 1897. That the question is one of difficulty sufficiently appears from the division of opinion in your lordships' House. I have come to the conclusion that the judgment of the Court of Appeal is right and ought to be affirmed.

The statute in its seventh section draws a marked distinction between employment in engineering work and in the construction of a building, and in construing the statute the distinction is of importance to the decision of the case. In the opening part of that section the Act is declared to apply to "engineering work," and also to employment about any building which exceeds thirty feet in height, and is either "being constructed or repaired by means of a scaffolding or being demolished." In the same section engineering work is defined or described to mean "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer," or the other works there enumerated. Again, under the description of undertakers in the case of an engineering work, the term means "the person undertaking the construction, alteration, or repair," and in the case of a building means the persons undertaking the construction, repair, or demolition.

Within the provisions of section 7 of the statute, on the meaning of which the whole question in dispute turns, in three different passages engineering work is thus defined to include, not only construction or repair, but "addition," while in contrast with this, in the case of a building, the definition twice repeated includes construction or repair only. The work by way of "addition" is not included. It must, in my opinion, especially having in view the juxtaposition of the provisions, be taken to have been designedly intended to create a distinction between the two classes of work.

It is more than doubtful whether the question really in dispute, as it has been argued in the Court of Appeal and again in this House, was clearly before the learned judge of the county court. The claim which was made under the Employers' Liability Act of 1880, which failed, suddenly became before him a claim under the Workmen's Compensation Act of 1897, under which he came to act as arbitrator. It is recorded by him in his notes that the court holds: "The defendants were undertaking the construction, *alteration*, or repair." If the case was one of alteration only of an existing construction, it does not follow that the circumstances would create the liability insisted on, because that word is not in the statute applied to a building. The finding seems to show that the learned arbitrator could not hold the case as one in which there was "construction," which inferred liability under the statute.

As to the question of repair, I say it out of consideration, for, whatever was being done at the building, there was no repair going on. None of the completed work had gone wrong or given way so as to require any repair, or setting right in itself; and what was done was, therefore, no act of repairing, but something entirely new. The question remains, and it seems to me the only question in the case, Was the building in the course of construction?

There was little, if any, evidence given as to the facts bearing on that question, apparently because the appellant's case was really presented as one, under the Employers' Liability Act, of fault or negligence on the employer's part from alleged defective scaffolding. The evidence taken before the coroner seems to have been put in, and there the witness Nicholson said that the alteration to the building was to stay the building, "so that the wind may not vibrate it." Accordingly the facts beyond this statement must be taken from the admissions made before the Court of Appeal. These admissions are really part of the appellants' case, for they are necessary to raise the question of liability as well as to give the grounds on which the Court of Appeal proceeded in holding that the statute did not apply; and Mr. Ruegg, in his able argument, candidly admitted the facts on which the Court of Appeal in their judgment proceeded. The facts are—(1) that the building had been completed and in use for somewhere about six months before the accident occurred; (2) that the work then being carried on was not contemplated when the building was constructed; (3) that the iron stays were being put in to strengthen or stay the building and prevent vibration; and (4) that the appellants, who had not been employed in the construction of the building, where employed in putting in the stays.

In this state of the facts, I am of opinion, with the Court of Appeal, that the case is not within the provisions of the seventh section of the statute, as the building was not "being constructed by means of a scaffolding." It was a building which had been so constructed months before, and had been in use as a completed building, and on which an improvement, or an addition only, was being made. What is the distinction which the statute has drawn between engineering work and buildings? As I have said, the former includes construction, alteration, or repair; the latter, only construction and repair; and, repair being out of the case, "construction," which seems to me equivalent in meaning to "erection," only remains. If the word erection had been used, the appellant's argument would have been the same, that the placing of stays was erection in part, as it is now said to be construction of a part of the building. This was a constructed building, long in use, on which it was thought desirable to make an improvement, or addition, to make it more secure or more comfortable. Is it to be said that every such improvement or addition, where scaffolding is in use in the building, is "construction" of a building within the meaning of the statute? I cannot give to the term "construction" so wide, I might say so loose, a signification. The work might be the putting in of one or more windows in order to light the building better, or it might be the making of commodious presses, internal presses or closets, or the making of closet or lavatory arrangements by internal work. It appears to me that such additions, alterations, or improvements in a building cannot be regarded as "construction," and I say the same in regard to stays put in in order to prevent vibration.

The erection of a new or additional storey to a building might be represented as construction, because in that case a new building, including an outside structural wall, is really made or constructed;

but that entirely differs from such internal operations as occurred in the present case, and the character of the addition, improvement, or alteration, in my opinion, makes all the difference.

The argument of the appellant disregards the distinction which the statute has drawn between engineering work and work on a building. It has been observed that the word "alteration" may have been omitted designedly, because it is impossible to conceive any alteration in a building which does not involve construction. The observation would, it appears to me, apply with the same force to a "railroad, harbour, dock, canal, or sewer" in which engineering work may be employed. The use of the term construction was not deemed sufficient to include in that case work of the nature of an addition, and accordingly that term was added, and I am unable to construe the term construction in a wider sense when it is used as applied to a building, so as to include everything of the nature of an improvement or addition, than the proper sense in which it is used as applicable to engineering works in the same sentence.

It was argued for the appellant that if a case of repair, and it might be of comparatively small repair, is sufficient to bring the building within the statute, why should not an improvement or addition also have the same effect? The answer to that observation is that the statute in its terms has drawn and enacted a distinction between the two cases. For my part I agree in thinking the distinction ought to be done away with, and cases of alteration should be put on the same footing as those of repair; but this must be done by amending legislation, and not by straining the language used so as to include cases which it may seem desirable to include, though the terms used will not, according to their ordinary and proper interpretation, do so.

I agree in thinking that the staging from which the deceased fell was a scaffold or scaffolding within the ordinary meaning of these words, and that it was so seems to be simply a question of fact.

I further agree with my noble and learned friend Lord Macnaghten that, as a matter of law, the erection and use of a scaffold or scaffolding "capable of being used for the construction or repair of the building as a whole" is not required in order to bring the building under the provisions of the seventh section of the statute.

Lord DAVEY.—I agree with my noble and learned friend on the woolsack, and I only desire to add two observations of my own.

This case is, of course, not free from difficulty, but I have come to a clear opinion that the addition of these iron stays was "construction" within the meaning of the Act. The Master of the Rolls says it was not construction, because the building was already completed. I take leave to say that the learned judge assumes the whole point in controversy. No doubt it was intended to be completed, and the parties thought it was completed, when the omnibus company took possession. But the experience of a few months showed that something more was needed to adapt it to the purpose for which it was intended, or, in other words, that it was not in fact complete; and the addition of these iron stays was required to complete the construction. It is none the less construction because it was an addition made at a later date, or because the addition was not contemplated or was omitted in the original specification, and the necessity for it was not then apparent.

The second observation is as to the construction put by Collins, L.J., on the words of the Act. The learned Lord Justice says that the scaffolding must bear some relation to the height of the building, and be such a scaffolding as would be required to construct or repair a building of that height. I think it very likely that the draftsman had something of that kind in his mind, but I can only interpret the Act by the language which he has used. The Lord Justice further says that the requirement of a building of a certain height and of a scaffolding was intended to fix the standard of danger to the workman. That would be all very well if the compensation was confined to accidents arising out of or in some way connected with the height of the building or the scaffolding. But that is not so. By the seventh section the Act is made applicable to any employment "in or about any building," &c., without any qualification. A carpenter, for example, employed on the ground-floor in preparing and putting in the woodwork, the joists, doors, and window-frames, would be within the Act though he never went near the scaffold.

I will not detain you further. I have had the opportunity of seeing the judgment about to be delivered by my noble and learned friend Lord Brampton. He has gone very fully into the question whether the platform in question was scaffolding within the meaning of the Act. I will not anticipate what he will read, but only say that I entirely agree with his reasoning. I express my concurrence in the motion proposed by my noble and learned friend on the woolsack.

Lord BRAMPTON.—Benjamin Hoddinott, the late husband of the appellant, a riveter, being a workman in the employ of the respondents, ironwork contractors, was, on the 19th of August, 1898, fatally injured whilst working for them at and in a building at Putney exceeding thirty feet in height, and occupied as stables by the General Omnibus Co. He died on the 22nd of the month, leaving the appellant surviving him, and it is not disputed that if any compensation is payable under the Workmen's Compensation Act, 1897, in respect of his death, she is the person to claim it.

The facts of the case are very loosely stated in the appendix, but are sufficiently supplemented in the judgment of A. L. Smith, L.J., to enable me to form my opinion upon them. The building, a new one, especially designed for stables, was erected for the General Omnibus Co., according to a contract and specification, by a firm of builders unconnected with the respondents, by means of ordinary builders' external scaffolding. It was roofed in and completed by the builders, so far as they were concerned, about six months before the time of the accident. On the completion of the building the scaffolding was removed, and from that time the stables have been occupied by the horses of the omnibus company. A few months after such completion, and very shortly before the accident, it was considered by the engineer of the company that the building was deficient in stability and required to be stiffened in order to strengthen it and prevent its vibration by the wind, with possible danger to the whole structure. To remedy this it was determined to introduce iron stays (each weighing about one hundredweight), and by means of them to connect the iron girders over the stalls with the upright iron columns inside the building. The respondents were employed by the omnibus company, and they undertook to do this work, and the appellant's deceased husband was employed by them upon it. At the time of the accident he was with a fellow-workman inside the stable, standing upon a platform erected solely for the purposes of this work. It was used by the workmen in the daytime, but was removed every evening to enable the horses to occupy their stalls for

the night. No poles were used in its construction; it was formed by boards each twelve feet long, nine inches wide, and one and a-half inches thick, resting on ledgers lashed to the iron columns, and, in order to make the structure more firm, trestles were placed under the middle of the scaffold boards to support them. The platform on which the deceased was standing was raised about eight feet above the ground. He was in the act of lifting one of the stays when he lost his balance and fell to the ground, the stay falling on him, and he died from the injuries thereby occasioned.

No question arises as to the regularity of the proceedings before the county court judge, who found as facts, first, that the building was of a height exceeding thirty feet, measured from the ridge of the roof, though the top of the parapet wall was only twenty-eight feet; secondly, that the work the deceased was employed upon was a work of "construction, alteration, or repair," and he held that the structure from which the deceased fell was "scaffolding" within the meaning of section 7 of the Act, and awarded to the appellant, as widow of the deceased, £245 14s. as compensation.

I would here point out that there really was no finding to justify any award, for the county court judge only found that the deceased was engaged on one of three descriptions of work—construction, alteration, or repair. If it was "alteration," no claim would arise. The point, however, was not taken, and this House, I assume, will treat the finding as though the word "alteration" had been omitted.

The 7th section of the Act, sub-section 1, enacts: "This Act shall apply only to employment by the undertakers on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished."

In endeavouring to arrive at a satisfactory interpretation of this section one labours under considerable difficulty. The whole statute is full of incongruities. In it, so many things are said which could not have been meant, and so many things which must have been meant are left unsaid, that one often has great hesitation in even forming a conjecture as to what may have been the views and intentions of its framers.

What, for instance, could be the object of debarring a workman from seeking compensation under the Act for any injury he might sustain during his employment in erecting a building intended to be of much greater height than that mentioned by means of a scaffold, until that building has been already actually erected to a height exceeding thirty feet, even though such injury is caused by something falling on him from the very scaffold which had been put up to a much greater height for the purposes of the building then in course of construction? Yet such was the substance ruled in the case of *Billings* v. *Holloway*, 47 W. R. 105, [1899] 1 Q. B. 70, by compulsion of the plain unambiguous language of the Act. The effect of this enactment would, in the case of a building intended to be thirty-one feet high, be to limit the liability of the employers to the period of time occupied in erecting the last foot.

I have neither heard nor read any satisfactory reason for the enactment. I am rather inclined to think it was taken and adopted without consideration from article 2 of the Schedule to the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), defining the character of the accidents required to be notified to the Board of Trade—an article which is foreign to the objects of the Act I am now considering, and which article was repealed by 58 & 59 Vict. c. 37, s. 54, before the passing of the Employer and Workmen Act. It is not disputed by anyone that the Act applies to internal as well as to external scaffolding.

I pass on to consider now the only questions which this House is called upon to decide in the present case.

They are, first, whether the work upon which the deceased was employed when he met with his injury was a work either of construction or repair; secondly, whether the structure from which he fell was "a scaffolding" within the meaning of the 7th section, sub-section 1.

In his judgment in the Court of Appeal, A. L. Smith, L.J., said that it could not be construction, for that the building had already been constructed and completed, and was in actual use, and that which was done was only an addition to that which had originally been contemplated; and that an addition could not come under the head of repairs; and on that ground the appeal from the county court judge was allowed.

I cannot assent to this view of the case, my own opinion being that that which was being done to the building was a work of construction. It must be conceded that, so far as the original builder was concerned, his contract had been carried out according to the specification, and the external scaffolding had been removed six months before the accident, and it was then considered by all concerned that the building needed nothing more to make it fit for permanent use. This concession, however, seems to me to be immaterial. We have nothing to do with the building contract. The question we have to deal with is, Was the building in fact fully constructed, or was it faulty and deficient in its construction, for the purpose for which it was intended? If that which was being done when the accident occurred was needed for the proper strength of the building, and ought to have been done, but was omitted to be so when the builder had finished his work, then, whether such omission was attributable to the neglect or oversight of those who framed the specification, or to to the builder failing to perform his obligations, the building was in fact deficiently constructed, and if the work done was simply to supply that deficiency and make the building what it ought to have been at the first, it was a work of construction. It may be that it was also an addition in the sense that it was an addition of something necessary to supply an omission, and give to this building that inherent strength which it ought to have had originally.

If the same stays which were in course of being fitted when the accident happened had been so fitted before the original building had been handed over by the builders to the company, they would clearly have formed a part of the building: why should they not become so when fitted to supply the omission of that which was deemed to be essential to its security? I fail to see any reason, and I therefore think the work was one of construction. Suppose the foundation of one of the walls had been found to be insecure, would not work done to make it safe be work of construction? Assuming I am right in the view I have expressed, what signifies it that the discovery of the defect was not made for a long time? That would not alter the fact.

Assuming, however, for a moment that when the builders' work was originally completed, it was in all respects apparently perfect, but that in the course of a few months it was from some undiscovered cause found to be deteriorated, and so unsteady that it was necessary to put in the stays or to do some other work to restore it to the condition it had been in when the builders left it: why might that not be treated as repair, I fail to see. No cases have yet been decided upon the subject of what is "construction" and what is "repair." In *Wood* v. *Walsh*, 47 W. R. 504, [1899]

1 Q. B. 1009, A. L. Smith, L.J., said, "Constructed or repaired means some work relating to the structure of the buildings."

I will now deal with the question whether the arrangement on which the deceased was working, and from which he fell, was a scaffolding within the meaning of section 7, sub-section 1, of the statute.

Hitherto the Court of Appeal seems to have treated this question as a matter of fact for the county court judge or the arbitrator, by whom the claim for compensation is heard, to determine, and upon which his finding is not open to review. In the last reported case on this subject, *Ferguson* v. *Green*, *ante*, p. 105, W. N. [1900] 247, it was so expressly ruled by the Master of the Rolls (Sir A. L. Smith) and Collins and Stirling, L.JJ., following previous decisions by the same court, *Wood* v. *Walsh* and *Maude* v. *Brook*. With all respect for those judgments, I cannot concur in them.

I thoroughly agree that the arbitrator or county court judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not "scaffolding" within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, &c.; and his finding upon such facts is, according to the general rule, final; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of section 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal. I think it is expedient that it should be so, for were it otherwise, considering the number of county court judges and arbitrators who are called upon to try such cases, there would probably be much diversity in their judgments upon the question, and the law would be very unsettled. Whereas by holding that the Court of Appeal has jurisdiction to review such finding, something like uniformity in the decisions as to what constitutes a scaffolding will very soon be established.

This view is confirmed by the opinion of Collins, L.J., in the case of *Maude* v. *Brook*, in which he expressly said: "Whether a particular arrangement is a scaffolding is not a question of pure fact, and therefore not merely a question for a jury without direction as to the law."

Whether a bicycle was a carriage within the meaning of the Highway Act was treated as a question of law in *Taylor* v. *Goodwin*, 27 W. R. 489, 4 Q. B. D. 228.

No definition is given in the Act as to what shall be deemed a scaffolding within the meaning of the 7th section. Nor do I think it would be possible to frame a satisfactory definition which would be universally applicable. Few people are unacquainted with that character of scaffold which has for certainly many generations been commonly used by builders, but nobody in these days would venture to assert that the meaning of the word "scaffolding" is confined to such arrangements as those; and I entirely agree with Rigby, L.J., who, in his judgment in *Maude* v. *Brook*, says: "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything whether usual or unusual that can properly be called scaffolding is within the Act"; and a little later on he illustrates his meaning by expressing a clear opinion that, if a builder had the control of two walls, one on each side of the site where a scaffold was needed, he might, if he could do so, utilize them by laying planks across from one to the other, and that such a structure would be a scaffolding without the use of either poles or trestles; so in like manner in the present case, in my opinion, the iron columns already existing in the stables might equally be used—as they were—to form a scaffolding by lashing to them by ropes pieces of wood or metal to help in the support of the boards which were to form the platform on which the workmen were to do their work. No doubt for all external scaffolding wooden poles, boards, and planks, fastened together by ropes in the ordinary way, are commonly used, because they are found to be most convenient; but they are not essential to the formation of external scaffolding, while for internal scaffolding it would for the most part be impossible to use such scaffolding in houses or buildings divided into rooms.

Possibly some day a question may arise whether an arrangement suspended from the ceiling, such as is often used for the interior of cathedrals, &c., is a scaffold within the Act. Old dictionary definitions, written more than a century ago, on such a subject are but of little use in these modern days, except to inform us as to the general character and use of a scaffold or scaffolding. For that purpose only I refer to an old dictionary published in 1754, composed by Dyche and Pardon, in which a scaffold is described as "a place erected above the ground with poles for walls and supports, and boards laid loosely for floors, to serve a present occasion of workmen's standing safe and easily to repair or build a house, church, &c., or for spectators to see a show, &c.," and "scaffolding" is defined as "the poles, boards, &c., that are kept or made use of to build or erect scaffolds upon any occasion."

In Walker's Dictionary, "scaffolding" is defined as "a support for workmen." Now, when section 7 speaks of "a building which is either being *constructed* or *repaired* by means of scaffolding," it obviously includes either external or internal work of construction or repair, and it contemplates a scaffolding being used for either, and it is noticeable that it speaks of workmen employed "on, *in*, or about" a building. The line between that which constitutes construction and that which constitutes repair is often a very fine one, and either may be needed *either* inside or outside a building. Brickwork may become defective, window or door sills may require to be taken down and replaced by new ones, beams supporting ceilings may give way, plastering may fall away from walls, &c., in any part of a building—for most of such works, whether of construction or repair, a scaffold of some kind is necessary. Outside the house, if the work to be done was high up, it might be most convenient to use a tall substantial one; inside, in rooms, a much smaller one would be all that was required, and that might be constructed in a variety of ways, and of any material or combination of materials suitable for the purposes. The size, height, and mechanism of it would, as a matter of fact, of course, depend upon the position in the building of the place needing construction, reconstruction, or repair, and a variety of circumstances impossible to anticipate, and which, therefore, I will not attempt to describe. A reference to decided cases will give some idea of what might and what could not satisfy the term "scaffolding." I will merely mention the most recent of them: *Wood* v. *Walsh*; *Maude* v. *Brook*; *Hoddinott* v. *Newton, Chambers, & Co.*

In my opinion the structure in the case now before us may well be described as a scaffold within the

meaning of section 7. I know that Collins, L.J., expressed a different opinion both in *Hoddinott* v. *Newton, Chambers, & Co.* and in *Maude* v. *Brook*. In the latter case that learned judge summarizes his opinion thus: "The word 'scaffolding' as used in this Act indicates that there must be one system of scaffolding for the whole building which is capable of being used for its construction or repair as a whole." I cannot agree in this, for, were it so, it would be impossible to introduce into an ordinary room undergoing repair and requiring the use of a scaffold one adapted for the construction or repair of the whole building. I think the meaning of the Legislature was that from time to time, when work of construction or repair required the aid of a scaffold, any scaffold suitable for that particular purpose would be within the meaning of section 7. The scaffold used in the construction of the building as a whole had no connection with the accident in this case; it had ceased to exist months before the work on which the deceased was employed was even contemplated, and even had it been in existence, it would have been useless as regarded that work. Had there been no scaffold used in the construction of the original building I should have thought it immaterial to the present case, though it might have protected the employer against compensation for accidents happening during the construction of the original building. This scaffolding pointed to in section 7 must and could only reasonably apply to one used for the particular work in the course of being carried out when the accident occurred. In construing this section it must be remembered that the Act was only passed in 1897 (about three years ago), when an indefinite number of buildings exceeding thirty feet in height were in existence—some unsafe and requiring demolition, others badly constructed at first and requiring work of reconstruction; others from one cause or another falling into a state of deterioration and needing repairs to make them fit for future occupation. All these conditions must have been in the contemplation of the Legislature in framing the Act. When I realize to myself that the necessity for such works of construction or repairs may occur in all or any parts or part of the building, whether high up near the top or low down even to the foundations, and that such defects will in course of time inevitably make their appearance in the now newest buildings, and that such works, reconstruction, or repair will, when the defects cannot be reached by a man standing on the ground, require the assistance of a scaffold, I feel driven to the conclusion that the Act, with all its faults, in using the word "scaffolding" meant scaffolding suitable for the occasion, and could not have intended to confine it to such a scaffold as was capable of being used for the construction or repair of the building as a whole, which in a large majority of cases would be so inconvenient and costly as to be absurd.

For the reasons I have given, I think that this appeal should be allowed with the usual costs.

Lord LINDLEY.—This is an appeal from a decision of the Court of Appeal against an award made under the provisions of the Workmen's Compensation Act, 1897.

The facts of the case are not in all respects so clear as might be desired; but admissions were made by counsel on both sides, both before the Court of Appeal and at your lordships' bar, and with the assistance of those admissions the facts may be stated as follows.

Some time before the accident which gave rise to the claim for compensation, the London General Omnibus Co. had employed some builders to erect some large stables for them in Putney. Those stables had been erected and completed, according to the original design and specification, some five or six months before the time of the accident, and had been taken over and used by the omnibus company for stabling their horses.

The stables were constructed partly of brickwork and partly of iron. The ironwork consisted of upright pillars carrying transverse girders. There were two storeys, and the horses were stabled both on the ground floor and on the first floor. The height of this erection was twenty-eight feet from the ground to the top of the walls, and thirty-six feet to the ridge of the roof. None of the scaffolding used in the erection of the stables was standing when the accident happened. The defendants, Newton, Chambers, & Co., had not been employed in the erection of these stables.

After they had thus been completed and had been in use for stables, it was thought desirable to put in some iron stays in order to prevent vibration, and the defendants Newton, Chambers, & Co., were employed by the omnibus company to do this work. The stays were T angle iron bars twelve or fourteen feet long and about one hundredweight in weight. These were to be fastened by one end to the upright pillars on the ground floor and to the transverse girders carrying the first floor. The stays were put diagonally across the angles made by the pillars and girders, and they met, or nearly met, at the top. They thus stiffened the ironwork and stopped the vibration. The extent of the vibration is not proved; the cause of it is not proved; why it was desirable to stop it was not proved. There is no evidence whatever to show that the building was unsafe. It was stated before the coroner that the stays were put in "to stay the building so that the wind might not vibrate it." The evidence before the coroner was used by consent before the judge of the county court, and also before the Court of Appeal. But this is all that can now be ascertained as to the reason for putting in the stays. The inquiry is only important with reference to the question whether the building was being constructed when the accident happened. To this question I will return presently.

The stays were put up in the daytime, when there were few, if any, horses in the stables. The stays had to be lifted up into their proper places and held there for a short time whilst the places at which rivet-holes were to be made were marked. To enable the workmen to raise the stays to their places and to hold them there, platforms had to be constructed about eight feet above the ground floor; and in order to stable the horses at night these platforms had to be daily constructed when the stables were empty, and to be removed before the horses came in for the night. These platforms were made by placing ordinary loose planks carried by trestles and by ledgers laid across poles lashed to the pillars. These platforms are called scaffolds by all the witnesses who speak of them, and by the county court judge and by the members of the Court of Appeal. I so regard them; I do not know how better to describe them. I will consider presently whether they came within the meaning of a scaffolding as used in the Workmen's Compensation Act.

The husband of the plaintiff was on one end of these scaffolds lifting one end of a stay, whilst another man was lifting the other end. The plaintiff's husband overbalanced himself, or was overbalanced, and he fell from the scaffold and died shortly afterwards.

The plaintiff brought an action for damages against the defendants on the ground of negligence and defect in the scaffold; but the county court judge decided that the scaffold was not insufficient,

and that the accident was not caused by insufficient scaffold. Thereupon an application was made for compensation under section 1, clause 4, of the Workmen's Compensation Act, 1897, and the county court judge heard such application, and decided that the defendants were "undertaking the construction, alteration, or repair of the stables." He further decided that the building exceeded thirty feet in height, and he awarded the plaintiff compensation to the amount of £245 14s., from which, however, the defendants' costs of the action were to be deducted. From this award the defendants appealed, and the Court of Appeal set aside the decision of the county court judge. From this decision the plaintiff has obtained leave to appeal *in formâ pauperis* to this House, and the appeal has been fully argued at your lordships' bar.

The case turns on sections 1, 7, clauses 1, 2, of the Workmen's Compensation Act, 1897, and on the language there used with reference to buildings. The putting in of the stays was not an engineering work as defined in section 7. This observation is important, because in the case of an engineering work undertakers are defined to mean "the person undertaking the construction, alteration, or repair"; whilst in the case of a building, undertakers are defined to mean "the persons undertaking the construction, repair, or demolition," the word alteration being omitted.

Confining ourselves to buildings, and interpolating the definition of undertakers of buildings, section 7, clause 1, makes the Act applicable, but only applicable, to employment by persons undertaking the construction, repair, or demolition of any building, of any person on, in, or about any building which exceeds thirty feet in height, and is being constructed or repaired by means of a scaffolding, or being demolished. Now, I cannot bring myself to say that the defendants were persons undertaking the construction, repair, or demolition of these stables. Demolition may be disregarded; nothing was being demolished. Repair may also be disregarded: nothing was out of repair. Construction alone remains; but can it be fairly said that the defendants, who had nothing whatever to do with the erection of the stables, undertook the "construction" of them when they undertook to stop or diminish the vibration of which their owners complained? It is true that the stays were additions to portions of the structure of the stables, and in that way were additions to the stables. But constructing a building is one thing; improving it after it is constructed, even by making additions to its structure, is quite a different thing. I quite admit it may be very difficult to draw the line sharply in all cases between constructing a building and adding to its structure; but in this particular case I see no difficulty at all in coming to the conclusion that the defendants in this case did not undertake to construct this building, and were not undertakers within the meaning of the Act. I cannot bring them within the words of the definition. The fact that the word "alteration," which enters into the definition of undertakers of engineering works, is omitted from the definition of undertakers of buildings, is not to be overlooked, and it supports the conclusion at which I have arrived. If the omission were designed, it would support such conclusion very strongly. But the Act is very badly drawn, and it is scarcely safe to rely on the contrast between the two definitions. It is safer to rely on the fact that in the definition of undertakers of buildings nothing is said about additions, improvements, or alterations: and unless they can fairly be regarded as works of construction, repair, or demolition, the persons who undertake them are not undertakers as defined in section 7

The learned county court judge evidently failed to appreciate the difficulty created by the definition clause; for he introduced the word "alteration," and found that the defendants were undertaking the "construction, alteration, or repair." This finding was clearly insufficent to make them liable under the Act.

I pass now from the builders to the building itself. The Act does not apply to all buildings, but only to those which exceed thirty feet in height and are being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof. The words relating to the use of machinery have no application to the present case, and I therefore say nothing about them. The provisions relating to height and to the use of scaffolding refer to the time of the accident, and not to any time before or afterwards. The use of the present tense "which exceeds thirty feet," and "is either being constructed or repaired," &c., shows this; and the Court of Appeal so decided in *Billings* v. *Holloway*. Why thirty feet should have been adopted as the minimum height is not apparent, but that limit is adopted, and the only question is how the measurement is to be made. The county court judge and the Court of Appeal have both held that the height of the roof must be reckoned, and be added to the height of the walls, and this appears to me obviously correct.

The reference to scaffolding creates great difficulty. Sections 1 and 7 of the Act clearly extend to accidents which are not caused by defective scaffolding, and which are not in any way attributable to the use of scaffolding. If a house is thirty feet high, and is being constructed or repaired by means of a scaffolding, and any workman is injured to the extent mentioned in section 1, clause 2*a*, by any accident arising out of and in the course of his employment on, in, or about such building, he is entitled to compensation, whatever the cause of such accident may have been, unless it arose from his own serious and wilful misconduct: see section 1, clause 2*c*. This seems plain from the language of sections 1 and 7, and has also been decided by the Court of Appeal in *Maude* v. *Brook*. But the use of a scaffolding is essential to bring a building being constructed or repaired within the Act where no machinery is employed to construct or repair it. What is meant by a scaffolding? Is any scaffolding meant? Is there any difference material to the present question between a scaffolding and a scaffold? There is nothing in the Act which requires the scaffolding to be of any particular description or dimensions, or to be in any particular place or of any particular height. I cannot help thinking that to make any distinction between one scaffolding and another, or between a scaffolding and a scaffold, would be to introduce a subtlety not required by the Act, and one far too fine for practical work. In my opinion, anything which can fairly be called a scaffold is a scaffolding within the meaning of section 7 if used as mentioned in the Act. This I understand to be the view adopted by the present Master of the Rolls and by Rigby, L.J. But a more restricted meaning is put on the word scaffolding by Collins, L.J. He thinks that boards on trestles inside a room are not, in point of law, a scaffolding within the meaning of the Act, and he did not consider the platforms in this case to be such a scaffolding. He thinks that nothing can be a scaffolding within the Act except "one system of scaffolding for the whole building, which is capable of being used for its construction or repair as a whole." I cannot go so far. I cannot say that boards on trestles, even inside a room, may not be a scaffolding,

and still less can I say that the platforms in question in this case could not be so regarded if used as mentioned in the Act. This question of scaffolding is one of such importance, and it was so much discussed at your lordships' bar, that I have thought it desirable to allude to it, and to express my own opinion upon it.

But although I think the platform in this case might have been a scaffolding within the meaning of section 7. and that the stables were a building more than thirty feet high, yet, for reasons already stated, I cannot come to the conclusion that such building was being constructed or repaired when the accident happened.

The Act, therefore, has no application to this case. It does not apply either to the defendants or to the building at the time of the accident.

The appeal ought, in my judgment, to be dismissed.

Order of the Court of Appeal reversed, and award of the county court judge restored. The respondent to pay the appellant her costs in the courts below and in this House, costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis. *Case remitted to the county court.*

Solicitors, *C. F. Appleton; Ingle, Holmes, & Sons.*

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — March 1, 22.

SHUTTLEWORTH *v.* MURRAY. (*a.*)

Will—Construction—"Eldest son" entitled to possession.

A will limited successive estates to the sons of A. other than and except an eldest or only son for the time being entitled to the possession or receipt of the rents and profits of the C. estate. A son became entitled as tenant in tail in remainder of the C. estate, and, before becoming entitled to possession, joined with his father, the tenant for life, in a sale, from which he derived a benefit.

Held, that the words of the exception must bear their natural meaning, and that the son, not coming within those words, was not excluded from taking under the will.

Decision of Cozens-Hardy, J. ([1900] 1 *Ch.* 795, 48 *W. R. Dig.* 205), *reversed.*

This was an appeal from a decision of Cozens-Hardy, J., of the 29th of March, 1900.

By his will dated the 29th of January, 1855, Edmund Grimshaw devised his real estates in the county of Lancaster, after the death of his nephews, Richard Atkinson and F. F. Brandt, to whom he gave successive life estates, to the use of all and every the son and sons of the said F. F. Brandt who should be born in the testator's lifetime or in due time after, and all and every the son or sons of the said Richard Atkinson then living and who should be born in the testator's lifetime or in due time after (other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits of certain estates situate within the parish of Cockerham, in the said county of Lancaster, after the decease of the said Richard Atkinson as tenant for life or any greater estate or interest whatsoever) severally and successively in remainder one after another and as between each branch as they and every of them should be in seniority of age and priority of birth, but as between the two branches alternately and turn by turn and their assigns during their several and respective lives without impeachment of waste, the eldest or only one of such sons or son of the said F. F. Brandt taking the first turn, and the eldest or only one of such sons or son of the said R. Atkinson (other than and except as aforesaid) taking the next turn, and so successively changing from one branch to another. With limitations over, under which, in the events which happened, the remainder in fee became vested in Richard Atkinson.

The testator died in 1875. F. F. Brandt died in the lifetime of the testator without having married. Richard Atkinson had several children, the eldest of whom, Richard Norton Atkinson, was born in 1847.

At the date of the disentailing assurance mentioned below R. Atkinson was tenant for life, and R. N. Atkinson tenant in tail in remainder of the Cockerham estate.

By a disentailing deed dated the 16th of January, 1869, the Cockerham estate was limited to such uses as the said R. Atkinson and R. N. Atkinson should jointly appoint.

By a deed dated the 19th of January, 1869, the estate was jointly appointed by the father and the son to trustees upon trust for sale, and trusts were declared of the purchase-money under which the son took certain benefits.

The estate was subsequently sold by the trustees who received the purchase-money.

In 1870 R. N. Atkinson became bankrupt, and his interest in the purchase-money and his interest under the testator's will were acquired by his father R. Atkinson from the trustee in bankruptcy.

Richard Atkinson died recently, and this summons was taken out to determine whether R. N. Atkinson was excluded under the exception of an eldest son for the time being entitled to the possession of the Cockerham estate.

Cozens-Hardy, J., held that he was so excluded, and that his next surviving brother was entitled to the rents and profits of the devised estates

From this decision the persons entitled to the interest of R. N. Atkinson now appealed.

Haldane, K.C., Macnaghten, K.C., and *Hon. T. H. Watson,* for the persons entitled to the interest of R. N. Atkinson.

Swinfen Eady, K.C., Vernon Smith, K.C., and *E. S. Ford,* for the second son of Richard Atkinson.

Cur. adv. vult.

March 22.—RIGBY, L.J., after reading the material parts of the will as set forth above said, before saying anything as to the construction of the will he would refer to some of the facts. The Cockerham estates in 1869 stood limited to R. Atkinson for life with remainder to his son R. N. Atkinson in tail. R. N. Atkinson was born in 1847 and soon after coming of age he concurred with his father in disentailing the property and appointing it to trustees upon trust for sale. The trustees sold the property, the sale taking place before the bankruptcy of R. N. Atkinson in 1870. The Cockerham estates were therefore held by strangers and had gone away completely from the Atkinson family. Looking at the reasonableness of R. N. Atkinson ever having been in possession there was not the slightest ground for saying that he was ever in enjoyment of the property. Of course he might have repurchased the estate and resettled it, but nothing of the sort took place. In 1870 R. N. Atkinson became bankrupt, and all he then had, which was an interest in the proceeds of sale of the

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

property, was purchased by his father. The son therefore at that time had no interest in the property in any sense of the word and at that time the will of the testator had not then taken effect as an operating instrument. Referring again to the words "entitled to possession, &c.," his lordship thought that the words of exception should be read as if transposed and as if they followed the words "entitled to possession, &c," That would make a great distinction between this and the other cases cited. His lordship said he was quite unable to follow the reasoning of the learned judge in the court below, who seemed to have thought that the words of exception were technical words which had received an accepted construction for many years. His lordship differed, however, entirely from that view, and was of opinion that they were not technical words, but plain English words, and that they had never been construed as technical words by any court down to the present time. True it was that words in some respects resembling them had received an interpretation different from the natural and *primâ facie* meaning, but that was done under an overriding constraint of intention. But these words were never held to be technical words. With regard to the cases discussed by the learned judge: where there is a disposition of property by a parent and a gift of an estate to one child and a gift of portions to other children—in that class of cases it has always been held that the intention was that a child should not take both the estate and a portion. If there are exceptional cases which go beyond that proposition they did not apply here. In some cases liberty had been taken with the language used and a very wide interpretation placed upon it which was hardly justified by the rule as to the paramount intention of the parties The case of *Collingwood* v. *Stanhope*, 17 W. R. 537, L. R. 4 H. L. 43, was, it need hardly be said, a case of great authority, and must be followed in its real meaning, but it did not apply to the present case and had not the slightest tendency to support the judgment of the court below. The case of *Fazakerly* v. *Ford*, 4 Sim. 390, was one in which a use in favour of a certain person was sought to be displaced, and the learned judge there said you ought to give the words their strict, that is, their natural meaning. Now here there was not strictly the substitution of one use for another, but the present case came precisely within *Fazakerly* v. *Ford*, as explained in *Collingwood* v. *Stanhope* in the House of Lords. This was not the case of a person *in loco parentis* making provision that the eldest son should have the estate and the younger children portions. There was nothing of the sort here. In the present case there was no gift to a class and no period for distribution, and arguments based on a gift to class or on distribution were therefore unfounded. Another case referred to was the case of *Domvile* v. *Winnington*, 32 W. R. 699, 26 Ch. D. 382, in which Kay, J., made some observations upon which Cozens-Hardy, J., seems to have relied, but those observations were not necessary for the decision of that case and were mere *obiter dicta*. He merely said that if the case had arisen he might have decided in a certain way. The words of exception in the present case must bear their primary and natural meaning, and as the said R. N. Atkinson did not come within those words, he could not be deprived of his succession. The decision of the court below was therefore wrong and ought to be reversed.

VAUGHAN WILLIAMS, L.J., said he arrived at the same result, though not without some hesitation. He took it as fixed law that with regard to family settlements it was a rule that what had been called "a prodigious latitude of construction" was to be allowed. The rule, however, with regard to persons *in loco parentis* had no application at all to the present case. That rule had no application outside family cases as laid down in the case of *Sandeman* v. *Mackenzie*, 1 J. & H. 613, 628. He therefore approached this will minded to construe it as deduced from the words within the four corners of the document. The rule that there is to be equality among children was not an arbitrary rule, but an instance where the court would depart from the primary meaning of the words to give effect to an overriding intention. Although it was a stereotyped rule that you must deduce the intention of the testator from the words of the will itself, the general principle applies to all documents, unless from the document itself and the surrounding circumstances you come to the conclusion that the author of the document had an obvious intention to depart from the primary meaning. He looked about to see if the words of the exception would give effect to an intention which was so inherently probable, and to see whether the words were sufficiently ambiguous to give effect to the intention which his lordship was disposed to attribute to the testator. But having looked at the words, they were too strong for him, and they must be read in their natural sense. Reading them in that sense R. N. Atkinson did not come within them, and was not therefore excluded.

STIRLING, L.J., agreed.—The object in all these cases, as explained in *Collingwood* v. *Stanhope*, was that no one child should obtain a double portion. There was, however, a great body of authority showing that the rule only applied where the provision was made by a parent or person *in loco parentis*. That was shown by *Scarisbrick* v. *Skelmersdale*, 17 Sim. 187, *Sandeman* v. *Mackenzie*, 1 J. & H. 613 and other cases. In *Scarisbrick* v. *Skelmersdale*, 4 Y. & C. Ex. 117, it was said: "It is not every act done by a parent which is to be construed on principles different from those which would have been applied if the same thing had been done by a stranger, but only those acts which the parent does in fulfilment of some natural duty. Now, though it is a natural duty incumbent on a parent to provide for his children, and in doing so to use language which will secure some provision for all, it certainly is no natural duty to cause estates to shift in one course of succession rather than another." Accordingly, in the present case the ordinary meaning of the words must prevail. The testator did not stand *in loco parentis* to R. Atkinson or his children. Coming to the words of exception, the words "for the time being" ought to be read in connection with the son for the time being. The person excepted was to be not only an eldest son but entitled to possession. Those words point to a natural enjoyment of the estate. But at the time the eldest son had not the enjoyment, and did not therefore fall within the words of the exception. The testator simply considered that a son in possession did not require bounty. The decision must be reversed.

Appeal allowed.

Solicitors, *Collyer-Bristow & Co.*, for *Shuttleworth & Dallas*, Preston; *Robins, Hay, Waters, & Hay.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 1.

STACEY v. HILL. (a.)

Bankruptcy—Landlord and tenant—Rent guaranteed by third party—Bankruptcy of lessee—Disclaimer of lease by trustee—Liability of surety after date of disclaimer—Bankruptcy Act, 1883, *s.* 55 (2).

Where a lessee for a term of years becomes bankrupt, and his trustee disclaims the lease under section 55 *of the Bankruptcy Act*, 1883, *the term, as between the lessor and the lessee, is put an end to; and, therefore, a surety for the payment of the rent under the lease is released from his liability under the guarantee as and from the date of the disclaimer, there being no rent due from the lessee after that date.*

Appeal by the plaintiff from a judgment of Phillimore, J., who tried the action without a jury.

The action was brought under ord. 14, r. 8, by the plaintiff, a solicitor at Sheffield, against the defendant, a jewellery manufacturer, of Coventry, as surety for the payment to the plaintiff of rent from time to time due to the plaintiff from one Thomas Chapman for premises No. 34, High-street, Sheffield, under the guarantee in writing of the defendant dated the 15th of November, 1898, hereinafter set out.

The facts were as follow:

The plaintiff was the owner of the above-mentioned premises at Sheffield, and on the 15th of November, 1898, he let them on lease for a term of five years from the 25th of December, 1898, to Chapman at the yearly rent of £280.

At the time the lease was granted, and in consideration thereof, the defendant gave the plaintiff the following guarantee:

"15th of November, 1898.—In consideration of your granting the lease of the premises 34, High-street, Sheffield, to Mr. Thomas Chapman, of Hull, I hereby guarantee the payment of so much rent as may be from time to time in arrear for twenty-one days to a sum not exceeding £140. This guarantee to remain in force concurrently with the lease for a period of five years from the 25th day of December next."

On the 3rd of November, 1899, a receiving order was made against Chapman, who was subsequently adjudicated a bankrupt, and a trustee of his estate appointed.

On the 15th of February, 1900, the trustee disclaimed the lease. Beyond the fact that the clerk to the trustee in bankruptcy left the key of the premises at the office of the plaintiff, and that the plaintiff had advertised them to let, there was no evidence that the plaintiff had resumed possession of the premises, which had remained locked up.

The defendant paid the rent of the premises down to the 25th of December, 1899, and admitted his liability, and offered to pay £40 10s., the proportionate part of the rent from that date to the 15th of February, 1900, the date of the disclaimer, but denied liability to pay any rent accruing after that date.

The action was brought to recover £70, a quarter's rent due on the 25th of March, 1900, when the defendant paid £40 10s. into court, and pleaded section 55 (2) of the Bankruptcy Act, 1883.

Phillimore, J., found as a fact that the plaintiff had not resumed possession of the premises. But he arrived at the conclusion that the effect of the disclaimer was to release the lessee from liability to pay rent, and that as the defendant's guarantee only extended to the payment of rent in arrear, there was no liability under the guarantee for any rent after the disclaimer. He accordingly gave judgment for the defendant.

The plaintiff appealed.

Sylvain Mayer, for the plaintiff.—Under section 55 of the Bankruptcy Act, 1883,* the defendant is liable for the whole quarter's rent, as the disclaimer does not affect the rights or liabilities of any person except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability. That is expressly provided by the last clause of sub-section 2. So far as regards the liability of the surety the lease must be deemed to be still in existence and the rent as still accruing. The object of the Act was not to put the surety in a better position than if the lessee had not become bankrupt. The liability of the defendant under his guarantee, therefore, still continues, and his remedy is to prove against the bankrupt's estate: *Harding* v. *Preece*, 9 Q. B. D. 281, 30 W. R. Dig. 23; *Ex parte Walton. In re Levy*, 17 Ch. D. 746, 29 W. R. Dig. 26; *Hill* v. *East and West India Dock Co.*, 32 W. R. 925, 9 App. Cas. 448; *In re Finley, Ex parte Clothworkers Co.*, 37 W. R. 6, 21 Q. B. D. 475.

Montague Lush, for the defendant.—By the disclaimer the term has come to an end and no rent can be said to be accruing after that date. By the guarantee the defendant has expressly limited the duration of his liability by the words "concurrently with the lease." In *Hill* v. *East and West India Dock Co.* the decision of the House of Lords turned upon the disclaimer section in the Bankruptcy Act, 1869. In that section the words were that the property disclaimed should be deemed to have been surrendered, and therefore, as a matter of fact, the term was not put an end to by the statute. By the later Act, section 55 (2), the term as between the lessor and lessee is destroyed outright. If the surety remained liable then the bankrupt lessee would be liable too, by a roundabout process if you will, for the landlord would in fact get the rent after the disclaimer out of him first by getting it out of the surety, who, in his turn, would prove for it against the bankrupt's estate (see judgment of Watkin Williams, J., in *Preece* v. *Harding*, and that of Lord Lindley in *In re*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

* By section 55 (1) of the Bankruptcy Act, 1883: "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee . . . may, by writing signed by him, at any time within three months after the first appointment of a trustee disclaim the property. Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment he may disclaim such property at any time within two months after he first became aware thereof."

By sub-section 2: "The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him; but shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

Finley); a landlord they held could not after disclaimer prove for future rent. If the plaintiff's contention is correct he is entitled after the disclaimer to re-enter and let the premises and to collect the rent from the surety of the late lessee at one and the same time. The lease having gone, the liability of the surety has also gone.

A. L. SMITH, M.R.—In this case we have to decide what is the effect of the disclaimer upon the defendant's liability under his guarantee. My brother Phillimore held, and, I think, rightly held, that the effect of the disclaimer was to end the term as between the plaintiff and the lessee, and, therefore, as no rent after the date of the disclaimer could accrue, the surety was no longer bound. That being so, the learned judge held that the defendant could not be called upon under his guarantee for alleged arrears of rent after the date of the disclaimer. We have listened to a learned argument as to the difference between the Bankruptcy Acts of 1869 and 1883 from Mr. Montague Lush. I am not going into that question, and for this reason: The present case seems to me to be concluded by the decision of this court in *In re Finley, Ex parte The Clothworkers' Co.*, where the judgment of the court, consisting of Lord Esher, the present Lord Lindley, and Lord Bowen, was delivered by Lord Lindley. In dealing with the effect of section 55 of the Act of 1883, Lord Lindley said the operation of those clauses in the simple case of a lease is not very difficult to ascertain. If there is nothing more than a lease, and the lessee becomes bankrupt, the disclaimer terminates his interest in the lease under sub-section 2. He gets rid of all his liabilities, and loses all his rights, by reason of the disclaimer. There is no need of any provision for vesting the property in the landlord, but the natural and legal effect of sub-section 2 is that the reversion will become accelerated." In other words, the meaning of the words "the disclaimer shall operate to determine as from the date of the disclaimer the rights, interests, and liabilities of the bankrupt" in sub-section 2 is that the term is put an end to altogether as between lessor and lessee. If the lease be therefore terminated by the disclaimer, how can any rent after the disclaimer is made become due from the lessee to the lessor? Clearly no rent can be due. The term having been terminated, the reversion is accelerated, and the lessor again enters into possession of the premises. This is also to the advantage of the lessor, for once in possession he is in a position to let to another tenant at any rent the land will command. Having thus ascertained the position of the lessor and the lessee after the date of the disclaimer, what is the position under the new set of circumstances of the surety? The liability of the lessee has ceased. Is the liability of the surety to the lessor kept alive? If it is, then he should be able to prove against the bankrupt's estate. If the surety is liable to pay to the lessor the rent due after the disclaimer, and is entitled to prove, and does prove, against the bankrupt's estate, how does the disclaimer release the bankrupt or his estate from the liability to pay rent? The guarantee was on the face of it a guarantee for the payment of so much rent as might be from time to time in arrear. In my opinion, for the reasons I have above stated, after the disclaimer there can be no rent demanded, and therefore no rent in arrear. There is also another ground upon which this case might be put. There was a special stipulation in the guarantee that the guarantee should remain in force "concurrently with the lease." The lease having been put an end to, it might well have been argued that under this stipulation the guarantee had also gone. I am content to rest my judgment on the same ground that my brother Phillimore did, and therefore it is unnecessary for me to do more than point out this alternative reason why, in my judgment, this appeal fails.

COLLINS and ROMER, L.JJ., delivered judgments to a like effect.

Solicitors for the plaintiff, *H. A. Maude*, for *W. H. Stacey*, Sheffield.

Solicitors for the defendants, *Pepper, Tangye, & Co.*, for *Pepper, Tangye, & Winterton*, Birmingham.

High Court of Justice.

Chan. Div. } Feb. 20, 21.
Kekewich, J. }

OLIVER v. BANK OF ENGLAND. (a.)

Principal and agent—Power of attorney—Transfer of stock—Forged signature—Implied authority—Stockbroker—Liability—Indemnity.

A stockbroker who executes a transfer of stock as attorney under a power impliedly warrants that he is the duly authorized agent of the stockholder. If this is a misstatement of fact, even though honestly made in ignorance of the true state of facts—as, for instance, if a signature on the power has been forged without the knowledge of the stockbroker—he is nevertheless liable for any loss thereby occasioned.

This was an action claiming a declaration that transfers of a sum of £2,633 12s. 6d. Consols and a sum of £147 5s. 4d. Bank of England Stock, to which the plaintiff was entitled as surviving trustee, were void because the plaintiff's signature to the power of attorney under which the transfer was made was forged.

The plaintiff also claimed a declaration that the bank was bound to replace the stocks, and pay the back dividends, or pay the value and interest at 4 per cent., and an order to that effect.

In consequence of this the bank claimed by third-party notice from Messrs. Starkey, Levison, & Cooke, who or some of whom had claimed to act and had acted on the powers of attorney, to be indemnified by them and each of them against all loss which might accrue to the bank by reason of the transfers of stock, or any payment the bank might be ordered to make in the action and against all costs, and claiming judgment accordingly.

Prior to December 1897, the above-mentioned Consols and bank stock were standing in the books of the bank in the names of the plaintiff Edgar Oliver and his brother F. W. Oliver as trustees.

F. W. Oliver was a solicitor who had been acting for the trustees in these matters.

In December, 1897, Messrs. Starkey, Levison, & Cooke, stockbrokers, who usually acted for F. W. Oliver, received instructions from him to apply for a power of attorney for the sale of the Consols. This was obtained and forwarded for execution to F. W. Oliver. He returned the power, which purported to be signed and executed by himself and the plaintiff, and appointed William John Starkey and Edward John Levison attorneys for the purpose of selling and transferring the Consols. W. J. Starkey, however, alone demanded to act on the power, and did so act.

On the 23rd of December, 1897, the bank, acting

(a.) Reported by C. W. MEAD, Esq., Barrister-at-Law.

under this power, transferred the Consols into the names of other persons. Before acting on this power the bank, following their usual plan, compared the signatures with other genuine ones of the trustees in their possession, and also wrote to the trustees informing them of the proposed sale.

The plaintiff Edgar Oliver had never signed the power; his name had been forged to it; a wrong address had been given so that the letter from the bank had never reached him, and he was ignorant of the whole transaction.

On the 8th of March, 1898, the bank transferred the Bank Stock to other persons under precisely similar circumstances.

On the 7th of July, 1899, F. W. Oliver died, and the plaintiff for the first time heard of these transactions. He thereupon brought this action against the bank, and they claimed by third-party notice to be indemnified by Messrs. Starkey, Levison, & Cooke on the representations made in the powers and the transfers that they were authorized by the trustees and on the implied warranty that the signatures were genuine.

The stockbrokers denied making any representations as to their authority, and claimed that the bank had relied on their own inquiries, having examined the signatures by experts and passed them as genuine, and by notifying the holders by letter that such a power had been lodged.

At the trial of the action the forgery of the plaintiff's name on the powers was proved and judgment given for him in the terms of the statement of claim.

The claim of the bank against the stockbrokers was then proceeded with.

Warrington, K.C., and *R. M. Pattisson*, for the plaintiff.

H. D. Greene, K.C., *Latham, K.C.*, and *Howard Wright*, for the bank.—There was a breach of warranty and authority. The loss was occasioned by the brokers having dealt solely with one of the trustees, the solicitor, and doing nothing to ascertain that the plaintiff had in fact executed the power. They ignored him, and the loss was occasioned by this carelessness. The application for the power was a representation by the firm that they were authorized by the plaintiff. There was a breach of warranty by Starkey acting on behalf of his firm. The firm received and paid over the money to F. W. Oliver alone. All the partners of the firm are rightly added as defendants, and they are jointly and severally liable to the bank, which is entitled to be indemnified by them against the loss: *Collen* v. *Wright*, 6 W. R. 123, 8 E. & B. 647; *Firbank's Executors* v. *Humphreys*, 35 W. R. 92, 18 Q. B. D. 54.

Swinfen Eady, K.C., *P. O. Lawrence, K.C.*, and *Stewart Smith*, for the brokers.—The bank did not rely on any warranty by the brokers but tested the genuineness of the signatures themselves both by comparing them with others in their possession and by writing to the stockholders that a power had been lodged. It is only after the bank has satisfied itself by these tests that they act on the power. This custom is well known, and the bank cannot be heard to say that the brokers impliedly warrant when they really rely on their own tests: *Halbot* v. *Lens*, *ante*, p. 214, [1901] 1 Ch. 344. Where the fact is equally within the knowledge of both parties, the agent is not liable for an honest misrepresentation: *Smout* v. *Ilbery*, 10 M. & W. 1. In *Polhill* v. *Walter*, 3 B. & Ad. 114, the case of a forged power of attorney is mentioned as an instance where the agent would not be liable.

KEKEWICH, J.—I need not trouble you Mr. Greene. This is a case of considerable importance affecting a very large class of persons. It affects through the defendants the whole class of brokers, and it affects through the bank very large bodies as well as those who are concerned in transfers of stocks and shares, for instance, large railway companies, such as the London and North-Western Railway Co. by way of example. Therefore I repeat it is a case of considerable importance. But to my mind the whole question is a very simple one; it may be difficult, but it is a very simple one of law, and of law only. On the admitted facts—that is to say, the facts which are really common to both parties—there is no question of fact at all, and I, though others may think differently, think a great many of the facts which have been put in evidence, might without disadvantage have been wholly omitted. I will not say more. The law which I have to apply is laid down in many cases, but I think I need only refer to one or two. Take the statement from the judgment given by Willes, J., in *Collen* v. *Wright*, in 8 E. & B. 647, where he says at p. 657, "I am of opinion that a person who induces another to contract with him as the agent of a third party by an unqualified assertion of his being authorized to act as such agent, is answerable to the person who so contracts for any damages which he may sustain by reason of the assertion of authority being untrue." That is explained a little lower down on the same page thus: "The obligation arising in such a case is well expressed by saying that a person professing to contract as agent for another impliedly, if not expressly, undertakes or promises the person who enters into such contract, upon the faith of the professed agent being duly authorized, that the authority which he professes to have, does, in point of fact, exist." Now the same doctrine is enunciated in a much later case than that, certainly thirty years later, in *Firbank's Executors* v. *Humphreys*, in the Court of Appeal, where Lord Esher expresses the doctrine on p. 60. I will only read one passage: "The rule to be deduced is that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred." The present Lord Lindley, then a member of the Court of Appeal, expresses it on p. 62 tersely, if I may venture to say so, "Where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." But he says that is an exception to the rule that an action for damages will not lie against the person who honestly makes a misrepresentation which misleads another. Now that is the law which it seems to me I have to apply, and I have to apply it to the very short facts of this case. I propose to dispose of it entirely on one point, which, strictly speaking, is not pleaded, but which seems to me to be far more important than any of the other points which are put forward. On the 25th of December, 1897, and the 5th of March, 1898, respectively Mr. Starkey purported to transfer in the bank books two sums of Consols and Bank of England Stock, which could only be transferred by his signing in the books, as the attorney for the transferors, the transfers of course being made out in the ordinary form as transferred by the stockholders—that is to say, the persons who were the owners of the stock in the bank books. That, to my mind, is a complete representation by him that he transfers as

the attorney of the two Olivers—in other words, that he is a person authorized to transfer in their name. One need not pause to consider whether that is a contract within the meaning of *Collen* v. *Wright*, which applies to contract only, though I myself have no doubt that the principle of *Collen* v. *Wright* could not be confined to cases of contract in the strict sense of the word; but the other case which I cited, and which I cited mainly for that purpose, of *Firbank's Executors* v. *Humphreys* shows that the principle of *Collen* v. *Wright* is applied to a transaction which may or may not be contracted, and the transaction in this case comes within the decision. Now, unless there is some answer to that in the arguments which I have heard on behalf of Mr. Starkey, it follows that Mr. Starkey is liable, on that principle, by an implied contract, to make good the loss which the bank have sustained by acting on those transfers and allowing the stock to pass into the name of other holders, and which at the suit of the plaintiff in the principal action they have been ordered to make good. The first objection is that Mr. Starkey behaved honestly—that is to say, he behaved honestly in the belief that he had the authority of those principals in whose name he purported to act. That he did honestly believe it nobody could possibly doubt, and he is acquitted of anything approaching improper intent, or really, according to the ordinary course of business, neglect of due precaution, though of course in the ordinary course of business precautions are neglected which might with advantage and with a view to perfect safety be taken. But he says he honestly believed it. Mr. Swinfen Eady cited me *Smout* v. *Ilbery* and *Polhill* v. *Walter* as authorities to show that that honest belief excuses him. I doubt whether either of those cases go to that length. There is certainly an expression in the judgment in *Smout* v. *Ilbery* which tends strongly in that direction, to say the least. *Polhill* v. *Walter*, I think, may possibly be explained by the peculiar character of the pleadings. I doubt whether the judgment means more than that the defendant would not be liable on the pleadings in that case. But those cases are old, in the sense that there are modern cases which have dealt with the principle, and which have made no such exception, and it is to be observed that Lord Lindley, in the passage which I have just quoted, says this: "Speaking generally, an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another." And then he makes the exception which I read, and which I must read again, "Where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes." He says that is an exception from the rule that the man is not liable who honestly makes the representation. It follows as a matter of course that the exception covers the whole of the rule, and that the person who honestly makes the representation, but so as to come within the exception that Lord Lindley lays down, is liable for that misrepresentation. But if that were not so I should have no difficulty in saying that these later cases, apart from any direct statement by any of the judges, go further and expound the law more fully than it is expounded in *Smout* v. *Ilbery* and *Polhill* v. *Walter*, and that the authority of those later cases must be upheld as against the others, and that may possibly be referable to improved forms of pleadings. There may have been (I do not profess to say there were) very great difficulties in such a form of action as I am now considering in the time of those two other cases. Then the other objection, and there is only one other, is that the bank knew as much as Mr. Starkey knew himself, or, at any rate, that they had the means of knowing. To a great extent that was true. It is possible, of course, that Mr. Starkey might have taken means to verify the signature of his principal, but the bank might have had the means, also, if they had chosen to follow it out. The answer to that is, that they are not bound to do anything of the kind. How far they are bound to verify the signature to the execution of a power of attorney I do not pause to consider, but they certainly are not bound as between themselves and the person who demands to act under the power of attorney, to see that that power of attorney has been properly executed. In discharge of their public duties they would probably think, as they always have thought, that it is not right to take the risk without all precautions that are possible, but they may throw the risk on the agent who comes, and leave it to him to justify his position if unfortunately it is necessary to do so. Then it is said that all this was known to these stockbrokers, and it is the practice of stockbrokers to rely on the bank, and they know that the bank take these precautions, and therefore the stockbrokers are content to leave the bank to take all the precautions which they always do, and which they did in this particular case. A great deal that the bank does in that way, as explained by the witnesses, is obviously work of supererogation, and they are not bound to do it, and they are certainly not bound to tell the stockbroker, and as a matter of fact they do not, because one witness particularly, the gentleman who was a member of the committee of the Stock Exchange, was very careful to say that he only knew of what was done externally. He does not know, the bank does not tell him, the bank would not be right in telling him, all that takes place within the walls of the bank itself. That is no excuse. According to the authorities Mr. Starkey has honestly misrepresented a fact, he has honestly misstated that he was the duly authorized agent of the two stockholders for the purpose of transferring those stocks. It is unfortunate for him that it turns out to be untrue, but according to the law of England, as settled by the cases to which I have referred, he is liable for that misrepresentation in point of fact But the bank have not been content to sue Mr. Starkey, who executed the transfer, but they endeavoured to make liable his two partners, and though it matters of course not a whit, because Mr. Starkey no doubt acted as one of the firm, and if he is liable no doubt that will set itself right as between himself and his partners, still I have to consider whether any relief can be granted against the others. To my mind the others were improperly made defendants. That fortunately has not added to the costs, and I do not think any relief can be granted against them. I am not proposing to go back to an exposition of the law. I shall take that for granted now. But let us apply it to what happened. The first thing that took place was that Mr. Starkey and his two partners together applied for a power of attorney, they all applied for it, and if it could be maintained that they were liable through a misrepresentation in doing that, they all three made a misrepresentation, and they all three would be liable. But what is the action which we are considering, because I am treating it as if it were an entirely independent action, as perhaps it strictly ought to have been, though we are conveniently disposing of it on what is called a third-party notice? It is in action on an implied warranty, and all the cases lay down without exception that the remedy against the agent—that is to say, the person who has purported to act as agent when he had no authority, is on that implied warranty which has injured the plaintiff, and in the action you can only recover those damages

which have been suffered by reason of the breach of the implied warranty or implied contract—it is immaterial which. Even if you could maintain an action technically without alleging and proving the damages incurred, at any rate, you would get no relief. What they might do in the King's Bench Division beyond depriving the plaintiff of the costs I know not. I certainly should not hesitate if I had a case of that kind to make the plaintiff pay the defendant's costs of the action. It is impossible to suggest with any intelligence that this application alone did the bank any harm, or caused them any injury at all. It is not really put forward in that way. What has been attempted to be done is to link them together, and then to ground an action on each of them considered with respect to the other. But that, I think, is a fallacious way of treating an implied warranty. You must find your implied warranty in one document, or in one act, and sue upon that, or you can put the two together and say they are one. That may be, but you cannot take three or four together and say, "They make an implied warranty, and now I will sue on each of the three or four portions." That seems to me entirely wrong. Now nothing happened on this at all. The application was made for the power, and the power was issued. It might very well have stopped there. I venture to say, that if it had stopped there, not only, of course, would there have been no action, but that if any fanciful person had endeavoured to found an action on that, it might have been got rid of in a very speedy way. The next step is that the power is supplied, and the power is made out in the name of Mr. Starkey and Mr. Levison. The application was only for the two, so we have nothing to do with the other partner there. Then the power came, and then the demand to act on the power by Mr. Starkey alone. Here I have not to consider the question of the others, but going back to the power again, though it was part of the history of the case, and though it was necessary that it should be proved here undoubtedly, and we should know all about it, still it led to no action itself. The whole transaction might have stopped there. In fact part of the defendant's case is that it ought to have stopped there, and the bank ought to have found out the power was a bad one, and at any rate there was no warranty there which led to any damages, and no damages could possibly be recovered. But besides that we have what is called the transfer ticket, which is the mere form apparently, a step in the transaction, and that is signed in each case by Starkey and of his partners—that is to say, the other partner, who was the other attorney in the power. I will not at length repeat what I have said, but nothing came of it. It was a step in the whole transaction, and it is necessary to be borne in mind; but it is only a step in the whole transaction, and it is quite impossible to sue for damages on that. It appears to me that an action founded on this—and those are the only real cases of misrepresentation which are alleged in the statement of claim—must inevitably have failed. But the statement of claim points out, though it does not state, that the transfer was executed by this gentleman Mr. Starkey as attorney, and having executed as attorney, I think he is liable on that ground. Therefore, of course, the whole question is here whether Mr. Starkey is liable or not, and it matters not whether one member of the firm or the whole of the three members of the firm are liable. I do not think that making only one liable ought to make any difference in the costs of what I will call the action. Mr. Starkey must pay to the bank all that the bank are bound to pay to the plaintiff in the original action, including, of course, the costs of which they have been ordered to pay, and they must beyond that pay the costs of this third-party notice.

Solicitors, *Hore, Pattison, & Bathurst; Freshfields & Williams; Morley, Shirreff, & Co.*

Chan. Div. } Farwell, J. } Feb. 9.

In re WALKER.
WALKER *v.* DUNCOMBE. (*a.*)

Infant — Accumulation — Maintenance—Mansion-house —Subscription to charities.

Where a testator directs payment of an annual sum for the maintenance and education of a tenant for life, or in tail, and directs accumulation of the residue for his benefit if he shall attain full age, and, in the event of his death, on specified trusts,

The court has jurisdiction to allow the expenditure of a larger annual sum if, on the true construction of the will, there is a paramount intention which authorizes it.

This was an originating summons in which Sir Robert James Milo Walker, an infant suing by his next friend, was plaintiff, and the trustees of the will of Sir James Walker were defendants, to have a sum of £4,000 a year paid to the mother of the plaintiff to enable an establishment to be kept up at Sand Hutton Hall, where the plaintiff and his three brothers might reside.

Butcher, K.C., and *Wilkinson*, for the plaintiff, referred to Simpson on Infants, 262, 264; *Collins* v. *Collins*, 31 W. R. 650, 32 Ch. D. 229; *Hunt* v. *Parry*, 34 W. R. 773, 32 Ch. D. 383; *Griggs* v. *Gibson*, *Ex parte Maynard*, 14 W. R. 513; *Havelock* v. *Havelock*, 29 W. R. 859, 17 Ch. D. 807; *Revel* v. *Watkinson*, 1 Ves. sen. 93; *Bennett* v. *Wyndham*, 5 W. R. 410, 23 Beav. 521.

Davenport, for the trustees and the younger sons.

FARWELL, J.—The testator, Sir James Walker, was the great grandfather of the present plaintiff, who is an infant and tenant in tail in possession under the limitations contained in the will. His father and his grandfather died in 1899 and 1900 respectively. The testator died in 1883. This is an application asking that the trustees may be permitted to expend some £4,000 a year in keeping up Sand Hutton, the mansion-house on the property, and paying the mother of the infant plaintiff a sum of money to enable an establishment to be kept up at Sand Hutton, where the infant tenant in tail, who is now ten years old, and his three brothers may reside. The estate was a very large one, and I am told it appears in the evidence that it is about £11,000 or £12,000 a year in land, and some half a million or so in personalty, which is given by a codicil to be invested in the purchase of land to be settled to similar uses to those devised by the will. I should have mentioned that the will directs the settlement to be made, but inasmuch as it sets out very fully the provisions which are to be contained in the settlement, and the settlement is, I am told, practically a copy of the powers in the will. I am dealing only with the words as contained in the will. The testator directs that during the minority of every person entitled, either as a tenant for life or in tail by purchase to the possession of the free-

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

holds the trustees may manage the hereditaments, and receive the rents and profits, and make any new or additional buildings, fences, plantations, or other improvements thereon as the trustees shall think proper and most advantageous for the same hereditaments, and the persons interested therein, and to apply for such purposes accordingly any part of the rents and profits of the hereditaments, and so on.

Then there is a provision for £500 a year for the maintenance, education, or benefit of the minor until he attains eighteen, and £600 a year after eighteen, and a direction to accumulate the residue for the benefit of such tenant for life or in tail as aforesaid, if he or she shall attain full age; but if he or she shall die under that age, then to hold all investments and accumulations of surplus rents during his or her minority, upon the trusts therein directed concerning the moneys to arise from any sale of the settled estates.

It is obvious that £500 a year is wholly inadequate to keep up Sand Hutton. There is a general power of leasing in the will which does not exclude the mansion-house; but there is one element of evidence to show that the testator regarded Sand Hutton as the family mansion-house, because there is a request in his will that his son would reside at Sand Hutton.

The question that I have to consider is whether I have any jurisdiction on the true construction of the will to authorize the trustees to make this expenditure, which is larger than that which is mentioned in the will. I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible; but on the true construction of the will it is open to the court to have regard to what has been called sometimes the paramount intention, and which I think is what is pointed at by Lord Hardwicke and Pearson, J., in the cases I have before me. The case of *Revel* v. *Watkinson* was a very strong one. Lord Hardwicke there had a tenant for life and a remainderman. There were charges upon the estate, the interest on which more than absorbed the whole of the income of the property, and of course, there being no express direction, I think, in the will, at law the tenant for life was bound to keep down the interest on the charges; but Lord Hardwicke said that there was in that case a paramount intention that the tenant for life should not starve, and he accordingly, notwithstanding that the income was not sufficient to keep down the interest on the incumbrances, directed maintenance of the tenant for life. That was extended by Pearson, J., in the case of *Collins* v. *Collins*, to the education and bringing up of the infant in a way suitable to the position which he was likely to fill in the world afterwards; and that appears to me to rest also on the same principle of paramount intention. So that a testator who settles his property on A. for life, with remainders over, and provides for infants being maintained, does not, when he mentions a sum for maintenance, and directs an accumulation of the rest, without negative words, necessarily exclude all intention that the estate should be kept up, and the infant should be brought up, in a way suitable to the position which he has pointed out for him by his will. There are, in fact, two intentions running side by side in the will; one is that the infant is to inherit the full enjoyment at twenty-one of that which he now has possession subject to the management clauses; the other is that he shall have an allowance of £500 a year.

I think I do no violence to the words of this will when I regard the £500 a year as a sort of allowance which a parent in the position of the testator here makes to a son who is under age; either allowing it to him personally, or regarding it as the amount which would be necessary to pay his school bills, and his clothing, and so on, his father providing and keeping up the home, the family estate, and the family mansion at which the boy lives with him. The direction as to management in this will to my mind points to that. The testator certainly did not contemplate that Sand Hutton Hall should be shut up. On the contrary, he leaves heirlooms to go with the estate and to be enjoyed in the mansion-house. He certainly did not contemplate that the family mansion should be let, because I think if he had, he would have expressed it in terms; and although the power is wide enough to include the letting of Sand Hutton in case it became necessary, I think probably the testator had no contemplation of the possibility of letting, nor would it be desirable or convenient that the house should be let as a furnished house with the heirlooms in it unless it was absolutely unavoidable. I therefore hold that on the true construction of this will I have authority to accede to the suggestion which is made to me. It seems to me that if any particular case is more in point than another as showing the jurisdiction to do such a thing as this, and as bearing out the view expressed in two cases I have already cited, it is the case of *Griggs* v. *Gibson*, before Lord Hatherley. No question is here raised by Mr. Davenport that the amount is insufficient, and it seems to me to be a very fair and proper amount; and as regards one item of charities, which Mr. Butcher specially called attention to, although I am not aware that cases are reported, certainly within my own recollection many times in cases of large estates judges have allowed a sum to be expended for charities on the footing, amongst other things, that it is within the principle that the son is to be brought up and to live on the property, keeping up the reputation of the family and the estate; and that he could not do if the ordinary subscriptions to charities which a country gentleman living in the country necessarily pays should not be paid on behalf of the infant. Therefore I will make an order as asked.

Solicitors, *Long & Gardiner*, for *Crust, Todd, Mills, & Sons*, Beverley.

(1903) 2 KB. 644

K. B. Div. (Bucknill, J.) March 6.

ELLEN v. GREAT NORTHERN RAILWAY CO. (a.)

Negligence—Personal injuries—Acceptance of money in full discharge of claim for compensation—Subsequent development of injuries not before apparent—Claim for further damages—Right to bring action.

The plaintiff, who was injured in a railway collision, signed a receipt for a sum of money paid him by the railway company in full satisfaction and discharge of all claims. He returned to work, but his eyesight soon began to fail, and he became totally blind.

Having commenced an action to recover damages from the railway company, the defendants pleaded that the action was not maintainable, and the question was ordered to be tried first whether the plaintiff had by his conduct debarred himself from suing for damages.

Held, that the action was maintainable, it being a question for the jury.

Action to recover damages for personal injuries,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

alleged to have been sustained by reason of the negligence of the defendants' servants.

On the 16th of March, 1899, in his capacity of postal sorter, the plaintiff was travelling on the Great Northern Railway from Retford towards Doncaster, and was injured in a collision that occurred near Babworth Crossing. He sustained injuries which caused concussion of the brain and general shock to the nervous system. He was examined by his own doctor and by doctors on behalf of the railway company, and it was admitted that he was not informed and that the doctors had themselves no idea, that he had sustained injuries other than those abovementioned, and that they were only temporary. In this belief he instructed his solicitor to accept from the Great Northern Railway Co. on his behalf £190, and sign the following receipt: "Sept. 26, 1899. Received of the Great Northern Railway Co., per W. B. Jones, Esq., the sum of £190 in full satisfaction and discharge of all claims, legal and medical charges included, in respect of injuries sustained by Mr. T. E. J. Ellen near Babworth Crossing, Retford, on the 16th of March, 1899."

He returned to his work, but, after an interval, found his eyesight was beginning to fail, and in February of last year he was dismissed from his employment in the Post Office. He had since become totally blind and destitute.

The plaintiff alleged in his statement of claim that the failure of his eyesight was caused by the injuries sustained in the collision, and he sought to recover compensation in addition to the sum he has already been paid.

The defendants pleaded there had been an accord and satisfaction, and that the action was accordingly one that could not be maintained.

It was ordered at chambers that this question of law should be tried by a judge alone, before the trial of the issues of fact.

The defendants admitted for the purposes of this defence that neither the plaintiff nor his doctor at the time of the settlement knew or had reasonable grounds for supposing that the plaintiff's eyesight was or would be affected; the plaintiff on his part admitting the receipt of the £190.

M'Call, K.C., and *W. Clarke Hall* appeared for the plaintiff.

Montague Lush, for the railway company.

BUCKNILL, J.—The question I have to decide in this case is whether the plaintiff who was injured in the collision near Retford on the 16th of March, 1899, and who afterwards signed a receipt for a sum of money paid by the railway company in full satisfaction and discharge of all claims he might otherwise make, bound himself by that contract not to sue for damages he now alleges he suffered by reason of that collision which have since developed themselves. Now I am not going to shut the plaintiff out from having that question tried by a jury, because I think it is a question for a jury to answer. If the acceptance of the money and the document signed by the plaintiff's solicitor amounts to an agreement as distinguished from a receipt, the plaintiff has made a binding bargain and he must stand by it. Attention has been drawn to the fact that the pleader has used the word agreement in the statement of claim, but I think the pleading is nevertheless capable of the following construction: The plaintiff said in it that he had concussion of the brain and general shock, and that he did not know that he had sustained any other injury, and that with that knowledge only he gave the defendants a receipt for £190 in full satisfaction of all claims in respect of the injuries of which he then had knowledge, but that if he had known that he was to be tied down on the development of something of which he had then no idea, he would not have accepted the £190, and therefore he was still entitled to go to a jury and ask them to give him damages in addition to those received for the development of the further injuries in respect of which he had never intended to give a receipt. During the argument, *Prosser* v. *Lancashire and Yorkshire Accident Insurance Co.*, 6 Times L. R. 285, was cited, in which Huddleston, B., on the authority of *Rideal* v. *Great Western Railway Co.*, 1 F. & F. 706, proposed to leave to the jury the question whether the plaintiff intended at the time he signed the receipt and agreement to debar himself from claiming for any subsequent disablement arising out of the accident. I take that case as a guide, and although it is not on all fours with the present case because the jury there was discharged by consent, and on appeal the Court of Appeal held the plaintiff was, as the judge decided, entitled to succeed on the true construction of the agreement itself, yet it is a decision that shows the spirit in which the court has approached questions of this kind, and supports me in deciding that in this case it is not for me as a judge to say on the wording of their pleading whether there has or has not been a binding contract such as would debar the plaintiff from maintaining a further claim for compensation. My interlocutory judgment is for the plaintiff, with costs against the defendants, but I will grant leave to appeal.

Solicitors for the plaintiff, *Wareham & Waugh.*

Solicitor to the defendant company, *R. H. Dawe.*

K. B. Div.
(Bruce and Phillimore, JJ.) } Jan. 29; Feb. 16.

HULL v. LONDON COUNTY COUNCIL. (a.)

Metropolis—Building—General line of buildings—"Projection"—Electric sign affixed to wall of house—Lapse of time between offence and information—London Building Act, 1894 (57 & 58 *Vict. c. cxxiii.*), *s.* 73. *sub-section* 8—*Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 11.

By an agreement in writing the appellant let to an advertiser's agent a position covering the first-floor window of a house in the Seven Sisters-road for the purpose of erecting an electric advertising sign. The sign consisted of a wooden case with a glass front, which was attached to the external wall of the house by iron brackets, a space of six inches intervening between the back of the case and the level of the front wall. The cornice of the shop-front, which was below the sign, projected twenty inches beyond the external wall of the premises so that the sign projected four inches less than the existing projection of the premises.

More than six months after the sign was completely erected, the respondents laid an information against the appellant for an offence under section 73, *sub-section* 8, *of the London Building Act*, 1894, *in extending a projection beyond the general line of buildings, without the respondents' permission. The summons was heard by a metropilitan magistrate, and at the hearing a further point was raised by the appellant, whether the prosecution*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

of the alleged offence was barred under section 11 *of the Summary Jurisdiction Act*, 1848, *by lapse of time, the sign having been erected on the* 20*th of June*, 1899; *notice to remove served on the* 16*th of March*, 1900, *and the information laid on the* 17*th of May*, 1900, *which information alleged that the offence was committed on or about the* 19*th of December*, 1899, *the date when the sign was first brought to the attention of the council. The magistrate decided in favour of the council, and convicted the appellant.*

Held (allowing the appeal), that the erection of the sign was not an offence within section 73 (8) *of the London Building Act*, 1894, *which section only extended to such projections as were part of the architectural structure of the building itself.*

Held, also, that, if this sign were a "projection," nevertheless the information was barred by lapse of time under section 11 *of the Summary Jurisdiction Act*, 1848.

Held, further, that the tenancy would have been no answer to the charge.

This was an appeal, by case stated, from the decision of the metropolitan magistrate, James Bros, Esq., sitting at Clerkenwell, convicting the appellant under an information preferred by Mr. Thomas Chilvers, on behalf of the respondents, charging the appellant with unlawfully extending a projection at No. 209, Seven Sisters-road, Islington, beyond the general line of buildings of Seven Sisters-road and Campbell-road, Islington, without the permission of the council, contrary to section 73 (8) of the London Building Act, 1894 (57 & 58 Vict. c. cxiii).

Upon the hearing of the information the following facts were proved: No. 209, Seven Sisters-road is at the corner of Seven Sisters-road and Campbell-road, Islington.

By an agreement in writing made on the 9th of June, 1899, the apellant let to Mr. S H. Benson, an advertiser's agent, a position covering the first floor window at the corner of the premises for the purpose of erecting thereon an electric or other advertising sign.

The tenancy was to commence as soon as the sign was let, and in any case not later than the 24th of June, 1899, and was to be for the term of one year, with the option of renewal for a period of not less than two years at a yearly rental of £20

This agreement was entered into by Mr. Benson on behalf of his clients, Messrs. Frederick King & Co. (Limited), whose registered office is in London. They were the proprietors of an article known as Edwards' Desiccated Soup, which was the subject-matter of the advertisement.

Between the 13th and 20th of June, 1899, the Electric Sign and General Advertising Co. (Limited) put up for Messrs. Frederick King & Co. (Limited) an electric advertisement sign over the front of the appellant's premises in the position mentioned in the agreement. The sign was commenced to be put up on the 13th of June, 1899, and was completely affixed to the external wall of the premises on the 20th of June, 1899. It consisted of a wooden case with a glass front, the case being attached to the external wall of the premises by iron brackets, a space of 6in. intervening between the back of the case and the wall, and a portion of the apparatus working the sign being within the room on the first floor. The sign measures 10ft. 6in. in height by 7ft. in breadth, and when lighted by electricity shows an advertisement of Edwards' Desiccated Soup. The sign was placed immediately over the cornice of the shop-front and, including the iron brackets, projected only 16in. beyond the external wall of the premises. The cornice of the shop-front, which was below the sign, projected 20in. beyond the external wall of the premises, so that the sign projected 4in. less than the existing projection of the cornice. The sign did not project over the highway.

On the 16th of March, 1900, a notice was served on the appellant requiring him to comply with the law. The information, which was preferred on the 17th of May, 1900, charged that the offence was committed on or about the 19th of December, 1899, the date on which it was brought to the attention of the council.

On the 2nd of June, 1900, the superintending architect of metropolitan buildings gave his certificate defining the general line of buildings of the premises as being the main fronts of the buildings on the eastern side of Campbell-road and on the northern side of Seven Sisters-road respectively.

On the part of the appellant it was contended that the information was invalid, inasmuch as it was not laid within six calendar months from the time when the matter arose, as required by section 11 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43); that the offence, if any, was complete and the matter of the information arose on the 20th of June, 1899, the date on which the sign was completely affixed to the premises; that the alleged offence was not a continuing offence, and was wrongly stated in the information to have been committed on or about the 19th of December, 1899; that the sign was not a projection within the meaning of section 73 (8) of the London Building Act, 1894, inasmuch as the sign did not extend beyond the existing projection of the shop cornice and did not extend over the highway; and that the appellant was not liable or a proper defendant to the information, inasmuch as by the agreement he had demised the part of the premises on which the sign was affixed and had no power to control or alter the position of the sign without trespassing on the property of his tenant or to remedy the alleged breach of the section. On behalf of the council it was contended that the offence was a continuing offence, that the sign was a projection, and that the appellant was liable notwithstanding the agreement. The learned magistrate found as a fact that the sign did project beyond the general line of buildings in the streets as defined by the superintending architect, and held that the offence was a continuing offence. The questions for the opinion of the court were—(1) Whether the prosecution of the alleged offence was barred under section 11 of the Summary Jurisdiction Act, 1848, by lapse of time; (2) whether the sign constituted a projection within the meaning of section 73 (8) of the London Building Act, 1894; (3) whether the appellant could, having regard to the agreement, under the circumstances be properly convicted of the alleged offence.

Macmorran, K.C., and *G. M. B. Kenrick*, for the appellant.—This sign is no part of the architectural structure of the building, and therefore the conviction under section 73 (8) of the London Building Act, 1894, must be quashed. That section enacts "that the following provisions shall (except with the consent of the council) apply to projections from buildings," and when these are looked into it is clear that such a "projection" as this sign is not intended to be included. This is clear even when sub-section 8, under which the prosecution was instituted, is considered alone, for that enacts that "except so far as is permitted in this section in the case of shop-fronts and projecting windows, and with the exception of water-pipes and their appurtenances, coping, string-courses, cornices, facias, window dressings, and other architectural decorations, no projection from any building shall extend, &c." The projections which are there specially exempted, but for this sub-

section, would, as forming part of the building, come within the general heading of the section as being projections from a building which were necessarily attached and formed part of the building itself. The reason is to be found in the fact that other projections—*i.e.*, things merely added to the buildings and projecting therefrom—had been dealt with in earlier acts—for example, projections endangering or incommoding the passage of the public along the street are dealt with in section 119 of the Metropolis Local Management Act, 1855. If the respondents are right in their contention this section would include shop lamps, reflectors, clocks, and other like projections. Moreover, we say the proceedings were commenced too late. This is not a continuing offence within the meaning of section 200, sub-section 3. And in the absence of express words a penal clause must be construed strictly: *London County Council* v. *Cross*, 66 L. T. Rep. 731, 40 W. R. Dig. 148; *Marshall* v. *Smith*, L. R. 8 C. P. 416, 21 W. R. Dig. 139; *Metropolitan Board of Works* v. *Antony*, 33 W. R. 166, 54 L. J. M. C. 39; *Welsh* v. *West Ham Corporation*, [1900] 1 Q. B. 324, 48 W. R. Dig. 102. Lastly, we say that, the appellant having leased the position to a third party, the information was laid against the wrong person.

Avory, K.C., for the respondents.—The summons was rightly taken out under section 73, for that section deals with things of a smaller character than section 22, and these two sections should be read together. I admit that by the earlier Acts such projections as a clock or a horizontal flagsteff are dealt with, but these signs are as much part and parcel of the house to which they are attached as a porch shelter which projects over the pavement without pillars to support it. The test is whether the projection is attached, is dovetailed into the fabric in such a substantial way that it reasonably ought to be regarded as part of the building itself and not a mere appurtenance thereto: *Coburg Hotel* v. *London County Council*. 16 Times L. R. 9, 63 J. P. 805, 48 W. R. Dig. 120. If the projection is part of the structure then the consent of the council is necessary; *Ellis* v. *Plumstead Board of Works*, 41 W. R. 496, 68 L. T. Rep. 291, and *Venner* v. *M'Donell*, 45 W. R. 267, 61 J. P. 181, throw light on this principle. I say that the erecting of a thing is the offence, the retaining it in position after notice is the continuing offence: *London County Council* v. *Worley*, 43 W. R. 11, [1894] 2 Q. B. 826. This sign is firmly affixed to the building just as a large flower box would require to be, and as the Act did not wish to interfere with ordinary window boxes, but did intend to prevent the attachment of large glass ferneries or covered flower stands, the consent of the local authority was made necessary by section 210 (16) of the Act. The whole object of the Legislature was to preserve the uniformity of the street. It is therefore unnecessary to show that the projection is an annoyance. These signs are so large now that it is quite time that the council interfered and stopped them being erected without consent.

Macmorran, K.C., replied.

Cur. adv. vult.

BRUCE, J., read the following written judgment of the court: In this case we think that the sign does not constitute a projection within the meaning of section 73, sub-section 8, of the London Building Act, 1894. The section in question commences: "The following provisions shall (except with the consent of the council) apply to projections from buildings." In order to ascertain the meaning of the phrase "projections from buildings," used at the commencement of the section, and the meaning of the words "projection from any building," used in the last sub-section, the provisions of the whole section must be considered. The first sub-section provides in substance that every coping, cornice, string-course, facia, window dressing, and such like, and every architectural projection or decoration and also the eaves, barge boards, and cornices to any overhanging roof shall, except as therein mentioned, be of brick, tile, stone, or other fireproof material. We think it is clear that this sub-section refers only to projections from buildings in the nature of architectural projections or decorations and to the overhanging parts of buildings, and it relates to the material for the construction of the parts of buildings to which it refers. Sub-section 2 enacts that every balcony, cornice, or other projection shall be tailed into the wall of the building and weighted and tied down to the satisfaction of the district surveyor, and that no cornice shall exceed in projection 2ft. 6in. over the public way. This sub-section relates only to projections in the nature of architectural projections. Sub-section 3 lays down rules regulating the extent to which in a street a shop-front and a cornice to a shop-front may project beyond the external wall of the building to which the shop-front or cornice belongs. Sub-section 5 relates only to bay windows, and sub-section 6 lays down the rules under which projecting oriel windows or turrets may be constructed. Sub-section 7 provides that the roof, flat, or gutter of every building and every balcony, verandah, shop-front, or other similar projection or projecting window shall be so arranged and constructed and so applied with gutters and pipes as to prevent the water therefrom from dropping upon or running upon any public way. We now come to the 8th sub-section, upon the construction of which the main question in the case turns. That sub-section is in these terms: "Except in so far as is permitted by this section in the case of shop-fronts and projecting windows and with the exception of water-pipes and their appurtenances, copings, string-courses, cornices, facias, window dressings, and other like architectural decorations, no projection from any building shall extend beyond the general line of buildings in any street except with the permission of the council, after consulting the local authority." The whole of the preceding part of the section relates to the construction of buildings, to projections from buildings, in the nature of architectural projection or decoration, or to the overhanging parts of buildings, and therefore it is plain that the projections from buildings to which the main provisions of the section apply are projections forming part of the buildings from which they project. The question we have to determine is whether the words in the 8th sub-section "no projection from any building" are used in a different sense and apply to a different class of projection; whether they include such things as poles, blinds, sign-boards, or other structures hung out from or attached to the outside wall of a house. Giving the best consideration we can to the words of the 8th sub-section we think that the words "projection from any building" are there used in the same sense as in the earlier part of the section. It would be strange to find in the last sub-section of a long section containing a code of minute provisions relating to a particular class of projections a sudden departure from the subject to which all the preceding provisions of the section are devoted. The meaning of the two branches of the 8th sub-section, we think, is that, with the exception of architectural decorations of the character specified, and for an obvious reason water-pipes, no part of the structure of a building, no architectural projection not being a shop-front or projecting

window falling within the first branch of the sub-section, shall extend beyond the general line of buildings in any street. But it is contended by the counsel for the respondents that, although the words apply to such projections as we have mentioned, yet that they are wide enough to extend to everything attached to a building and extending beyond the general line of buildings, and that they apply to a structure such as the wooden box attached to the external wall of a house by brackets as described in the case. We do not think that the words, even apart from the context, have so extended a meaning. A projection from a building means a part of a building projecting or jutting out; it means a prominence extending from the building in the sense of coming out from the building as part of the building. If the words are taken in this sense they fall in with the scope of the section. It is quite clear that the object of the section is to preserve the width of the street and the general line of building frontage, in order to maintain architectural uniformity. But to extend the meaning of the words in the 8th sub-section to include structures not being part of the building and not joining any part of the architectural structure of the building would be to give an effect to the enactments altogether beyond the object to which the section seems to be directed. Further, we feel strengthened in the conclusion at which we have arrived by the circumstance that the 73rd section is in Part VI. of the Act, which is headed "Construction of Buildings." In another part of the same Act, where power is given to the council to deal with dangerous structures, the word structure is said to include anything affixed to or projecting from any building, wall, or other structure (see section 102). Had the Legislature intended the 73rd section to apply to a structure affixed to a building it may fairly be assumed that it would have used in that section words similar to the words used in the 102nd section. The 203rd section and the 73rd section were not, we think, intended to overlap. In each case the Legislature uses apt words to describe the particular kind of structure to which the several provisions apply. We may add that no inconvenience seems to be likely to arise from the construction we have placed on the sub-section in question, because the council has power under the 164th section of the same Act to make bye-laws for the regulation of lamps, signs, or other structures overhanging the public way not being within the city. And by the 7th sub-section of section 60 of the 2 & 3 Vict. c. 47 a penalty is imposed upon any person who shall set up or continue *inter alia* any pole, blind, awning, or any other projection from any window, parapet, or other part of any house, shop, or other building so as to cause any annoyance or obstruction in any thoroughfare. And by the 119th section of the Metropolis Management Act, 1855, provision is made for the removal of any lamps, iron sign-post, showboard, window shutter, gate, fence, or any other projection or obstruction placed or made against or in front of any house or building which shall be an annoyance in consequence of the same projecting into or being made in or endangering or rendering less commodious the passage along any street. Further, as to the point raised by the case whether the prosecution of the alleged defence is barred under section 11 of the Summary Jurisdiction Act, 1848, by lapse of time, we think it is. If any offence was committed it was, we think, complete on the 20th of June, 1899, the date on which the said sign was completely affixed to the premises. The case of *London County Council* v. *Cross* is, we think, in point. As to the third point, we think that, if the sign had been a projection within the meaning of section 73 of the London Building Act, 1894, and the proceedings had been taken in due time, the appellant could not have escaped liability on the alleged ground that he had no power to control or alter the position of the sign without trespass. The result of our judgment is that the conviction, determination, and order must be reversed, and we think the appellant is entitled to the costs of the appeal.

Appeal allowed, with costs.

Solicitors for the appellant, *S. M. & J. B. Benson.*

Solicitor for the respondents, *W. A. Blaxland.*

K. B. Div. (Wills and Channell, JJ.) — Feb. 8.

R. v. BISHOP OF SALISBURY. (*a*.)

Churchwarden—Election—Right of minister to vote—89th Canon—Sturges Bourne's Act, 1818 (58 *Geo.* 3, *c.* 69).

The minister of a parish has no right to vote in the election of the people's churchwarden.

Semble, *he may have a right to give a casting vote.*

Cause shown by the Bishop of Salisbury against a rule *nisi* ordering him to admit and administer the declaration to Mr. S. Vine as churchwarden of the parish of Winterborne Came.

At a meeting of the vestry of the parish of Winterborne Came held on the 23rd of April, 1900, two persons, Mr. Vine and Mr. Passemore, were nominated as people's churchwardens.

On the 7th of May, 1900, a poll was held, and the voting showed 29 votes given by 19 persons for Passemore, and 23 votes given by 8 persons for Vine.

The rector claimed the right to vote and gave six votes in favour of Vine, and he then gave a casting vote in favour of Vine, Vine thus obtaining 30 votes to Passemore's 29 votes.

Both claimed admission from the ordinary, and the matter was referred to the bishop, who was then on visitation.

On the 21st of June the bishop gave a considered judgment, and declared that Passemore was elected.

Passemore was subsequently admitted.

It was contended by the bishop that the rector had no right to vote in an election of the people's churchwardens.

Dibdin, K.C., and *Bailey*, for the bishop, showed cause.—The common law as to the election of churchwardens is contained in the 89th canon. That canon provides as follows: "All churchwardens or quest men in every parish shall be chosen by the joint consent of the minister and the parishioners if it may be. But if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another." The canon embodies the common law and declares that if the minister and the parishioners cannot make a joint choice, each is to choose one: *Stoughton* v. *Reynolds*, 2 Str. 1044. The minister, therefore, is to have no choice in the election by the parishioners of their churchwarden: *Wilson* v.

(*a*.) Reported by J. A. GREENE, Esq., Barrister-at-Law.

McMath, 3 Phillimore 67, at p. 84; Anderton on Churchwardens, p. 173. The common law is not altered by Sturges Bourne's Act. Section 3 of that Act does not specially allude to election of churchwardens, and so does not alter common law: *Reg.* v. *Scott*, 4 W. R. 777, 25 L. J. M. C. 128; *Reg.* v. *Morris*, 15 W. R. 999, 1 C. C. R. 90. "Parishioners" in the canon is not the same as "vestry" in the Act. If the Act takes away right of parishioners to sole choice of their churchwarden, then it takes away sole choice of incumbent to appoint his churchwarden.

Edwardes Jones, in support of the rule.—The minister as an inhabitant or parishioner is entitled to vote. *R.* v. *D'Oyly*, 12 A. & E. 139, per Lord Denman, p. 159: "Under section 3 of Sturges Bourne's Act the minister is an inhabitant and entitled to vote in respect of his assessment." The whole policy of the Act is to allow voting in the vestry on the basis of rateable value. Here the minister was entitled to six votes. The minister comes within the wording of section 3 of the Act, and there is nothing in the Act exempting the case of election of churchwardens.

He also cited *Green* v. *Reg.*, 1 App. Cas. 533, 24 W. R. Dig. 92; *Ranson and Knott* v. *Campkin*, 2 Rob. Eccl. Rep. 370; *Reg.* v. *Kirby*, 10 W. R. 13, 31 L. J. Q. B. 3.

WILLS, J.—This case is not free from difficulties, but I think the rule must be discharged. I find myself unable to believe that Bourne's Act was intended to affect the manner of electing churchwardens. There is no doubt that the common law is correctly expressed in the 89th canon. There is nothing that can be cited to the contrary, in fact it has been held to be a correct statement of the common law. According to the canon the minister, when he has once exercised his right of appointing his churchwarden, is ousted from taking any part in the election of the people's churchwarden. It is said that "parishioner" includes "minister," but to hold that would be doing great violence to language. In the canon "parishioner" certainly excludes "minister." Therefore at common law the minister was under a legal incapacity of voting in election of the people's churchwarden. I cannot think that by a mere side wind, so to speak, Parliament should have intended to alter so fundamental a principle. In construing a statute such as Bourne's Act where two contrary meanings may be put upon it, we ought to incline to that construction which is in agreement with the common law. It is said that section 3 of Bourne's Act enacts that in every case a minister who is rated is entitled to vote, but this is not an election by a vestry. It is true that it is an election in a vestry, but it is not an election by a vestry. I do not think that the general words referring to the general business of the vestry have removed the personal incapacity under which at common law the minister lies; as to section 8 of the Act it refers, I think, only to customs applying to a particular parish and has nothing to do with the point we are deciding.

CHANNELL, J.—In the words of the canon, one churchwarden is to be chosen by the minister, the other by the parishioners exclusive of him. The canon expresses the common law rule in authoritative language, and it has never been questioned except by a *dictum* of Lord Denman, which I will treat of presently. In *Wilson* v. *McMath* Sir John Nicholl says, in speaking of the minister: "And to be sure, if there was any case in which he ought to have retired from the chair it was at the election of a second churchwarden, with which he had nothing at all to do" There is nothing to the contrary except the *dictum* of Lord Denman, and that is only an adoption by him of a statement put forward in argument by counsel, and his decision that even if the statement is true, yet the argument should not prevail. If before Bourne's Act the minister was entitled to vote for his own churchwarden and then to vote for the other, then I think the applicants here should prevail, but in my opinion it was not so. I do not think Bourne's Act has altered the common law. We must not alter the common law in a special case by a general Act. The only doubt I have is whether on equal votes being given for the second churchwarden Bourne's Act applies as to the minister giving a casting vote. On the whole I think under the Act the minister in such a case has a casting vote, since he would be chairman, but this is not necessary for our decision here.

I think, however, the minister had no right to vote for the election of Vine, and that Vine was not properly elected.

Rule discharged.

Solicitors, *Robins, Hay, Waters, & Hay; Jenkins, Baker, & Co.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Feb. 27.

CHAMBERS *v.* GOLDTHORPE.
RESTELL *v.* NYE. (*a.*)

Contract — Building contract — Architect — Certificate — Liability for negligence in making certificate — Position of arbitrator — Duty to exercise impartial judgment.

A building contract provided that the builder should be paid on the certificates of the architect who was employed by the building owner to superintend the work and measure it up when completed, and that the final certificate should be conclusive evidence that the builder was entitled to receive payment of the final balance. The contract contained a clause providing that, in case any dispute under the contract should arise between the building owner, or the architect on his behalf, and the builder, such dispute should be referred to the arbitration of a person other than the architect.

Held, by A. L. Smith, M.R., *and* Collins, L.J. (Romer, L.J., *dissenting*), *that the architect occupied the position of an arbitrator in making certificates, and therefore that the building owner could not maintain an action against the architect for negligence in making his final certificate.*

Appeals from the Queen's Bench Division.

The first case was an appeal from the judgment of a Divisional Court (Channell and Bucknill, JJ.) on an appeal from the Holmfirth County Court.

The second case was an appeal from the judgment of Mathew, J., at the trial of an action without a jury.

In the first case, the plaintiff Chambers, who was an architect, sued the defendant Goldthorpe, a building owner, for fees, and the defendant counterclaimed for negligence, under the following circumstances: The plaintiff was employed by the defendant to prepare plans for houses which the defendant was about to have built, to superintend the work, and to measure it up when completed.

The defendant entered into a contract with a contractor, whereby the latter was to build the houses.

The building contract was in the printed form approved and issued by the National Association of Master Builders of Great Britain.

Clause 1 provided that, in the construction of the contract, the term "architect" was to mean the plaintiff or the architect for the time being employed by the defendant to superintend the erection and completion of the works.

Clause 8 provided that "any authority given by the architect for any alteration or addition in or to the works is not to vitiate the contract, but all additions, omissions, or variations made in carrying out the works, for which a price may not have been previously agreed upon, are to be measured and valued and certified for by the architect, and added to or deducted from the amount of the contract as the case may be, according to the schedule of prices annexed, or where the same may not apply at fair measure and value."

By clause 16 the contractor was to complete the whole of the works within five months after their commencement, unless the works were delayed from certain causes, for which due allowance was to be made by the architect, and then the contractor was to complete the works within such time as the architect should consider reasonable, and in case of default the contractor was to pay a certain sum per week by way of liquidated damages until the works were completed, provided that the architect certified in writing that the works could have been reasonably completed within the time appointed.

Clause 19 provided that the architect was to give *interim* certificates as the works progressed, and that when the works were completed, or possession of the buildings given up to the defendant, the contractor was to be entitled to receive the moiety of the amount remaining due, and the architect was to give his certificate accordingly, and the contractor was to receive the balance of all moneys payable under the contract within three months from the completion of the works or from the date of giving up possession, whichever first happened.

By clause 20, "a certificate of the architect, or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractor is to be conclusive evidence of the works having been duly completed, and that the contractor is entitled to receive payment of the final balance."

Clause 22 provided that "in case any question, dispute, or difference shall arise between the proprietor"—that is, the defendant—"or the architect on his behalf, and the contractor as to what additions, if any, ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractor, or by reason or on account of any directions or requisitions of the architect, involving increased cost to the contractor beyond the cost properly attending the carrying out the contract according to the true intent and meaning of the signed drawings and specification, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract, except as to matters left during the progress of the works to the sole decision or requisition of the architect under clauses Nos. 2, 10, and 11, or in case the contractor shall be dissatisfied with any certificate of the architect under clause No. 8, or under the proviso in clause No. 16, or in case he shall withhold or not give any certificate to which the contractor may be entitled, then such question, dispute, or difference, or such certificate, or the value or matter which should be certified, as the case may be, is to be from time to time referred to the arbitration and final decision of an architect, being a Fellow of the Royal Institute of British Architects, to be appointed at the request of either party by the president for the time being of such institute, and the award of such referee is to be equivalent to a certificate of the architect, and the contractor is to be paid accordingly." Such award or certificate might be made a rule of court.

After the houses were completed the plaintiff measured up to the work done, and gave his final certificate, the total amount of the cost of work coming out at £622.

The plaintiff, having sued the defendant in the county court for the amount of his fees—namely, 4 per cent. upon £622, the defendant admitted the claim and counterclaimed for negligence by reason of the plaintiff having incorrectly measured up certain of the work done, whereby the final certificate was for a larger amount than it ought to have been.

The county court judge gave judgment for the defendant on the counterclaim for damages to be assessed.

The Divisional Court on appeal held that the architect was, under clause 20 of the contract, placed in a judicial position between the building owner and the contractor with reference to giving his certificate,

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

and therefore was not liable for negligence. They accordingly entered judgment for the plaintiff on the counterclaim.

The defendant appealed.

Lowenthal, for the defendant.—The plaintiff was acting as agent for the defendant, and he is therefore liable to an action for negligence in the performance of his duty. The plaintiff was not in the position of an arbitrator or in any judicial position whatever as between the defendant and the builder. His duty was to his employer, the defendant, and he had power under the building contract to bind the defendant. But he could not bind the builder. It is clear from clause 22 that the builder was not bound by any certificate given by the plaintiff under clause 8 or under clause 16, nor by his final certificate. If there had been any dispute between the defendant and the builder, the plaintiff could not have given a certificate at all: *Lloyd Brothers* v. *Milward*, 2 Hudson's Building Contracts, 454. A person who is not permitted to settle a dispute cannot be an arbitrator: see *Clemence* v. *Clarke*, 2 Hudson's Building Contracts, 207. Secondly, the defendant is counterclaiming under the original contract by which he employed the plaintiff as his architect, and it is immaterial to show that the plaintiff is an arbitrator under some other contract: *Rogers* v. *James*, 2 Hudson's Building Contracts, 113.

He also referred to *Pappa* v. *Rose*, 20 W. R. 784, L. R. 7 C. P. 525; and *Stevenson* v. *Watson*, 27 W. R. 682, 4 C. P. D. 148.

Scott Fox, K.C., and *R. W. Harper*, for the plaintiff.—The plaintiff was bound, so far as regards his final certificate, to exercise his judgment impartially between the building owner and the builder; and that, according to the judgment of Blackburn, J., in *Pappa* v. *Rose*, is sufficient to exempt him from liability for negligence. This case is governed by *Stevenson* v. *Watson*; see also *Tharsis Sulphur and Copper Co*, (*Limited*) v. *Loftus*, 21 W. R. 109, L. R. 8 C. P. 1. Secondly, the defendant is counterclaiming for negligence in giving a certificate, and the giving of certificates was not provided for in the original contract, but only in the building contract.

In the second case, the plaintiff Restell, a building owner, sued the defendant Nye, an architect, for negligence under the following circumstances:

The defendant was employed by the plaintiff as architect in connection with the building of a bungalow. The terms of the employment of the defendant were contained in certain letters which passed between the parties, from which it appeared that the defendant was to be paid by the plaintiff for "plans, specifications, and supervision of works" 5 per cent. upon the amount of the expenditure, travelling and out-of-pocket expenses to be charged extra.

The defendant prepared a specification, and a tender submitted by a firm of builders for the erection of the bungalow for £1,790 was accepted.

The plaintiff signed a building contract which was similar in its terms to the building contract in the case of *Chambers* v. *Goldthorpe*, and provided that the price should be paid by instalments upon the defendant's certificates, and that his final certificate should be conclusive evidence that the builders were entitled to receive payment of the final balance.

The arbitration clause was as follows: "Provided always that in case of any question, dispute, or difference arising between the employer or the architect on his behalf and the contractors attending the carrying out of the contract according to the true intent and meaning of the signed plans and specifications, or as to the works having been duly completed, or as to the construction of these presents, or the said specifications, or as to any other matter or thing arising out of this contract or the execution of the works hereby contracted for (except as to matters hereinbefore left during the progress of the works to the sole decision of or requisition of the architect), then such question, dispute, or difference is to be from time to time referred to the arbitration and final decision of Mr. Samuel Denman, or, him failing, Mr. Hunt, and the said referee's charges and costs of and incidental to the reference shall be paid by such parties as the referee shall direct, and the said reference shall be considered a reference to arbitration within the meaning of the Arbitration Act, 1888, or any statutory modification thereof, and no proceedings whatsoever shall be taken by the contractors against the employer until the contractors shall have obtained, and save upon, the award of the said referee, whose appointment shall be irrevocable."

The work was completed, and the plaintiff paid the contract price together with the cost of certain extras on the defendant's certificates.

The plaintiff alleged that the defendant had been guilty of negligence in measuring up the work executed and in checking the builders' accounts, and had negligently passed as extras, works included in the contract and certified for sums improperly passed.

Mathew, J., gave judgment for the defendant on the ground that he was in the position of an arbitrator, and that an action would not lie against him for negligence.

The plaintiff appealed.

Bray, K.C., and *Morten*, for the plaintiff.

L. Horton-Smith, for the defendant.

A. L. SMITH, M.R.—I will first deal with the case of *Chambers* v. *Goldthorpe*. The plaintiff, an architect, sued the defendant, a building owner, for payment of fees—viz., 4 per cent. on the total cost of work done under a building contract. The building owner counterclaimed for damages for negligence on the part of the architect in bringing out his final certificate. The county court judge held as a matter of law that the counterclaim against the architect for negligence could be maintained, the question whether in fact there had been negligence being left in abeyance. The Divisional Court reversed his decision, holding that the counterclaim could not be maintained. The question we have to decide is whether the plaintiff was placed in the position of an arbitrator, or whether he was merely in the position of a person acting as agent for the building owner. If he was an arbitrator, then the building owner cannot sue him for negligence; he can only sue him for fraud or collusion; and there is no suggestion in this case of anything of that kind. Looking at the building contract it is plain that under many of the clauses of the contract Chambers was only to act as agent for Goldthorpe. With regard to the matters dealt with in those clauses his duty was simply to look after the interests of Goldthorpe, and in respect of those matters no doubt he would be liable to an action of negligence. But when we come to clause 20, the question arises, Does the architect still remain merely the agent of the building owner, or is he not an arbitrator? It seems to me to be impossible to say with regard to clause 20 that the architect's sole duty was to look after the interests of the building owner. The architect undertook the duty of bringing out a final certificate. With respect to that he owed a duty to the builder as well as to the building owner, his duty being to hold the balance fairly between the one and the other. It is suggested that the architect cannot have been in the position of an arbitrator because the building owner was absolutely

bound by his certificates, whereas the builder was not, but I do not see why under the terms of clause 22 the building owner might not go to the referee. We were referred to the cases of *Clemence* v. *Clarke* and *Lloyd Brothers* v. *Milward*, and it was argued that in this case there was no dispute, and that there could be no arbitration unless there was a dispute. In my opinion there may be an arbitration to settle what otherwise might be the matter of a dispute. The present case seems to me to be exactly like *Stevenson* v. *Watson*. Chambers, like the defendant in that case, had not merely to make an arithmetical calculation, but to use professional knowledge and skill. *Tharsis Sulphur Co.* v. *Loftus*, which was the case of an average adjuster, has also, in my opinion, a strong bearing on the case before us. I therefore think that Chambers was in the position of an arbitrator. With regard to *Rogers* v. *James*, that case seems to me to have nothing to do with this. There the architect was sued for not supervising the building, which was a matter in which it was not his duty to act in the interest of the builder, but rather to act adversely to the builder. I think that the counterclaim cannot be maintained, and that the appeal must be dismissed. For the same reasons I think that the claim in the other case, *Restell* v. *Nye*, cannot be maintained, and that the appeal in that case should also be dismissed.

COLLINS, L.J.—I am of the same opinion. The question is the same in both cases—viz., whether the architect was in the position of a *quasi*-arbitrator. If he was, then the case against him in each instance must fail. The question depends on this, whether he was in such a position that he was bound to exercise his judgment impartially between the two parties. It was suggested that he was only the agent of the building owner, and owed no duty to the builder. But in my opinion, when the building contract is read, it is clear that he was in the position of a *quasi*-arbitrator. It was held in *Lloyd Brothers* v. *Milward* that where a dispute has arisen, *i.e.*, has been formulated, between the parties to a building contract before the architect has given his certificate, the architect's jurisdiction is ousted, and the jurisdiction of the referee is let in; but if there is no formal dispute before the certificate is given, then the referee's jurisdiction is not let in, and the architect's certificate is final. But an architect who has to give a final certificate which shall be binding not only on his employer, but on the other party, cannot be said to be free from duty to the other party; he is under a duty to exercise his judgment impartially between the two contracting parties. And where a person is bound to exercise judgment between others involving professional skill he is entitled to the immunities of an arbitrator. I am of opinion that these cases come within the principle of *Pappa* v. *Rose*, *Tharsis Sulphur Co.* v. *Loftus*, and *Stevenson* v. *Watson*, and that the architect in each case was in the position of a *quasi*-arbitrator.

ROMER, L.J.—I regret to have to differ from my learned brethren. I will state my views on what seem to me to be a question of principle. In my opinion, if a person undertakes for reward to value or estimate for another, work about to be done for his principal by a third person, he does not, so far as his principal is concerned, become placed in the position of an arbitrator in regard to his valuation or estimate, merely because he knows that his principal and the third person have by contract between them agreed that, in default of dispute previously arising with regard to the matter, his valuation or estimate is to be taken as conclusive and as determining the price to be paid by his principal for the work to be done by the third person. In such a case, in giving his valuation or estimate he would still be acting for his principal, and, so long as he acted without fraud, he would be under no obligation or liability to the third person. And acting, as he would do, for his principal, if he was guilty of negligence causing damage, he would be liable to his principal in an action brought by him. I cannot bring myself to think that that view is wrong. And yet, undoubtedly, the contrary view must be maintained by the architect in the present case to enable him to succeed on this appeal. For on the facts it appears to be clear that by the terms of his employment by the defendant the architect undertook to measure up from time to time the work to be done for his principal by the contractor, and to certify the amount in money the work represented, and in particular, on completion of the work, to certify the balance payable. For this work he was to be paid by his principal. It would follow that, if in doing that work, for which he was to be paid by his principal, he was guilty of negligence from which damage ensued to his principal, he would be *primâ facie* liable. To enable him to escape from that liability, the onus would be on him to show that by the terms of the contract between his principal and the contractor he was freed from that *primâ facie* liability. No doubt he might do so if he could show that by those terms he was undoubtedly placed in the position of an arbitrator with regard to his certificates, and that the principal's complaint against him in regard to the certificates was for something done in his capacity of arbitrator. But, in my opinion, the architect would not succeed in showing this merely by reason of the fact that his principal and the contractor had by the contract agreed that in the case of no prior dispute arising with reference thereto his certificates should be treated as conclusive between them. In the contract in the present case not only is there nothing going beyond what I have just mentioned, or indicating that in measuring up the work and certifying the architect was regarded or treated as an arbitrator, but the provisions of the contract appear to me to negative the idea that under that contract he was regarded as, or placed in the position of, an arbitrator. I need not go through the whole of those provisions, but I may point out that there is an arbitration clause (clause 22) which does provide for the settlement of disputes by an arbitrator who is not the architect; and in that clause the architect is clearly recognized as the agent of the building owner, as a person who in reference to what he has to do is considered as acting for his principal and as one opposed to the contractor. And clause 8 is not without significance. If there were any matters in respect to which one would expect to find the architect placed in the position of an arbitrator, if he was ever intended to occupy that position, it would be in reference to the matters dealt with by that clause. And yet we find that though the architect's principal would be bound under clause 20 by the architect's certificate in reference to these matters, yet under clause 22 the contractor might challenge the certificate and go to arbitration upon it. In fact, on this contract, far from it enabling the architect to discharge the onus which I have mentioned, in my opinion it is strongly against him. To hold the opposite view appears to me to put a construction on the contract not necessary or right, and one which would work injustice as between the building owner and the architect guilty of negligence. I do not think I am prevented by the authorities from taking the view which I take of this case. The cases of *Wadsworth* v. *Smith*, 19 W. R. 797, L. R. 6 Q. B. 332, and *Jenkins* v. *Betham*, 3 W. R. 283, 15 C. B. 168, support my view strongly, and the balance of all the authorities seem to be in favour of my view rather than

of the contrary view, and also to be more in consonance with natural justice. The only case which causes me any difficulty is *Stevenson* v. *Watson*. But there the parties expressly agreed that they should be bound to leave all questions to the architect, whose decision should be final. I am not surprised that the court held him to be an arbitrator. If that case is opposed to *Wadsworth* v. *Smith*, then I prefer *Wadsworth* v. *Smith*. I am therefore of opinion that the appeals ought to be allowed.

Appeals dismissed.

Solicitors for the plaintiff in the first case, *Van Sandau & Co.*, for *Mills & Co.*, Huddersfield.

Solicitors for the defendant in the first case, *James & Mellor*, for *Learoyd & Co.*, Huddersfield.

Solicitors for the plaintiff in the second case, *James White & Leonard*.

Solicitor for the defendant in the second case, *J. A. P. Ingoldby*, for *Nye & Clewer*, Brighton.

From Chan. Div.
(Rigby, Vaughan Williams, and Stirling, L.JJ.) } Feb. 27.

COLLINGHAM *v.* SLOPER. (*a.*)

Practice—Compromise—Power to bind absent parties—R. S. C., ord. 16, *r.* 9a.

A scheme for compromise of an action provided for setting aside a fund to make payments to bondholders of a certain company. This scheme was sanctioned by the Court of Appeal, and, under ord. 16, *r.* 9a, *made binding on all the bondholders of the company. A certain number of bondholders failed to claim their rights within six years from the sanctioning of the compromise. On a motion to fix a time within which such bondholders must come in,*

Held (Vaughan Williams, L.J., dissentiente), *that, there being nothing in the original scheme to determine the period within which claims under it must be made, the court had no jurisdiction to vary the order by introducing such a term.*

This action was originally brought for the administration of the trusts of a sum of money amounting to upwards of £200,000 in the hands of three persons called the London Commissioners, as trustees for the Saragossa and Mediterranean Railway Co., and for the bondholders of the company.

The funds in question were raised by bonds for the sum of £20 each, payable to bearer, which formed a first charge on the company's undertaking, and were handed over to the commissioners to be applied by them in constructing the railway, subject to payment of interest and of the bonds, which were redeemable by yearly drawings.

The plaintiffs in this action, who represented a majority of the bondholders, claimed the enforcement of the trusts under which the moneys subscribed in respect of the bonds were held by the commissioners.

A second action was brought with a similar object by certain other bondholders; and a third action was brought by the plaintiffs in the second action claiming a declaration that the objects for which the moneys had been subscribed were no longer capable of being performed.

On the 9th of August, 1894, the Court of Appeal, under ord. 16, r. 9*a*, sanctioned a scheme for the compromise of the three actions, and being of opinion that the scheme would be for the benefit of all the holders of obligations, ordered that it should be carried into effect so as to be binding on the holders of all obligations, other than three dissentients named in the order, whose claims were to be provided for by the commissioners setting aside £600 out of the moneys in their hands. All further proceedings in the actions were to be stayed. By the scheme it was provided that out of the funds in the hands of the commissioners there should be set aside for distribution in respect of all obligations then outstanding, "when and as soon as the holders thereof shall be duly ascertained within fourteen days after presentation of the same for payment, upon such obligations being delivered up to be cancelled," a sum sufficient to pay £2 10s. in respect of each obligation. Most of the holders had surrendered their obligations on these terms, and there now remained only 1,700 obligations outstanding. Every effort had been made to find the holders of these obligations, but without success. There was in court a fund more than sufficient to pay £2 10s. in respect of each obligation still outstanding. The company now applied by original motion in the three actions, that a period of three months, or such other time as the court might think fit, might be limited within which the holder of the obligations must come in under the scheme and accept the £2 10s. per obligation, and that the holders who should not come within the time limited should be deemed to have elected not to take the benefit of the scheme, but to rely on the charge on the railway works created by the obligations, and that such holders might be excluded from the benefit of the scheme and of the order sanctioning it.

Upjohn, K.C., and *Martelli*, for the motion.

Butcher, K.C., and *Peterson*, *contra*.

Upjohn, K.C., replied.

RIGBY, L.J.—In this case an application is made by a railway company to alter the form of an order for compromise made by the Court of Appeal under order 16, which gives the court the extraordinary power—I grant it may be a very useful power indeed—to bind absent persons who have no sort of opportunity of seeing the terms of the compromise, or of bringing forward their own views on the subject, or indeed of even so much as knowing that a compromise has been suggested. I say it is an extraordinary power without venturing for a moment to say that it is not a power which may very usefully be exercised by a court of law, and it may be very desirable to have such a power vested in the court, especially of course in those cases, in which alone I expect it would be put into force, where a great majority of the persons who are in the same position as the absent persons who are sought to be bound, are of opinion that the compromise is a beneficial one for themselves and therefore for persons who, though absent, have similar interests.

Now I do not think it necessary to go in detail into the matter, but, roughly speaking, I have gathered that in this case a certain railway company, with a considerable scheme for carrying out the construction of railway lines, borrowed money on debentures, the security proposed to be given by them being a security on the whole line so intended to be made. I do not know why or how—and it is not necessary that we should know—but that railway company failed absolutely, so much so that a sum of money which had found its way into the hands of certain commissioners here in London was practically the only source for the repayment of the bondholders. The debenture-holders looked, in fact, to this money to get

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

partial repayment of the moneys which they had advanced.

Under those circumstances the matter came before North, J., in the case of *Collingham* v. *Sloper*, Sloper being one of the commissioners in whom the funds were vested, and the other defendants being, I suppose, the other persons in the same position. North, J., made an order, and an order which is said to have been without precedent. It may have been right for all that—I do not know, and I have not heard sufficiently to form an opinion. But whilst that order was under appeal a scheme of compromise was brought forward, and an application was made to North, J., for his sanction, I suppose under order 16, to that scheme of compromise. He declined to give it, for reasons we do not at present know, and it is not important to inquire into. But that refusal of his to sanction this scheme also came before the Court of Appeal, and on consideration of all the facts they came to the conclusion that the scheme of compromise was one that could be properly sanctioned, and they made an order to sanction the scheme of compromise. Of course, then the original order of North, J., no longer had to be considered the subject of an appeal, and, in fact, that order was stayed. There could be no resort to rights given to the debenture-holders present or absent under that order, because the scheme of compromise settled the rights altogether. Now, as I said before, it is a very strong jurisdiction to give any court power to bind people who have not had an opportunity of laying their views before the court, and are not parties in any way; but still that scheme of compromise sanctioned by the court became binding on all the debenture-holders present or absent. Since that time a very great number of debenture-holders, knowing of and sanctioning the compromise so far as their individual rights were concerned, have come in and been paid under it. A great number have come in, and there have been debenture-holders who are strangers who have also come in; they have come in slowly—probably as they happen to learn for the first time of the compromise, or it may be to make up their minds with regard to it—but they have come in slowly, and they have not yet ceased to come in, for I understand that about the 8th of the present month holders of between 2,000 and 3,000 bonds have come in, and they are now asking for payment under the compromise. Therefore, although the operation of the order is slow, it cannot be said to be entirely terminated, and we do not know what may take place. It is said that at the present time there is a fund of about £5,000 left in court, and there are a considerable number of bondholders outstanding.

Now the important clause that we have to consider is the clause of the scheme that appropriates a fund for distribution "in respect of the 61,000 obligations issued by the railway company, when and as soon as the holders thereof shall be duly ascertained, being at the rate of £2 10s. per obligation within fourteen days after presentation of the same for payment. Upon such obligations being delivered up to be cancelled there shall be set aside a sum," and then the sum is mentioned. Now I look upon that as the sum which is to be set aside to be distributed as, when, and so soon as the holders thereof shall be duly ascertained. The holders of 1,700 bonds have not been ascertained. What right has anyone to say "We will do away with that condition, which is a condition precedent to payment, and we will set the fund free before ever they are ascertained at all." Then there are the words "within fourteen days after presentation." It may be that when the bondholder was ascertained, when it was known who he was and where he was, and when an intimation of his rights had been given to him, there might have been a right to come to the court—I do not say that on the mere construction of the agreement there would be—but there may have been a right to call upon him either to present a bond for payment and to deliver it up in return for payment of £2 10s., the amount fixed for payment on each bond, or the court might in the exercise of a reasonable jurisdiction have said "You must come within a reasonable time." But I cannot imagine with what force the railway company now says, "Fix a reasonable time." How can a reasonable time be fixed in the case of a man who is not ascertained, and of whom we know nothing. We only know that there is a bond distinguished by a certain number, and we cannot tell who is the owner of that bond. How it is possible to say that we can fix a reasonable time for the holder of that bond to come in? I have examined that, and I do not think that really anything beyond that is necessary for the decision of this case as I am deciding it. Obviously the responsibility of framing an order sanctioning the compromise is in itself very considerable, but it is a mere nothing as it appears to me compared to the responsibility of a court, which on an argument, necessarily in many respects less exhaustive than that which might have been presented to the court of first instance, undertakes to alter the whole scheme. The court has chosen to say, "This is a proper scheme by which we should bind debenture-holders." Can we now insert something that the Court of Appeal in sanctioning the order did not express? Shall a construction we cannot find in the words of the language be deemed to be there—or indeed which can be shown conclusively not to be there, for the whole scheme is to take place only when and so soon as the holders of the bonds are ascertained. For my part I decline to acquiesce in such a responsibility. I daresay it may happen that a few thousands of pounds—somewhere about £4,000 it would appear to be—will be locked up. Why should it not be, even on the merest possible chance that a bondholder will come in. What sort of right or equity has this defaulting railway company to insist upon such a term being for the first time introduced into the scheme? I say they have absolutely no right, and if indeed it happens that for a very considerable time the £4,000 is locked up I cannot see any injustice. They seem to me to have got out of the effect of their default in a very easy manner, all things considered, and I am not at all disposed—even if I felt myself justified—to make any order simply because it is convenient to them and would be pecuniarily profitable to them to make the order. In my judgment, therefore, no order can be made in the matter.

VAUGHAN WILLIAMS, L.J.—I am sorry to say that I do not quite agree. Having regard to the view of the other members of the court, it is not necessary, nor would it be convenient, that I should consider what should be the order and the terms of the order which we might make if the court were going to make any order. Neither is it necessary or convenient that I should consider what would be a reasonable time in respect of these absent persons who by the order of the court were to be bound by the compromise, because, as I understand the view that has been expressed by Rigby, L.J., the court here really has no power to make an order at all. I shall also not trouble myself with the question whether it is to the interests of the community that sums of money should remain for an indefinite time tied up in court because of a difficulty in ascertaining who are the people entitled to certain interests in it. I have no right to deal with such a difficulty. There the difficulty is, and there it must remain until the Legislature has removed it. To

my mind, what I have got to do here is to construe this order, and, taking the view that I do, that is only another mode of saying that what I have to do is to construe this agreement to compromise, because the scheme of arrangement here is sanctioned by the court, and it is a scheme which should be carried out. One has to look at this scheme, and to see whether, according to its proper construction, these people who had the option of coming in and of receiving out of this fund £2 10s. are entitled to wait as long as ever they choose before exercising that option. According to my view of the construction of this order, they have not got that right. If they have got that right under the order, it does not seem to me that the court would have any right to modify it or alter it at all.

Now the compromise is the same both for the people who did assent, people who were present and being present were bound, as it is for the people who not being present were bound by the order the court made under the power of ord. 16, r. 9*a*.

Now these absent people have been bound by that order and that compromise which is sanctioned by the order. The question is, what that compromise means. Now first I will speak of what the meaning of the compromise is to those people who have been absent, or I will take those who being present have not elected to come in. Have they got an unlimited time to make up their minds; if notice were given to one of them that it was proposed if they did not come in in a further time to apply to the court to take this money out, is the agreement such that the person in question would be entitled to come to the court and say, "No; under the terms of this compromise there is no time limited whatsoever. I have got the right to say I have not made up my mind yet; there is no expression of any fixed time within which I am to come in, and there is nothing said about my coming in within a reasonable time, and I insist upon my rights." I cannot conceive that as against such a person a reasonable time might not be limited, and that the court might not say under this contract, as indeed of necessity under every contract where time is not expressed, that the law implies a reasonable time. If my memory does not deceive me — I have not the authority before me — the expression "of necessity," I think, is Lord Coleridge's expression. It is of necessity that you read in "a reasonable time," and it seems to me that if you have got people who were absent, but who are now here in the country and ascertained, the same thing could be said as against them—You must come in under this within a reasonable time. It seems to me that if you take the people who are absent and unascertained, in this case also they must come in within a reasonable time. The only thing, to my mind, which casts any doubt upon the propriety of reading into this agreement, if it be an agreement, the implied provision as to reasonable time is, first, that it may be said, "This is not a mere agreement, this is an order of the court," and that that rule does not apply to an order. I have very great doubt about it, because the rest of the court do not agree as to this. I think when the court sanctions a compromise you ought to read into the compromise "reasonable time." Then the other thing which is said against reading in "reasonable time" here is that there is another condition expressed in terms here, "As soon as the holders thereof shall be duly ascertained," and then it is said, however much one may read "reasonable time" into an ordinary contract, the reasonable time cannot here begin to run as against people who have not been ascertained, and that in each individual case the obligation and the right do not arise until the individual has been ascertained. I do not feel constrained to exclude what I call the necessary term of reasonable time by these words, because it seems to me that the words which follow, "within fourteen days after presentation," get over the difficulty because they import that presentation must be made within a reasonable time. If I am asked what is a reasonable time for an unascertained person my answer is that it is not to the interests of the community that these bondholders or anybody that should sleep upon their rights and do nothing for an indefinite time, but that people must act reasonably in these matters, and that if people for a long time do not choose to come forward and take advantage of an order which has been advertised throughout the length and breadth of the civilized world, the law will presume that those notices reached them, and make the time run from the reasonable presumption of the date when it must be taken that the notices reached the people. But I will say nothing further as to what those terms should be because the majority of the court think that there is no power to make the order.

STIRLING, L.J. — I regret to find myself in difference with my brother Vaughan Williams, L.J., but I do not think that in this case we have any right to make an order against persons who are unascertained to be the holders of outstanding bonds. It is quite true that in certain cases the Legislature has deprived persons who do not assert their rights of those rights by Statutes of Limitation and otherwise, but here no Statute of Limitation applies. The scheme which we have to consider is one which was made with the sanction of the court, and I apprehend that the court in sanctioning such a scheme would be very careful in all cases to see that it did not, in dealing with the rights of absent parties, deprive any absent person of his property in a case in which the Legislature had not decreed that he should lose it. It is by no means true in this country that persons who sleep on their rights are in all cases deprived of their property. A very strong example of that is to be found in the tender regard which the Legislature has always paid to the rights of holders of Government stock who do not come forward to claim their dividends. That is familiar to all who practice in the Chancery Division, and I think it is rather to such an example than to the case of the Statutes of Limitation in sanctioning such a scheme as this, regard ought to be had. So much as regards the general policy of the court in dealing with such schemes.

But now let us look at, and construe the agreement before us. I find that over £60,000 is set apart for a particular purpose for distribution in respect of 61,000 obligations issued by the company when and as soon as the holders thereof shall be duly ascertained, being at a certain rate per obligation, within fourteen days after presentation of the same for payment. That seems to me to imply that that fund should be set apart and distributed amongst the holders of those obligations, and that each holder has a right first of all to be ascertained, and secondly to have an opportunity of presenting his obligation. I am not differing with the Lord Justice that when once you have ascertained a holder it cannot be that it is not in the power of the court to make him exercise his option. It may be that a holder when ascertained may be in this position. The company may apply here—they may serve him with notice and ask in default of his making application within a limited period that the fund should be paid out to the company. That I think may be justified on the footing that when a person has abstained from elect-

ing in a particular way which he has a right to, he shall be held to have adhered to the rights which he has under his bond, and to have chosen to stand upon his bond rather than take the benefit which is given by the scheme. But I cannot think it is right that that should be applied until the holder has been ascertained, and has had an opportunity of ascertaining his rights for payment. It seems to me on the true construction of the compromise that we have no right to take away from any holder who has not been ascertained the fund which is provided for him. On that ground I agree with Rigby, L.J., and think that no order ought to be made.

Solicitors, *Francis & Johnson; Huxam & Rawlinson.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) Feb. 15.

PHARMACEUTICAL SOCIETY *v.* WHITE. (*a.*)

Pharmacy Act — Sale of poison — "Seller" — Orders transmitted by shopkeeper to duly registered vendor— Pharmacy Act, 1868 (31 *&* 32 *Vict. c.* 121), *ss.* 1, 15, 17.

An action to recover a penalty under section 15 *of the Pharmacy Act,* 1868, *was brought in the county court against the defendant, who was a florist, for having sold a certain weed-killer, which contained a large quantity of arsenic, and was admittedly a poison within that section, the defendant not being a duly registered chemist.*

The judge found as a fact the defendant acted only as agent for the chemical company who manufactured the weed-killer, and was in the position merely of a canvasser for orders, with authority to receive money on account of the company, and that the defendant was not the "seller" of the poison within the Act.

Held, that, as the county court judge had found as a fact that there was no contract of sale as between the defendant and the purchaser, and as there was some evidence to support that finding, the court could not interfere to set it aside.

Decision of the Divisional Court (48 *W. R.* 335, [1900] 1 *Q. B.* 454) *affirmed.*

Appeal by the Pharmaceutical Society from a decision of a Divisional Court (Grantham and Channell, JJ.), affirming a judgment of the judge of the County Court of Worcestershire.

The action was brought under section 15 of the Pharmacy Act, 1868, to recover a penalty from the defendant White for selling a two-gallon drum of a certain weed-killer which was admittedly a poison within that section, he not being a duly registered pharmaceutical chemists or chemist and druggist.

The defendant was a florist and seedsman carrying on business at Worcester, and his practice with reference to the sale of the weed-killer, which was manufactured by the Boundary Chemical Co. (Limited), of Liverpool, was, when asked for it by customers, to inform them that he did not keep it in stock and that they could either write direct to the Boundary Co. enclosing a remittance or he would himself take the money, give them a receipt, and forward their order on to the company. He had an arrangement with the company whereby he received a commission of 25 per cent. of the price of the weed-killer sold through him as agent.

The county court judge gave judgment for the defendant upon the ground that he was not the seller within the meaning of section 15 of the Pharmacy Act; and he found as facts that the defendant acted as agent only, and that he was in the position merely of canvasser for orders for the Boundary Chemical Co. with authority to receive money on their account.

The Divisional Court affirmed the judgment of the county court judge.

The society appealed.

Danckwerts, K.C. (*T. R. Grey* with him), for the plaintiffs.—By section 1 of the Pharmacy Act, 1868, the sale of poisons by an unqualified person is unlawful. In the case of certain poisons—for example, arsenic—the vendor is to ask the purchaser the purpose for which he requires the poison, and must enter the circumstances of the sale in a book. This "weed killer" contains arsenic in such large proportions that a teaspoonful would be enough to kill two or three persons, and therefore it is not on mere academical grounds that a conviction is pressed for, but in order to prevent, if possible, the sale of these two-gallon drums to any person that likes to order one from any unregistered and irresponsible agent. The Act was passed to stop the very mischief that this way of carrying on business opens up. The contract of sale was complete when the order was taken by White and the money paid for the goods and the receipt given. Even if the contract was not then completed, but required the acceptance of the offer by the Liverpool firm and the delivery by them of the goods, the "seller," for the purposes of the Act, was White. There is a distinction between the person who sells and the person who ultimately has to make delivery. Section 1 makes the "sale" an offence, and White, having sold, not being duly qualified, is liable to a penalty under section 15. So, too, the "seller," within the meaning of section 15 of the Pharmacy Act, 1868, is defined by section 17 as the person who shall make the contract, and therefore again, as White made the contract, he is liable. There are many analogous cases under the Licensing Acts where the acts of the agent are treated as those of the principal—for example, *Stallard* v. *Marks* 26 W. R. 694, 3 Q. B. D. 412. The facts in this case differ from any that have been before the courts on this part of the Act, and the arguments in *Pharmaceutical Society* v. *London and Provincial Supply Association*, 28 W. R. 957, 5 App. Cas. 857, applied to these facts, are conclusively in favour of the plaintiff's contention that White must be deemed to be the person who actually sold within the meaning of the Act of 1868 to the purchaser the poison; even assuming the contract of sale was not completed until the Liverpool company had made delivery. In *Pharmaceutical Society* v. *Wheeldon*, 24 Q. B. D. 683, 38 W. R. Dig. 148, an unregistered assistant of a qualified chemist who in the absence of his master sold poison was held liable to a penalty under section 15. The words are perfectly clear, "Any person who shall sell poisons not being duly registered" commits an offence under the Act, and the appeal should therefore be allowed.

Cavanagh and *W. W. Orr*, for the defendant, were not heard.

A. L. SMITH, M.R.—In this case the Pharmaceutical Society appeal against a decision of the Divisional Court in an action heard in the county court which they brought against one White for selling poison contrary to the statute, and they claimed a penalty of £15. The county court judge gave judgment for the defendant on the ground that he was not "the seller" within the meaning of section 15 of the Pharmacy Act, 1868. He found as facts that the defendant acted as agent only, and that he was in the position merely of canvasser

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

for orders, for the Boundary Chemical Co., with authority to receive money on their behalf. If there is any evidence to support that finding of fact, then we cannot disturb the judgment, even although it may be a finding which we ourselves should not have found. [His lordship then read the shorthand notes of the evidence of the defendants given at the trial, and continued:] In the case of the *Pharmaceutical Society* v. *London and Provincial Supply Association* the House of Lords deals with the meaning of "seller" in this Act, the question there being whether a limited company could be a "seller." The decision which their lordships came to was that the word "person" in sections 1 and 15 did not include an incorporated company so as to make the defendants in that case liable to the penalty. But they pointed out that the actual seller must be a qualified person. Lord Selbourne, L.C., in his judgment said: "I will add that regard to the mischief which beyond all controversy the Act was intended to prevent, leads necessarily to the same conclusion—namely, that he who sells, whether he be master or servant, whether he be the principal or a person to whom the conduct and management of sales is delegated, is struck at by the 15th section; because, otherwise, a very wide door would be opened to the evils which the Act was intended to guard against. If it were otherwise, nothing would be necessary, according to the appellants' own argument, than that the business should belong to a person who does not himself carry it on, but who is qualified under the Act; and he might be at liberty to employ in the management of his business persons not qualified, by whom the actual sales would be conducted; and then the public would be exposed to all the dangers which the Act was passed to prevent. The statute, therefore, in order to be effectual must strike at the particular acts of those who actually conduct the sales, who actually compound the medicines; and it does strike at those acts." Again towards the close of his judgment Lord Selborne said that everyone whom a corporation employed would be penally answerable if he sold or compounded poisons or other medicines without having the required qualification. It is clear from the judgments of the law lords in that case that the person struck at by the Acts was the person who actually sold the poison. That was what the county court judge, in my opinion, meant when he found the facts as we have them from him, and when he said that White was not the seller—that is to say, the actual seller—within the meaning of the Act. That finding of fact this court cannot interfere with, as there was evidence, and, indeed, ample evidence, to support it. The appeal must therefore be dismissed.

COLLINS, L.J.—I agree. I am content to decide this case on the short ground that the county court judge has found as a fact that there was no contract of any kind as between White and the buyer. I think the facts in this case go very near the line, and very nice considerations of law might have arisen if the case had been necessarily decided on other grounds — for instance, on the question whether there was any contract between the defendant and the purchaser; and, then, if there was such a contract, whether the transaction itself, when it came to be analyzed, fell within the Act. The question whether there was a contract of sale was one for the jury, and therefore for the county court judge sitting alone, to try questions of fact as well as of law. He found as a fact that there was no sale at all as between the defendant and the purchaser, for he said: "I find White acted only as agent, and was in the position merely of a canvasser for orders." As I said before, the circumstances go in this case very near the line constituting a contract, but, unless this court can say that upon the facts there is an irresistible inference of law that there was a contract, we cannot interfere with the conclusion to the contrary arrived at by the county court judge. It is clear, moreover, that had the case been tried by a jury, the judge would not have been justified in directing the jury that upon the facts they must find that there was a contract. Therefore, as the county court judge found as a fact no contract, I desire to express no opinion upon the question whether, if there had been such a contract of sale found, the case would come within the mischief aimed at by the Act so far as to render the defendant liable to the penalty.

ROMER, L.J.—I concur. I am not satisfied that the defendant entered into a contract with the purchaser that would bind the company—that would render them liable in damages if they refused to execute the order, which was forwarded on by White. That proposition is not established and the county court judge who had all the necessary evidence before him finds merely that White transmitted the orders he got to the Liverpool firm for them to deal with. I think he contemplated that the Liverpool firm was bound by the acts of White as their authorized agent, but he does not so find it.

Solicitors for the plaintiffs, *Flux, Thompson, & Flux.*

Solicitors for the defendant, *Timbrell & Deighton*, for *Dobbs & Hill*, Worcester.

High Court of Justice.

Chan. Div. Cozens-Hardy, J. } Jan. 28-31; Feb. 1, 4-6, 21.

MARTTENS v. HILL. (a.)

Manor—Tenure of ancient demesne—Tenants—Freehold—Custom of manor—Fine on alienation—Quia Emptores (18 *Edw.* 1, *c.* 1)—*Act of* 8 *Edw.* 2 (*Parliament Roll, vol.* 1, *p.* 298).

A lord of the manor claimed a fine in respect of the alienation to, or purchase by, a defendant of a piece of land held to be within the ambit of the manor. The manor originally belonged to the Crown, and lands in it were held by the tenure of ancient demesne.

Held, that the freehold was in the tenants, and not in the lord.

Held, that the alleged custom, even if it could be proved, was bad in law, as it was inconsistent with the statute 18 *Edw.* 1, *c.* 1, Quia Emptores, *and a statute of* 8 *Edw.* 2 (*Parliament Roll, vol.* 1, *p.* 298).

This was an action brought to try the right of the plaintiff as lord of the manor and soke of Rothley, in the county of Leicester, to a fine of 1s. in the pound on the purchase-money paid by the defendant for certain property situate at Grimston known as The Wongs.

The plaintiff claimed (1) That the plaintiff is lord of the ancient Manor of Rothley.

(2) That The Wongs is within the ambit of the manor.

(3) That the Grimston tenants of the manor are only privileged copyholders, and that the freehold is in the plaintiff as lord.

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

(4) That by the custom of the manor all such tenants are bound to pay a fine of 1s. in the pound on alienation by way of sale to a "foreigner," or alternatively that the "foreigner" is bound to pay such a fine on entry.

(5) That the defendant is a "foreigner" within the meaning of the custom.

(6) That the custom is good in law.

It appeared from Domesday Book that William the Conqueror then held the Manor of Rothley and that King Edward the Confessor had held it.

To the manor pertained twenty members, of which Grimston was one.

"In Grimestone are three carucates of land, less one bovate and a half."

In these members there were stated to be "204 sockmanni, with 157 villani and 94 borderise, having four score and two ploughs, and they render among them all £31 8s. 1d."

The manor was therefore "ancient demesne," and the tenants had certain rights and privileges peculiar to that tenure.

The manor was granted by the Crown to the Templars, who had also the adjacent Manor of Dalby. Both manors continued in their hands until 1540, when they were vested by statute in the Crown.

In 1543 Henry VIII. granted to Henry Cartwright (*inter alia*) "all that the site of one Manor of Rothley." The grant included, not all the demesne lands of the manor, but only such as were then or late in the tenure or occupation of Humphrey Babington or his assigns under a twenty-nine years' lease from the Templars in 1530 reserving a rent of £6 13s. 4d. The grant to Cartwright was to hold in chief by the service of the thirtieth part of one knight's fee and rendering a yearly rent of 13s. 4d. in respect of the site of the manor.

In 1544 Henry VIII. granted the Manor of Dalby to Andrew Nowell to hold in chief. The Manor of Dalby included part of Grimston.

In 1553 Edward VI. granted certain lands in Grimston, part of the possession of the late monastery of Kyrkbybellers, to Wright and Holmes as of the Manor of East Greenwich in free socage and not in chief.

In 1561 Queen Elizabeth granted to Cave and Williams all her remaining lands in the vill of Rothley, and certain rents reserved on prior grants out of other lands in the vill, in free socage and not in chief.

In 1564 and 1576 certain lands in Grimston formerly belonging to the dissolved monastery of Launde and to the dissolved monastery of Kyrkbybellers were granted by Queen Elizabeth to persons through whom the plaintiff did not show title.

In 1590 Queen Elizabeth granted to Forcett and West certain land and rents in Grimston to hold in free and common socage.

In 1609 James I. granted to Sewall and others, through whom the plaintiff claimed, all the perquisites of courts of the lordship or preceptory of Rothley.

In 1670 Charles II. granted to Lord Hawley and others certain rents arising from that part of Grimston which was within the Manor of Dalby.

It appeared that manor courts had been held by the plaintiff's predecessors in title since 1576, if not earlier, without interruption except during a period from 1604 to 1675, when no court rolls were forthcoming.

It was recited in the Grimston Inclosure Act of 1765 that Thomas Babington, through whom the plaintiff claimed, was lord of the manor and soke of Rothley, and a good paper title was shown from the beginning of the last century.

Under the Inclosure Act of 1765 The Wongs (except a small portion) was allotted to a predecessor in title of the defendant, but there was no entry on the rolls of the court relating to The Wongs until 1825.

Swinfen Eady, K.C., *Eve, K.C.*, and *Stuart A. Moore*, for plaintiffs.

Micklem, K.C., *E. A. Wurtzburg*, and *H. J. H. Mackay*, for defendants.

COZENS-HARDY, J., found on the facts that the grant to Henry Cartwright in 1543 did not pass the manor, nor, on the other hand, did it extinguish the manor. But the lands granted were severed from the manor. Whatever passed to Cartwright was apparently vested in the plaintiff. The grant in 1561 to Cave and Williams did not pass the manor, but whatever was passed by that grant was apparently vested in the plaintiff. Neither was there anything in any of the other Crown grants which sufficed to pass the Manor of Rothley. On the other hand, it appeared that manor courts had been held by the plaintiff's predecessors in title since 1576, if not earlier, without interruption, except during a period from 1604 to 1675, when no court rolls were forthcoming. It was recited in the Grimston Inclosure Act of 1765 that Thomas Babington, through whom the plaintiff claimed, was lord of the manor and soke of Rothley, and a good paper title was shown from the beginning of the century. Under these circumstances he thought that the plaintiff had sufficiently established his title as lord of the ancient Manor of Rothley, notwithstanding the gaps above referred to. If necessary, a lost grant from the Crown must be presumed.

As to the second point, whether The Wongs was within the ambit of the Manor of Rothley, he thought he must hold that as against the defendant, and in the absence of any proof as to the boundaries of the manor, The Wongs was within the ambit of the manor.

Thirdly, what was the legal position of the tenants of the manor? The tenure in ancient demesne was in many ways peculiar, and it was not possible to reconcile all the authorities. The clearest and best description was contained in the third report of the Real Property Commissioners, pp. 12-14, of which the following was an extract: "There is great confusion in the law books respecting the tenure. All agree that it exists in those manors, and in those only, which belonged to the Crown in the reign of Edward the Confessor and William the Conqueror and in Domesday Book are denominated *Terrae Regis*. But the copyholders of those manors are sometimes considered tenants in ancient demesne, and land held in ancient demesne is said to pass by surrender and admittance. This appears to be inaccurate. It is only the freeholders of the manor who are truly tenants in ancient demesne, and land held in ancient demesne passes by common law conveyance without the instrumentality of the lord. The copyholders in an ancient demesne manor, like other copyholders, are merely to be considered as occupying a part of the lord's demesne, and do not not hold of the manor. They form the customary court. The court of ancient demesne, which is analogous to the court baron, is constituted by those who hold in socage of the lord of the manor. The tenants in ancient demesne, properly so-called, were made subject to certain restraints and entitled to certain immunities. They were forbidden to bring or defend any real action touching their tenements, except in the lord's court. In ancient demesne there are no subdivided or conflicting interests in the soil. The timber and minerals belong to the tenant, and the rents, fines, and services due to the lord are certain."

Applying this passage, his lordship thought the freehold was in the tenants, and not in the lord. But apart from that high authority, he arrived at the same conclusion for several reasons: (*a*) They are called "free tenants" in very early documents. (*b*) Their tenements ordinarily passed by feoffment, with livery of seisin, and not by surrender. (*c*) They used the writ of right close, which seems to have been only available for freeholders (Fitzherbert Natura Brevium, 11F). (*d*) They disposed of their tenement by will, without any surrender to the use of the will. (*e*) There is no trace of any claim by the lord, until quite modern times, to either timber or minerals; and, on the other hand, there are express dealings by the tenants with minerals. (*f*) The Inclosure Act of 1765 speaks of them as owners and proprietors who are seised in their land, and recognizes their right to trees growing on the land.

As to the fourth point, his lordship held that it was not proved that by the custom of the manor all the Grimston tenants were bound to pay a fine of 1s. in the pound on alienation by way of sale to a "foreigner," or that the "foreigner" was bound to pay such a fine on entry. It was also not proved that the defendant was a "foreigner" within the meaning of the alleged custom.

The last point was whether the alleged custom of paying a fine on alienation was good in law.

Now, if the freehold was in the tenants and not in the lords, as he thought it was, his lordship thought it was bad as inconsistent with the nature of the estate, and as a restraint upon alienation. The plaintiff was driven to rely, not on the comparatively modern 1s. in the pound composition, but upon an absolute right to prohibit alienation except to a person who was not a "foreigner," and to exact a fine as the price of the lord's assent to an alienation to a "foreigner." This was inconsistent with the statute 18 Edw. 1, *Quia Emptores*, which enacted that from thenceforth it should be lawful to every freeman to sell of his own pleasure his lands and tenements or part of them, so that the feoffee should hold the same lands or tenements of the same chief lords by the same services and customs as his feoffor held before. It was also inconsistent with an Act of Parliament of 8 Edw. 2, which was found in the Parliament Roll, vol. 1, p. 298, though not printed in the statute book, and which counsel for the plaintiff admitted to be or to have the effect of a statute. it enacted "that from henceforth none should demand or take any fine from freemen for entering upon the lands and tenements which are of their fee, so always that by such feoffment they be not losers of their services, nor that their services be denied." It was fairly urged that, by custom, a fine may be payable on the alienation of a freehold, but the only authority in support of this contention was a *dictum* in *Damerell* v. *Prothero*, 10 Q. B. 20, at p. 25. No such custom could, in his opinion, hold good against the express language of the statutes referred to. He did not pause to consider whether this custom was bad also for uncertainty. Thus far he had drawn no distinction between Rothley proper and Grimston, which was one of the members, but the defendant laid great stress upon the distinction. It seemed that in 1245 a composition and agreement was made between the Master of the Templars and the Reeve of Grimston for himself and for the men of the same vill (as also for the men of certain other members) in the following terms: "That they ought to increase their farm beyond the farm which they were wont to render to the Master of the Knights of the Temple in England, to wit, for every carucate of land which they hold in the aforesaid vills three shillings by the year for all works, tillages, and other villein customs which the said master exacted from them, and that they ought to come to the view of frank-pledge; and do suit at the court of the aforesaid Master of Rothley when any should be impleaded there by writ of the king of right, and when a robber is to be there indicted by afforcement of the court, and all those who are of the body (*de corpore*) of the Manor of Rothley ought to do suits and all other villein customs which before they were accustomed to do, to the same master, &c." This composition was entered on the rolls of the King's Court. Its validity was expressly acknowledged in 1285. In that year a writ was issued in the King's Court claiming a moiety of some land in Wantneby, one of the members, like Grimston, affected by the composition. The then Master of the Templars took proceedings before the justices in Eyre, at Leicester, to enforce his claim to exclusive jurisdiction. The court held that the composition had not "changed any estate of the same men in respect of the aforesaid custom of impleading, nor to them remitted or quit claimed the aforesaid custom." It was considered that the plaintiff should take nothing by his writ but be in mercy for false claim, and that he should sue by another writ of right close according to the custom of the manor if it seemed expedient to him. His lordship thought this decision did not have the effect which the plaintiff attributed to it. It only decided that the land being within the manor, the writ of right close must still be used. This was not a villein custom touched by the composition. It decided nothing beyond that. The defendant asserted (*a*) that any such custom as was alleged by the plaintiff was a "villein custom," which was expressly released by the composition, and that even if it were still in force in Rothley proper it was gone so far as Grimston was concerned. With this contention he agreed. The defendant also asserted (*b*) that the effect of the composition was to extinguish the ancient demesne tenure and to turn it into free and common socage. The case of *Griffith* v. *Clarke*, Moore 143, which was approved by Lord Ellenborough in *Doe d. Reay* v. *Huntington*, 4 East 271, at p. 290, tended to support this contention. But it was doubtful whether the decision of 1285 was consistent with the view that the land at Grimston was made frank free by the composition of 1245. It was remarkable that there was no entry of any alienation fine in Grimston prior to 1528, and that there were but few in Grimston until comparatively modern times, the great majority being in Rothley proper. Upon the whole he thought that even if the conclusion at which he had arrived was wrong as to Rothley proper, it was right as to Grimston, having regard to the composition of 1245. The result was that, in his opinion, the action failed, and judgment would be given for the defendant with costs.

Solicitors for plaintiff, *Millington & Drew*, for *Macaulay & Bennett*, Leicester.

Solicitors for defendant, *Stileman & Neate*, for *Latham & New*, Melton Mowbray.

Chan. Div.
Farwell, J. } March 12, 13.

In re SPINDLER AND MEARS' CONTRACT. (*a*)

Vendor and purchaser—Conditions of sale—"Notwithstanding intermediate or pending litigation"—Power to rescind—Notice to rescind pending proceedings—Costs.

(*a*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

The conditions of sale of certain property gave the vendors power to rescind the contract "if the purchaser shall insist on any objection or requisition which the vendors shall be unable or unwilling to comply with, and shall not withdraw the same after being required so to do, the vendors shall (notwithstanding any attempt to remove the same, or that there shall have been any intermediate or pending negotiation, proceeding, or litigation, and although they may have insisted that all or any of the objections and requisitions are or is untenable) be at liberty, by notice in writing signed by their solicitors, to rescind the contract, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatsoever." The vendors allowed a summons, taken out under the Vendors and Purchasers Act, 1874, by the purchaser for a declaration that his objections to the title had not been answered and that the title was defective, to be proceeded with after filing evidence and up to the moment of hearing, and then gave notice to rescind.

Held, that the vendors must pay the costs incurred up to the date of the notice to rescind.

On the 21st of May, 1900, the property, consisting of house and grounds, which was the subject of this action, was put up for sale by auction under conditions, one of which was as follows: "If the purchaser shall insist on any objection or requisition which the vendors shall be unable or unwilling to comply with and shall not withdraw the same after being required so to do, the vendors shall (notwithstanding any attempt to remove the same or that there shall have been any intermediate or pending negotiation, proceeding, or litigation, and although they may have insisted that all or any of the objections and requisitions are or is untenable) be at liberty, by notice in writing signed by their solicitors, to rescind the contract, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatsoever."

The property was not sold at the auction, but on the 19th of June, 1900, the plaintiff entered into a contract to purchase it subject to the particulars and conditions so far as they applied to a sale by private contract.

The abstract of title having been delivered, the plaintiff sent in voluminous requisitions, to which the vendors delivered answers, and the plaintiff, on the 20th of July, delivered replies to the answers.

On the 24th of July, the plaintiff took out this summons under the Vendors and Purchasers Act, 1874, asking for a declaration that the plaintiff's objections to the title had not been sufficiently answered and in particular that the title was defective on certain specified grounds, and for a return of his deposit moneys and costs.

The defendants were the vendors, who were trustees.

Both parties filed evidence, and the summons now came on for hearing, when counsel for the defendants stated that they had on that day required the purchaser to withdraw his requisitions and given him notice to rescind the contract.

J. G. Butcher, K.C., and *W. F. Philpotts*, for the purchaser.—The vendors must pay the costs of the summons up to the date of the notice to rescind: *Duddell* v. *Simpson*, 15 W. R. 115, L. R. 2 Ch. 102. The condition for rescission does not deprive the court of jurisdiction over costs, there being no express words: *Isaacs* v. *Towell*, [1898] 2 Ch. 285, 46 W. R. Dig. 170. The purchaser does not, of course, oppose rescission.

W. H. Upjohn, K.C., and *E. Beaumont*, for the vendors.—*Duddell* v. *Simpson* was different, for in that case there were two separate contracts as to different houses, and the purchaser's action succeeded as to one: see the report in the court below in 14 W. R. 418, L. R. 1 Eq. 578. The question of costs was neither argued nor mentioned in the judgments in the court below. In *Isaacs* v. *Towell*, Byrne, J., commented upon the absence of the words "notwithstanding any intermediate litigation," which are found here. The court here has no materials for going into the merits of the case, without which it cannot make an order as to costs. The power to rescind cannot be exercised after judgment: *In re Arbib & Class's Contract*, 39 W. R. 305, [1891] 1 Ch. 601.

J. G. Butcher, K.C., in reply, referred to *Best* v. *Hamand*, 27 W. R. 742, 12 Ch. D. 1.

FARWELL, J.—In this case the purchaser took out a summons under the Vendors and Purchasers Act, 1874, on the 24th of July last. The parties went into evidence. The summons came on for hearing yesterday, and counsel then stated that the vendors had that afternoon served the purchaser with a notice to rescind the contract, and they asked for the dismissal of the summons without costs. The question turns upon the wording of one of the conditions of sale. [Here his lordship read the condition as above.] That makes a case practically indistinguishable from that of *Duddell* v. *Simpson*. I cannot suppose that the two Lords Justices, in ordering the vendor to pay the costs in that case, overlooked the point arising on the construction of the condition. They decided that the vendor must pay the costs up to the time when he gave notice to rescind. I am bound by that decision. And upon the construction of this condition I think that, as the costs of investigating the title are specifically mentioned, the parties probably intended to exclude costs which are only payable under an order of the court. But, however that may be, I cannot refuse to follow a decision of the Court of Appeal merely because the Lords Justices did not fully state the grounds of their decision. Counsel for the vendors urged that there is nothing before me upon which I can decide the question of costs upon the merits. I cannot agree with him. I think it was very unreasonable on the vendors' part to let things go on until the summons was ready for hearing, and very hard upon the purchaser that the vendors should let him go on incurring all the costs and not make up their mind to rescind until the very last moment. These are quite sufficient grounds for making them pay the costs.

Solicitors, *H. Mear; Upton & Britton.*

K. B. Div. (Bigham, J.) — Feb. 28; March 1.

VIGERS *v.* SANDERSON. (*a.*)

Sale of goods—Rejection—Shipment—Passing of property—Goods not within the specification.

A contract for the sale of goods, to be of "about the specification" mentioned in the contract, provided that the goods were to be shipped in vessels to be provided by the purchasers, that the property in the goods was to be deemed to pass on shipment, and that, if any dispute arose as to the stipulations of the contract, the purchasers were not to reject the goods, but that the dispute was to be referred to arbitration.

Goods were shipped under the contract, 33 per cent. of

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

which were neither within nor "about" the specification, nor commercially within its meaning.

Held, that the clause as to non-rejection did not operate so as to prevent the purchasers from rejecting the goods; that the acceptance of the goods by the captain of the ship did not pass the property, the captain being only the purchasers' agent to receive the goods for the purpose of carriage.

Action tried in the Commercial Court without a jury.

The plaintiffs claimed for the price of goods sold and delivered to the defendants; alternatively, for damages for the non-acceptance by the defendants of bills of exchange.

By a contract in writing dated the 23rd of November, 1899, the plaintiffs sold to the defendants "the undermentioned about 225 standards wood goods of about the specification stated below" to be shipped at Wasa to Hull.

The contract provided that shiproom was to be provided by the buyers, and that payment was to be by approved acceptances of sellers' or authorized agents' drafts payable in London at four months from date of bill of lading or cash less 2½ per cent. on receipt of and in exchange for shipping documents.

The contract contained the following clauses: "Property in goods to be deemed for all purposes, except retention of vendor's lien for unpaid price, to have passed to buyers when goods put on board."

"Should any dispute arise under the stipulations of this contract impossible to settle by friendly arrangement, buyers shall not reject any of the goods nor refuse acceptance of draft or drafts, but the dispute shall be referred to two arbitrators of whom one is to be elected by each party with power to choose an umpire whose award on all points shall be final, the expenses to follow allowed."

The specification provided that the goods were to be sawn laths from 2½ft. to 4½ft. in length.

By a contract dated the 16th of December, 1899, the plaintiffs sold to the defendants a further parcel of sawn laths. This contract was in the same terms as the previous one, with the exception that the specification provided that the laths were to be from 2ft. to 4½ft. in length, but not more than 3 per cent. of 2ft. laths.

Parcels of goods, purporting to be in fulfilment of the two contracts, were shipped on board the steamship *Ella*, provided by the defendants; the bills of lading, specifying the number of bundles of various lengths, were sent to the defendants duly indorsed; and the plaintiffs drew on the defendants for the price of the goods. The shipment under the November contract contained 33 per cent. of laths 5ft. long. The shipment under the December contract contained about 60 per cent. of laths 2ft. long.

The defendants rejected both parcels, and refused to accept the drafts.

The plaintiffs contended that the property in the goods had passed to the defendants, and that they were not entitled to reject them; they admitted that an allowance would have to be made to the defendants in respect of the number of 2ft. laths in excess of 3 per cent., which allowance would have to be settled by arbitration; but the plaintiffs contended that the defendants had suffered no damage through receiving the 5ft. laths.

Evidence was given on which the learned judge found that neither 2ft. laths nor 5ft. laths were worth the contract price; the former were practically worthless, and the latter were difficult to sell in large quantities.

Robson, K.C., and *Lochnis*, for the plaintiffs.

Scrutton, K.C., and *F. D. Mackinnon*, for the defendants.

Azèmar v. *Casella*, 15 W. R. 998, L. R. 2 C. P. 677, and *Norman* v. *Phillips*, 14 M. & W. 277, were referred to.

Cur. adv. vult.

March 1.—BIGHAM, J., read the following judgment: This action is brought to recover £1,307, the price of a quantity of sawn laths, sold by the plaintiffs to the defendants, or, in the alternative, damages for non-acceptance of the same. By two contracts, dated respectively the 23rd of November, 1899, and the 16th of December, 1899, the plaintiffs sold to the defendants two parcels of sawn laths, to be shipped at Wasa for Hull, of "about the specification stated below." The contracts contained provisions to the following effect: Shiproom was to be provided by the buyers; payment was to be made by cash or bills against documents; and if the goods were not taken within a certain time, then acceptances were to be given for an approximate amount; the property in the goods was to be deemed, for all purposes except retention of vendor's lien for unpaid price, to have passed to the buyers when goods were put on board; and if any dispute arose under the stipulations of the contracts, buyers were not to reject any of the goods nor refuse acceptance of the drafts, but the dispute was to be referred to arbitrators, whose award was to be final. The specification in the first contract was for laths of lengths varying from 2½ft. to 4½ft., and the specification in the second contract was for laths of lengths varying from 2ft. to 4½ft., but not more than 3 per cent. of 2ft.

Under these contracts, and in pretended fulfilment of them, two parcels of laths were shipped by or on behalf of the plaintiffs in *The Ella*, a ship provided by the defendants. The shipment under the earlier contract contained 33 per cent. of laths 5ft. long (a length not mentioned in the specification); and the shipment under the later contract contained about 60 per cent. of laths 2ft. long, instead of not more than 3 per cent. The defendants rejected the goods and refused to accept the drafts. The question is whether the rejection was justifiable. On the one hand the plaintiffs say that the defendants must take the goods subject to an allowance for any loss due to the failure to comply with the specifications. On the other hand the defendants say that the goods are not what they bought, and, therefore, that they are not bound to accept them. I have heard evidence as to the value of laths 2ft. long, and as to the value of laths 5ft. long, and I find as a fact that neither length is worth the contract price; the former is practically worthless and the latter is very difficult to sell in large quantities, and requires more labour in handling than the shorter lengths. Neither shipment can, in my opinion, be regarded as in any sense a compliance with the contract, unless the clause as to non-rejection is sufficient to make it so. The plaintiffs say it is. They say that it is competent for them to disregard the specification altogether and to ship laths of any lengths, even of lengths wholly outside the specification, and to require the defendants to take and pay for such goods subject to an allowance. They rely on the words "should any dispute arise, buyers shall not reject any of the goods."

I am not disposed myself to give to these words the meaning contended for. It is not the meaning which the parties ever intended should be put upon them, and it is a meaning which might, and in the present case would, have the effect of forcing the buyer to take goods which did not in any sense represent what he wished to buy. The main object of these contracts

was to effect a sale, and to secure a delivery of two parcels of goods commercially within the description in the specifications; the goods are to be "the undermentioned parcel of goods of about the specification stated below," and at the bottom of the contracts are set out the specifications. The clauses of the contracts must be read and interpreted consistently with this main object, and not so as to destroy it. What, then, is the meaning to be put on the clause as to non-rejection. It is in my view no more than this. In a business of this kind there is almost of necessity some departure from the strict figures of the specification, and the departure may be such as to make it doubtful whether the shipper has adhered sufficiently closely to the stipulation that the goods shall be of "about" the specification lengths. In such a case the clause as to non-rejection comes into operation. It does not operate so as to force the buyer to take goods which are neither within nor about the specification, nor commercially within its meaning. I am fortified in my construction of the contracts by the view which the plaintiffs themselves took of the matter when the shipments came forward. The plaintiffs had themselves bought the goods of other vendors, and, when the defendants in this action refused to accept, the plaintiffs wrote two letters to their vendors. In these letters the plaintiffs set up the right to reject the goods which are not in accordance with the specification on the ground that they are goods "which they did not buy." I think they were justified in taking up this position towards their vendors, and it follows that they cannot complain that their purchasers are doing the same. I may add in this connection that the defendants have always been ready and willing to take and pay for such part of the goods as came within the specification, but the plaintiffs have refused to allow this, insisting on the defendants accepting the whole of both lots.

Two other points were taken by the plaintiffs. It was said that by the terms of the contract the property in the goods had passed on shipment, or, in the alternative, that the property had passed by reason of the defendants having accepted the goods by receiving them on board their ship, and that, therefore, the defendants must keep the goods and be satisfied with an allowance in respect of their inferiority. I think there is nothing in either of these points. The provision in the contract as to the passing of the property only applies to a shipment of goods which come within the meaning of the contract; it cannot apply to any others; and the receipt of the goods by the captain is no acceptance at all of the goods as a delivery under the contract. The captain of the ship is merely an agent to receive the goods for the purpose of carriage; he knows nothing of the contract of purchase, and is not an agent to accept delivery under it.

Judgment for the defendants.

Solicitors for plaintiffs, *Trinder, Capron, & Co.*

Solicitors for defendants, *Pritchard & Sons*, for *A. M. Jackson & Co.*, Hull.

K. B. Div. (Mathew, J.) Feb. 11.

LINAKER v. PILCHER, HEWLETT, AND OTHERS. (a.)

*Trade union — Newspaper carried on to further the interest of union—*Ultra vires*—Libel—Trustees sued as registered proprietors—Damages—Liability of funds of union to indemnify trustees for damages and costs—Trades Union Act,* 1871 (34 & 35 *Vict. c.* 31), *ss.* 8, 9.

The trustees of a trade union were registered as the proprietors of a newspaper printed and published to further the interests of the members of the trade union. A libel upon the plaintiff appeared in the newspaper which the trustees had not authorized the publication of. The plaintiff sued the defendants as the trustees of the union, and recovered damages and costs.

Held, that, as the property in the newspaper was vested in the trustees, they were liable, and were entitled to be indemnified out of the funds of the society.

Held, also, that the carrying on of the newspaper was not ultra vires.

Further consideration.

This was an action brought by Henry Linaker, district superintendent of the North-eastern Manchester district of the London and North-Western Railway Co., against John Pilcher as representative proprietor, Hewlett and Alcock together sued as the trustees of the Amalgamated Society of Railway Servants, and Mr. George J. Wardle, editor, to recover damages for libel.

The libel complained of was contained in an open letter to Lord Stalbridge, chairman of the London and North-Western Co., and imputed *inter alia* that the plaintiff was oppressive in his treatment of the men under his control, and that he was intoxicated on the occasion of the opening of the new Buxton and Ashbourne line on the 1st of August, 1899.

The defendants pleaded that the charges were true in substance and in fact. They further said they could not be sued so as to bind the property of the society.

The jury awarded the plaintiff £1,000.

Judgment was postponed for further consideration on the question whether the plaintiff could recover the damages awarded and costs out of the funds of the society.

The following facts were admitted or proved at the trial:

The *Railway Review* was registered in 1894 under the Newspaper Libel and Registration Act, 1881, in the names of the three trustees as proprietors, and in and since 1895 was registered in the name of the defendant Pilcher as representative proprietor. It was described as printed and published at 72, Acton-street, Gray's-inn-road, which was the head office of the Amalgamated Society.

On the question of whether the carrying on of the the newspaper by the society was *ultra vires* the following sections were cited of the Trades Union Act, 1872:

Section 2 of Schedule I. is as follows: "The whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable . . ." are "matters to be provided for by the rules of trades unions registered under this Act."

Section 14 provides that the rules of every trade union shall set forth these particulars.

Section 2 of the first rule of the society was as follows: "The objects of the society shall be to improve the condition and protect the interests of its members; to endeavour to obtain and maintain reasonable hours of duty and fair rates of wages; to promote a good understanding between employers and employed, the better regulation of their relations and the settlement of disputes between them by arbitration, or, failing arbitration, by other lawful means; to provide temporary assistance to members when out of employment through causes over which they have no control or through unjust treatment; to provide legal assistance when necessary in matters

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

pertaining to the employment of members, or for securing compensation for members who suffer injury by accidents in their employment occasioned by the negligence of their employer or of those for whom their employer is liable; to aid the young orphan children of all members; and to use every effort to provide for the safety of railway works and railway travelling. Also to provide a grant of money in case of members permanently disabled or killed by accident, or when by reason of old age they cannot follow their regular employment. Also to enable such members as voluntarily desire it to provide funds for their relief in sickness or temporary disablement and for their respectable interment."

Sir Edward Clarke, K.C. (with him *Joseph Walton, K.C.*, and *L. Sanderson*), for the plaintiff.—The *Railway Review* is a newspaper registered in the name of the defendants as the trustees of the society, and the ordinary regulations of the Trade Union Act, 1871, therefore apply. By section 8 the property of trade unions is to be vested in trustees, and section 9 gives such trustees power to bring or defend actions in any court of law "touching or concerning the property, right, or claim to property of the trade union." The society by its rules is made liable for the acts of its trustees. By section 2 of the first rule of the society (cited above) it is clear the trustees may carry on a newspaper provided its object is the furtherance of the interests of the society. There is no question here that the *Review* is run solely in the interest of the members of the union.

Rufus Isaacs, K.C. (*Horridge, K.C.*, and *Clem Edwards* with him), for the trustees.—The funds of the society cannot be made liable for a tort committed by the trustees. [MATHEW, J.—The trustees acted in a representative capacity throughout. The society could not be registered as proprietor.] Dealing with the question on the footing that the newspaper is the property of the union, then I say it is *ultra vires* for a trades union to own a newspaper. The first rule (2) of this society (*q.v.*) is the only one that the plaintiff could find that in any possible way could be turned into giving a power to the trustees to carry on the newspaper. But it is stretching the simple words there indicating the objects of the society beyond a reasonable degree to say that this rule enables the trustees to do so. It not being one of the authorized objects of the society, the loss that the verdict would throw upon the members cannot be properly met out of the funds since the fund cannot be attached for an act of the trustees that has been *ultra vires*: see section 23 of the Act of 1871 as modified by section 16 of the Trades Union Act, 1876. It has recently been held that a trades union cannot be sued as such, and *a fortiori* its trustees cannot be entitled to be indemnified out of the funds when condemned in damages. It is a straining of language to speak of a libel action against a man as an action "touching his property," and to hold so would be virtually to sweep away the statutory restrictions and practically to overrule the decision of the Court of appeal in *The Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants, ante*, p. 101, [1901] 1 Q. B. 170. Assuming that the newspaper is the property of the trustees, and that the trustees could properly be the proprietors of it, the funds of the union are not answerable for a tort committed by the trustees, for the officials of a union are not servants of the union so as to make the members liable for a tort in which they take no part: *Temperton* v. *Russell*, 41 W. R. 321. [1893] 1 Q. B. 435; *Flood* v. *Jackson*, 43 W. R. 453, [1895] 2 Q. B. 21.

Joseph Walton, K.C., in reply.—As trustees the defendants treated the *Railway Review* as the property of the society, and it so appeared in the balance-sheet.

Robson, K.C., *Montague Lush*, and *E. Browne* represented other defendants.

His lordship reserved judgment.

Feb. 11.—MATHEW, J.—The action was brought to recover damages for libel, three of the defendants being the trustees of a trade union. The sole point of law which I have now to deal with is whether there was a liability—for which it was assumed for the purposes of this case that these defendants as proprietors of the newspaper in question were responsible—on the funds of the society to indemnify these defendants. By their pleadings the defendants had taken the point that as a matter of law they could not in this action be sued in their capacity as trustees of the interests of the union, nor in any way so as to bind the property of the Amalgamated Society of Railway Servants. The *Railway Review* was started about the year 1894, and an endeavour was made in the first instance to register it as the property of the society. But the Board of Trade objected to the inconvenience of that course, because of the very large number of persons who belonged to the society; and it was ultimately arranged that the newspaper should be only registered in the names of the trustees of the society. In that way the names of the defendants appear on the record. Under the 8th and 16th sections of the Trades Union Act, 1871, the property of the society became vested in trustees, and they were bound to publish annual reports showing the position of the affairs of the society. In these returns the newspaper was treated as an asset of the society, and the profit and loss account shows that it was carried on at a slight loss. It was said by the plaintiff that the defendants were in the ordinary position of those who had a liability cast upon them within the limits of their trust by reason of their position as trustees. In reply, it was submitted that this was an action of tort; that the persons who appeared in the action were alone responsible; and that there was no right of recourse to the property of the *cestuis que trustent*, and no right to claim any indemnity from the society. There was no evidence that the trustees had anything to do with the conduct of the paper. It was said that if the Trade Union Act, 1871, was carefully examined there would appear to be clear indications that it was never intended to make the trade union responsible in respect of a cause of action against their trustees unless it came within the limits of the trust. Section 9 of the Act gave the trustees power to bring and defend actions "touching or concerning the property, right, or claim to property of the trade union." It was said that this was for the protection of trade unions, and, if so, it would follow that for any breach of contract or tort for which the trustees were liable the union would enjoy complete immunity. It was said that it was noticeable that all that the trustees were empowered to do under this section was to bring or defend an action respecting the property, right, or claim to property of the trade union. It was said that this meant specific property—*e.g.*, goods or land, and that as this was not an action in respect of specific property the liability would rest where it fell, and could not be transferred to the trade union. This seems to me to be an extremely narrow construction of the section. There seems to me to be no reason why this disability should be imposed on the trustees in respect of any but specific property, and I am satisfied that there could be no such intention on the part of the Legislature. Reference has been made to certain

dicta in the Court of Appeal in the case of the *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*, where it was suggested by a learned judge during the course of the argument that "property" meant "specific property," but my attention has also been called to another part of the argument where the same learned judge had expressed the opposite view. [His lordship, having deprecated the practice of referring to the remarks made by judges during the course of an argument, as they merely expressed what was passing in their minds at the moment, continuing, said:] I myself think that "property" means property generally, and that an action for a breach of contract entered into on behalf of the society would be an action touching their property, and likewise an action for damages for tort would be an action touching the property of the society. It follows that the construction put on the section by the defendants is not the correct one. The last point, which was a curious one in view of the character of these associations, was that to start a newspaper was *ultra vires*. No doubt there may be an analogy in this respect between the society and a company, but if one looks at the rules and objects of the society it falls within them, for the second section of the first rule says that the object of the society shall be to improve the condition and protect the interests of its members. It was said that section 23 of the Act of 1871 and section 16 of the Trades Union Act, 1876, cut down the rights of the society. The sections have no such operation as was suggested. This paper was started to protect the interests of members of the society. It was only necessary to look at the paper to see how thoroughly it devoted itself to this purpose, and that its main object was that indicated by the rule in question. The case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* only shows that one could not treat a trade union as a corporate body, and it throws no light on the present question. My judgment must therefore be for the plaintiff for £1,000 and costs, and I hold that the defendants in their position as trustees are entitled to be indemnified out of the funds of the society. The judgment will be against the trustees and Wardle, the editor.

Execution stayed with a view to an appeal.

Solicitors for the plaintiff, *R. S. Taylor, Son, & Humbert.*

Solicitors for the defendants, *C. J. Smith & Hudson.*

Q. B. Div.
(Bruce and Phillimore, JJ.) Jan. 16.

VESTRY OF FULHAM *v.* MINTER. (*a.*)

Metropolis—New street—Paving expenses—Open space—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Local Management Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Metropolitan Open Spaces Act*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 5—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 6—*London Open Spaces Act*, 1893 (56 & 57 *Vict. c. lxxi.*), *s* 25.

By virtue of section 1 *of the Metropolitan Open Spaces Act*, 1877, *and section* 6 *of the Open Spaces Act*, 1887, *metropolitan vestries have power to acquire open spaces of land within their parishes, and to hold the same "in trust for the perpetual use thereof by the public for exercise and recreation."*

By section 5 *of the Metropolitan Open Spaces Act*, 1881, *metropolitan vestries have power to acquire open spaces of land "in trust to allow, and with a view to, the enjoyment by the public of such open space . . . in an open condition, free from buildings . . . and for no other purpose."*

By the London Open Spaces Act, 1893, *the vestry may "erect and maintain on any of the open spaces belonging to them or under their control buildings for the accommodation of keepers, constables, and other persons employed by them in connection with the maintenance and management of such open spaces and also such other convenient and ornamental buildings and such appliances as they may think requisite for the purposes of exercise and recreation and for refreshment-rooms, band-stands, conveniences, and for other like purposes."*

An open space of land was conveyed to a metropolitan vestry in 1894 *"to the end and intent that it should at all times be kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation." In pursuance of the powers given by the Metropolitan Open Spaces Act*, 1893, *the vestry erected on the land a band-stand, a cloak-room, and a refreshment stall. They let the refreshment stall to a caterer and the seats near the band-stand to a contractor.*

Held, that the land must be deemed to have been acquired under the more beneficial Acts of 1877 *and* 1887, *and not under that of* 1881, *and that the vestry were "owners" of the land within the meaning of the Metropolis Local Management Acts*, 1855 *and* 1862, *and were liable to contribute to the expenses of paving a new street on which the land abutted.*

Case stated by a metropolitan magistrate.

The respondent was summoned for refusing or neglecting to pay the sum of £228, the sum charged upon him as the owner of certain houses or lands abutting upon a new street known as Bishop's Park-road, Section 1, under an apportionment of the expenses of paving works to be carried on in the said new street under the provisions of the Metropolis Local Management Act, 1855, and the other Acts of Parliament amending the same.

Upon the hearing of the summons the following facts were proved or admitted:

Bishop's Park-road, Section 1, was a new street within the parish of Fulham. On the north-west side thereof it was bounded by a row of houses, on the south-east by an open space called Bishop's Park.

This land was bought on the 15th of November, 1894, by the appellants under a conveyance wherein the land was conveyed to them in fee simple "to the end and intent that it should at all times thereafter be kept and maintained as an open space for the perpetual use thereof by the public for exercise or recreation." Part of the land thereby conveyed abutted on the south-eastern side of the new street. The land was acquired by the appellants under the powers conferred upon them by the Open Spaces Acts.

The appellants had erected on the land in pursuance of the powers given by the London Open Spaces Act, 1893 (56 & 57 Vict. c. lxxii), a band-stand, a cloak-room, and a refreshment stall. The appellants let the refreshment stall at a rent of £25 per annum to a caterer. The band-stand was not let, but seats for the public were let by the vestry to a contractor at a rental.

On the 17th of January, 1900, the appellants resolved to pave the new street in question, and to apportion the estimated cost of so doing upon the owners of the houses and lands abutting thereon. The respondent was the owner of Nos. 1, 3, and 6, Bishop's Park-road, which abutted upon the new street, and by this apportionment £228 was charged upon him. This

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

sum was duly demanded, and the respondent refused to pay. The apportionment proceeded upon the basis that the cost of paving the new street should be defrayed by the owners of the houses and land on the north-west side thereof, and not in any part by the owners of the land on the south-east side thereof.

It was contended on the part of the respondent that the apportionment was invalid for that a part of the cost of paving ought to have been apportioned upon the appellants as owners of the open space abutting upon the south-east side of the new street.

It was contended upon the part of the appellants that the apportionment was valid, and that the open space being *extra commercium*, or subject in perpetuity to the burden of a public right which deprived the appellants of the beneficial use of it, was not liable to contribute.

The magistrate dismissed the summons, holding that the appellants were the owners of the land on the south-east side of the new street, and that the apportionment was therefore bad, inasmuch as the appellants were not included as contributories to the expense of paving the new street.

Macaskie, for the appellants.—By section 105 of the Metropolis Local Management Act, 1855, it is provided that the owners of the houses forming a new street which the vestry has deemed it expedient to pave shall pay to the vestry the estimated expenses of such paving. By section 250 the word "owner" is defined to mean "the person for the time being receiving the rack-rent of the land or premises in connection with which the word is used . . . or who would so receive the same if such lands or premises were let at a rack-rent." Section 77 of the Metropolis Local Management Act Amendment Act, 1862, extends the liability for the expenses to the owner of land "bounding or abutting on" the new street. The land in respect of which it is sought to make the appellants liable to contribute to the expenses of paving the new street was acquired under the Metropolitan Open Spaces Act, 1881, and the buildings were erected thereon under the provisions of the London Open Spaces Act, 1893. Under the circumstances the land is within the class of cases in which such land has been held to be *extra commercium*, and the authority in whom it was vested has been held not to be "owners" so as to be liable to contribute towards the expense of paving a new street on which it abutted. This rule has been held to apply to a church and the land on which it is built: see *Angell* v. *Vestry of Paddington*, 16 W. R. 1167, L. R. 3 Q. B. 714; *Plumstead Board of Works* v. *Ecclesiastical Commissioners*, 39 W. R. 700, [1891] 2 Q. B. 361; *Wright* v. *Ingle*, 34 W. R. 220, 16 Q. B. D. 379; see also *Bowditch* v. *Wakefield Local Board*, L. R. 6 Q. B. 567, 19 W. R. C. L. Dig. 66; *Calyer* v. *Vestry of St. Mary, Islington*, 29 W. R. 538, 50 L. J. M. C. 59. [Counsel also referred to *Pound* v. *Plumstead Board of Works*, 20 W. R. 177, L. R. 7 Q. B. 183; *Vestry of St. Mary, Islington* v. *Cobbett*, 43 W. R. 44, [1895] 1 Q. B. 369; *Meyrick* v. *Attorney-General*, 42 W. R. 614, [1894] 3 Ch. 209; *Hornsey District Council* v. *Smith*, 45 W. R. 231, 561, [1897] 1 Ch. 843; *Great Eastern Railway Co.* v. *Hackney Board of Works*, 31 W. R. 769, 8 App. Cas. 687.] In *Lambeth Overseers* v. *London County Council*, [1897] A. C. 625, 45 W. R. Dig. 114, it was held that the London County Council were not rateable in respect of a public park acquired by them under circumstances similar to those under which the appellants acquired the land in question.

Bray, Q.C. (*B. A. Cohen* with him), for the respondent.—The appellants are "owners" of the land in question within the very words of section 250 of the Metropolis Local Management Act, 1855. They have not only power to let the land and buildings erected thereon, but they actually do let them. There is nothing to prevent them making a profit out of the land in other ways, such as selling the turf or putting up advertisements. The land is not, therefore, *extra commercium*.

Counsel referred to *Vestry of St. Giles, Camberwell* v. *The London Cemetery Co.*, 42 W. R. 446, [1894] 1 Q. B. 699.

BRUCE, J.—In this case I think that the decision of the learned magistrate was right. I think that the principle of the cases which have been cited is this: Where there exists land or houses abutting upon a new street, the person who receives the rent, or who if rent were payable would receive it, and who is the owner within the meaning of the definition of owner given in the Metropolis Management Act, 1855, is liable to contribute to the expenses of paving the new street. To that proposition the following exception has been established, that where the premises, whether land or houses, are of such a character that they are struck with a legal incapacity of ever being used or let at a rack-rent, that incapacity being of a permanent character and of such a kind as to affect the nature of the property, then the property is not property of which there can be an owner within the meaning of the statute. That is the substance of the definition in *Wright* v. *Ingle*. I refer also to the definition given by Lord Watson in *Great Eastern Railway Co.* v. *Hackney Board of Works*, where he says, "The person vested with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of section 77 of the Metropolis Local Management Act Amendment Act, 1862." Unless the land or houses are brought within one of these definitions—unless, that is, they are struck with an incapacity to let, or, I should say, an incapacity to be used beneficially—they are liable to contribute to the expenses of the new street. I do not think that the land in question is struck with any such incapacity. It is conveyed to be kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation, and for no other purpose. But it seems to me that that is not a burden which deprives the vestry of the beneficial use of the property. They possess power to erect and maintain on the open space buildings for the accommodation of keepers, constables, and other persons employed by them in connection with the maintenance of the open space; also such convenient and ornamental buildings and such appliances as they may think requisite for the purpose of exercise and recreation and for refreshment-rooms, band-stands and conveniences, and other like purposes, provided that the consent of the county council be first obtained. So that they have power to do many things which are not inconsistent with the enjoyment of the place as an open space for the public. They may build a gardener's cottage, and the gardener who is attending to the open space may live there. It may be said that they are not entitled to charge a rent for his living there. I do not know whether that is so or not, but the occupation of the cottage would be a beneficial occupation, because it would be taken into account in fixing the amount of his wages. Again, with regard to the band-stand, although no charge could be made to the public for listening to the band or for entering the ground, it is possible that a beneficial occupation should arise by the bandmaster paying for the privilege of soliciting contributions from the public. So with regard to

the refreshment-room; that room is let, and the vestry do derive a sum of £25 a year for the use of it. There, again, is a beneficial occupation. And so, I think, in many ways the vestry might derive, consistently with the terms on which they hold this land, a beneficial occupation, and it cannot be said that the land is *extra commercium*, or that, although it is dedicated to the use of the public, the vestry are prohibited from obtaining any profit from it.

Then it was said by Mr. Macaskie that the vestry could not let it at a rack-rent. Letting at a rack-rent, I think, merely means that the land is let for the best return that can be obtained for it. But I shall adopt the *dictum* of Collins, J., in *Vestry of St. Giles, Camberwell* v. *London Cemetery Co.* In considering the question of a rack-rent he says: "But where the owners are entitled by statute to use it beneficially, receiving as profit a lump sum which is equivalent to a rack-rent, the land is not *extra commercium*. It would be too narrow a conclusion that because the *reditus* is not received in the shape of rack-rent, the land is placed *extra commercium*, and the owners are not owners within the meaning of the statute. Therefore I think here there is a beneficial occupation, and, there being a beneficial occupation, I think the vestry are the owners of the land within the meaning of the definition given of owners, and that they are liable to contribute to the expenses of making up the new street.

PHILLIMORE, J.—I am of the same opinion. By the joint effect of the two Metropolis Management Acts the owners of houses and lands bounding or abutting upon a new street are bound to pay to the vestry expenses of paving and the other expenses of making up the new street; and the owner means the person who is for the time being receiving the rack-rent of the lands or houses in connection with which the words are used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if the lands or premises were let at a rack-rent. The very large and general words of that section have been limited by decisions to this extent, and this extent only, that if the lands or premises are for all time incapable of being beneficially used, they are not to be treated as lands which are or could be let at a rack-rent. At one time I thought perhaps the right thing was to say, "If the lands could never be let at a rack-rent," but the decision in *Vestry of St. Giles, Camberwell* v. *The London Cemetery Co.*, and I think the language of Lord Watson in *Great Eastern Railway Co.* v. *Hackney Board of Works*, point to the fact that that is too narrow a view. They must be, as Bowen, L.J., points out with regard to buildings (the same would be true of land), physically capable of beneficial enjoyment—profitable enjoyment. They must be also legally capable of profitable enjoyment. If those two conditions are satisfied then the lands fall into the ordinary category and are lands abutting on the new street which have an owner; and if there is an owner in this case there is no question it must be the vestry.

Now the question is, is this land capable of any profitable or beneficial enjoyment? I agree that it is not capable of much, and that some of the suggestions, possibly some I made myself, are rather strained and fanciful; but the fact remains, first of all, that actually at this moment a portion of the land is beneficially enjoyed; and secondly, that beneficial and profitable enjoyment can to some extent be got possibly out of every particle of the land. I quite agree that primarily the use for which the land is destined is for the recreation and enjoyment of the public. Nothing must interfere with that, but consistently with that, sometimes really assisting that, there may be uses out of which profit can be derived.

Mr. Macaskie in his argument, for which we are much indebted to him, has contended that the vestry is restricted by the express provisions of section 5 of the Metropolitan Open Spaces Act, 1881. It is not necessary to consider whether if the section did apply it would have all the restrictive force which he contends for, because this land is, in my opinion, and in the opinion of my learned brother, as I understand, not to be deemed to be acquired under that Act, but under the more beneficial Acts of 1877 and 1887, and I repeat again what I said in the course of the argument, that there is, in my opinion, excellent good sense, as there always was in every expression of the late Sir George Jessel, when in delivering the judgment of the Court of Appeal in *Great Eastern Railway Co.* v. *Hackney Board of Works*, he says, "If a public body was enabled to exercise public powers under either of the two statutes it was to be deemed, if there was any difference in respect of the two, to take it under the statute under which they took most beneficially." Therefore I am of opinion that this vestry must be taken to have acquired this land under the Acts of 1877 and 1887. It is possible that the Act of 1881 and the powers acquired under it remain for the purpose of acquiring churchyard cemeteries and burial grounds, and it is very possible that under no other Act can the vestry take such open spaces. It may very well be that when they take such open spaces sentiment, apart from other reasons, may make it desirable that they should make no money out of those particular open spaces, and therefore with regard to those particular spaces they may be specially restricted. We have not to consider that here, because they take under the general powers, and taking under the general powers they have the powers which all owners have except so far as they are restricted. They are restricted by the trust, and that is the only restriction we ought to look at. No doubt they are also restricted by the fact that the vestry being a public body can only spend its money upon certain definite objects, and would be proceeding *ultra vires* if it embarked in trade or similar enterprizes. But I do not think we ought to take that into consideration. The question we have to consider is whether the land can be beneficially used, and not whether the particular owner at the moment can beneficially use it. It may be that the vestry could beneficially use it in many ways besides those which my learned brother has pointed out. Certainly they do use it in some ways at present. Any hardship which might follow from this land being deemed to be liable to contribute to the expenses of making up the new street can be got over. The vestry may themselves, acting fairly and reasonably—and not acting unfairly—make a separate minor assessment upon the land to that which they make upon the houses. It is clear that the land of the park is by no means so profitable as the opposite land of the houses, but it does bring in, within the view of the Act, some profit to its owners, the vestry, and therefore to some extent it ought to contribute, in my opinion, to the paving of the new street. Therefore the assessment which was made upon the respondent in this case, which did not take into consideration any contribution by the vestry as the owners of the park, was a bad assessment, and the learned magistrate was right in dismissing the information.

Appeal dismissed.

Solicitor for the appellants, *T. Blanco White.*

Solicitors for the respondent, *Cooper & Bake.*

Court of Appeal.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — March 1, 4, 5; April 1.

MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO. AND TRAFFORD PARK ESTATES CO. (a.)

Contract—Illegality—Statutory confirmation—Vendor and purchaser—Agreement to give "first refusal" of land—Purchaser with notice—Injunction.

Where an agreement is confirmed by Act of Parliament, the effect is to give it statutory validity, so that no question as to remoteness or uncertainty can arise.

Where a contract so confirmed stipulates that B. shall have the first refusal of A.'s land, A. cannot sell the land without first informing B. of the actual cash price offered by an intending purchaser, and offering it to B. at that price.

Such a stipulation does not create an interest in the land, but it involves a negative contract not to part with the land to any other person without giving that first refusal, and can be enforced, not only against the vendor, but against an intending purchaser with notice.

Decision of Farwell, J. ([1900] 2 Ch. 352), *affirmed.*

This was an appeal from a decision of Farwell, J. (reported [1900] 2 Ch. 352, 48 W. R. Dig. 49), by which the learned judge held that the defendant Racecourse Co. were not entitled to enter into any contract for the sale and purchase of the Manchester racecourse with any person or corporation other than the plaintiffs without first complying with the provisions of an agreement made between the plaintiffs and the Manchester Racecourse Co, and granted an injunction to restrain the defendants from carrying out any contract for the sale and purchase of the racecourse in violation of that agreement.

The plaintiff company was incorporated by the Manchester Ship Canal Act, 1885, for the purpose of making a canal between the Mersey at Eastham and Manchester, and for the construction of docks, railways, and subsidiary works.

At the Manchester end the canal and docks lie in part between the racecourse belonging to the Manchester Racecourse Co. and the land of the Trafford Co., who purchased the Trafford Park Estate for development purposes in 1897.

Before 1893 there had been various disputes and differences between the plaintiffs and the Racecourse Co., and in order to settle and determine those disputes an agreement, dated the 7th of March, 1893, was entered into between the plaintiffs and the Racecourse Co.

By section 10 of the Manchester Ship Canal (Surplus Lands) Act, 1893, that agreement, which was set forth in the schedule to the Act, was confirmed and declared to be valid and binding on the parties thereto.

By clause 3 of the agreement it was provided: "If and whenever the lands and hereditaments belonging to the Racecourse Co. and now used as a racecourse shall cease to be used as a racecourse, or should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes, then and in either of such cases the Racecourse Co. shall give to the Canal Co. the first refusal of the aforesaid lands and hereditaments *en bloc*."

The plaintiffs alleged that on the 10th of August, 1899, the Racecourse Co. were expressly notified of the intention of the plaintiffs to apply to Parliament for power to acquire the racecourse for dock purposes, and that before that date the Racecourse Co., had not negotiated with any other person or corporation with a view to the sale of the racecourse.

Negotiations then followed between the plaintiffs and the Racecourse Co., which need not be set out in detail, and on the 20th of October, 1899, the chairman wrote the following letter on behalf of the Racecourse Co. to the plaintiffs: "Referring to the overtures lately made by you through your agent, Mr. Wallis, for the purchase of our property at New Barns, Salford, at present used as the Manchester Racecourse, and to the interviews which have recently taken place between Mr. Wallis and myself as the chairman of the Racecourse Co., in which your desire to purchase the property subject to certain conditions expressed by Mr. Wallis, my company think it well to repeat in writing the terms already stated by me to Mr. Wallis on which we are willing to sell to you the property. The conditions which I understood Mr. Wallis to accept as the basis of negotiations are (1) that we should have reasonable time within which to prepare for the continuance of our racing business on the site belonging to us at Castle Irwell, and (2) that the sale should be subject to the necessary licence being obtained for that purpose from the Jockey Club. Subject to the above two conditions we are prepared to sell to you the fee simple of our property at New Barns, containing a little over ninety-nine acres, for the sum of £350,000. I shall be obliged by your informing me within one week from this date whether or not the offer is accepted, and if not accepted, by your stating what is the highest sum you are prepared to give for the property subject to the above-mentioned conditions."

The plaintiffs alleged that when this offer was made the Racecourse Co. were in negotiation for the sale of the property to the Trafford Park Co. on other terms than those mentioned.

On the 27th of October, 1899, the plaintiffs replied to the following effect: "You have been informed of the intention of this company to apply to Parliament forthwith for compulsory powers to acquire your company's property at New Barns, Salford, at present used as a racecourse; but, in view of your suggesting that the negotiations for the purchase of the property should be continued, we venture to hope that a satisfactory price will be arrived at in a friendly spirit, and that there will be no need to have recourse to compulsory process in arranging terms between the parties."

This letter was answered on the 30th of October by the chairman of the Racecourse Co. in these terms: "My letter was written not with a view that the negotiations should be continued, but that they should result in an agreement or come to an end, as my company have other applications for the property. As, therefore, you have not accepted our offer or made any counter proposal, I now write to say that my company feel at liberty to deal with their property as they may think fit."

On the 8th of November, 1899, the plaintiffs issued a formal notice of their intention to take the racecourse for dock purposes.

The defendants, the Racecourse Co., admitted that on the 22nd of December, 1899, they had entered into an agreement by which they were to sell the racecourse to the Trafford Park Co. for £280,000 cash, but that agreement was expressed to be subject to the rights of the plaintiff company under the agreement of the 7th of March, 1893, and it was provided that the vendors should have the right to continue in occupation of the racecourse, free of rent, until the 31st of December, 1909, and also that the Racecourse Co. should have the option of acquiring a racecourse on the property

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

of the Trafford Park Co., an option which the defendants alleged to be of great value.

Farwell, J., held that, as the agreement of the 7th of March, 1893, had been confirmed by section 10 of the Act of 1893, and declared to be valid and binding on the parties thereto, it was made valid *in toto*, and therefore clause 3 was not open to the objection (to which it would otherwise have been open) that it violated the rule against perpetuities. His lordship also held that clause 3 had come into operation, because the plaintiff company had proposed to use the racecourse for dock purposes. Consequently, the Racecourse Co. were bound to give the plaintiffs the first refusal of their land *en bloc*. His lordship further held that "refusal" implied an offer, and that the offer contemplated by the agreement was an offer at a cash price which someone else was willing to give. In his lordship's opinion no such offer had ever been made to the plaintiff company. It would have been impossible for the plaintiffs to accept the terms offered by the Trafford Co. to the Racecourse Co. The plaintiffs had under their agreement an interest in the land, and the court had jurisdiction to interfere. His lordship accordingly granted an injunction restraining the Racecourse Co. from selling the racecourse to any person or company without first offering it to the plaintiffs at the same cash price as the intending purchaser was willing to give, and restraining both the defendants from carrying out the agreement of the 22nd of December, 1899, until this had been done.

Both the defendant companies appealed.

Warrington, K.C., Hughes, K.C., and *A. L. Ellis*, for the Racecourse Co., contended that the effect of the Act of 1893 was merely to remove any question of *ultra vires* and did not give validity to every clause of the agreement. Clause 3 was therefore void for remoteness and uncertainty. If valid neither of the events bringing it into play had happened. The Canal Co. had in fact been given the first refusal, since the option given by the Trafford Park Co. was worth more than £100,000, so that the actual consideration for their purchase was over £350,000.

Upjohn, K.C., and *Stewart Smith*, for the Trafford Park Co., contended that the Canal Co. had no remedy against them, whatever their rights against the Racecourse Co. personally might be: *Heathcote* v. *North Staffordshire Railway Co.*, 2 Mac. & G. 100.

Moulton, K.C., Swinfen Eady, K.C., Cripps, K.C., and *Clare*, for the Canal Co.

Cur. adv. vult.

April 1.—VAUGHAN WILLIAMS, L.J., read the judgment of the court, and after stating the nature of the case continued: The main question in this action is whether, according to the true construction of the scheduled agreement, the defendant Racecourse Co. did give a "first refusal" of the racecourse land to the Canal Co. There appear to be two possible meanings of the words "first refusal." One is that they mean the opportunity of refusing a "fair and reasonable offer" by the Racecourse Co. to sell the lands *en bloc* to the Canal Co.; the other is that they mean the opportunity of refusing the land at a price acceptable to the Racecourse Co. offered by some person other than the Canal Co., which is what I understand by the term "right of pre-emption." Now, the obligation to give a first refusal arises in either of two events—viz., (1) if and whenever the lands shall cease to be used as a racecourse; and (2) should the lands be proposed to be used for dock purposes. Clause 5 of the agreement appears to me to show that it was in the contemplation of the parties that the lands might be used for dock purposes while remaining in the hands of the Racecourse Co., and consequently without that company having determined to sell or part with the ownership of the lands. The object of clause 3, read in connection with clauses 5 and 6, appears to be to protect the Canal Co. as dock owners against competition, and the risk intended to be guarded against is the same whether the Racecourse Co. or some third party is owner of the docks. The agreement does not provide that the first refusal shall be given at any particular price or on any particular terms; nor that the price and other terms shall be ascertained by arbitration, or in any other way. Looking at these circumstances, I think there is at least fair ground for the contention that the clause only imports that the Racecourse Co. shall, in either of the prescribed events, make a fair and reasonable offer to sell the lands to the Canal Co., and I wish to consider the case from this point of view, which is the view most favourable to the defendants. We start with this, that the directors of the Racecourse Co. were on the 10th of August, 1899, approached by the Canal Co. with a view to the purchase of the lands by the latter company, and expressed themselves willing to discuss terms, and that negotiations between the two companies went on down to the beginning of October. About the 18th of September the Racecourse Co. appear to have consulted their solicitor as to their obligation under clause 3. He advised them, and the minutes record, that "it was thought that no harm could come from our naming a figure, say, £350,000." Negotiations with the Trafford Park Co. began on the 29th of September, and on the 4th of October a verbal offer was made by the Trafford Co. to the Racecourse Co. to become the purchasers at the price of £250,000, with the benefit of certain stipulations in favour of the Racecourse Co. [After referring to the further negotiations and correspondence, and to the offer of £200,000 made on behalf of the Canal Co., his lordship continued:] The Racecourse Co. thereupon refused the offer of £200,000, and, without making any further offer to the Canal Co., immediately offered the land to the Trafford Co. at £300,000, and ultimately entered into a contract with the Trafford Co. for the sale of the property at the price of £280,000, with the benefit of certain stipulations in favour of the Racecourse Co., the value of which Farwell, J., finds to be nothing like £70,000. I think that the price of £350,000 was one which the Racecourse Co. did not really expect to get, and that the offer made by the letter of the 20th of October, 1899, was not a fair and reasonable one. I also think that it was not the duty of the Canal Co. to make a counter-proposal. That company was entitled to a "refusal," which, I agree with Farwell, J., in thinking, imports an offer on the part of the Racecourse Co. In my judgment the evidence shows that at the very moment when the Racecourse Co. were offering the land to the Canal Co. at £350,000 the Racecourse Co. had determined to sell to the Trafford Park Co. for a less sum, and that in this sense the offer made by the letter of October, 1899, was not a fair and reasonable one. The contrast of figures is not so violent as in the supposed case where the Racecourse Co., for the purpose of freeing themselves entirely from the obligations of clause 3, offer at £1,000,000, and, having got their freedom by the continued refusal of that offer, subsequently sell at £100,000; but, taking the consecution of events here and the range of prices discussed at the previous negotiation between Davis for the Racecourse Co. and Wallis for the Canal Co., I have no more doubt than I should have had in the supposed case but that £350,000 was an offer made at a figure which was above the price which the Racecourse Co. were willing to take from

the Trafford Park Co., and I do not think such an offer is an offer within the meaning of clause 3, whatever construction is put upon it. I think that the very words "first refusal" in clause 3 import that the price at which the Racecourse Co. give the Canal Co. the "first refusal" is a price at which the Racecourse Co. will offer the land to other would-be buyers in the event of the refusal of the Canal Co. to buy at that price. If there is no person negotiating a purchase it may not be easy to prove that the price offered to the Canal Co. is above the price which the Racecourse Co. are willing to take from persons other than the Canal Co.; but whenever this can be proved, it seems to me that there is a clear infraction of the right of pre-emption given to the Canal Co. by clause 3. In the present case, however, there is no difficulty of proof.

Having thus disposed in the negative of the question whether the Racecourse Co. did give the Canal Co. a "first refusal" within the meaning of clause 3, I will now deal with the question whether either of the alternative conditions accrued giving rise to the right of refusal. The lands do not seem to have ceased to be used as a racecourse, and therefore one must consider the second alternative condition—viz., whether the lands were proposed to be used for dock purposes. I do not agree with Farwell, J., that the words "should the aforesaid lands and hereditaments be at any time proposed to be used for dock purposes," include a proposal so to use the lands by the Ship Canal Co. I think that the proposal must be by the Racecourse Co., their successors, or assigns—in other words, by a possible competitor in the dock business. But this is not very important, except as bearing on the construction of the clause, because I agree with Farwell, J., that within the meaning of this clause the Trafford Park Co. proposed before and at the time of the contract of sale entered into between themselves and the Racecourse Co. to use the land for dock purposes. The Trafford Park Co., who were negotiating the purchase of the land, proposed to use it, and the Racecourse Co. proposed to sell it for that purpose. This being so, the Canal Co. became entitled to a "first refusal"; and whatever those words may mean the Canal Co. in my opinion have not had a "first refusal"; for if one takes, as I have done in this judgment, the construction of clause 3 most favourable to the defendants, the Racecourse Co. on the happening of either of the alternative conditions came under the obligation to make a fair and reasonable offer to sell the lands to the Canal Co., and this, in my opinion, for reasons which I have already given, the Racecourse Co. have never done. If, on the other hand, clause 3 means that the right of "first refusal" is not to arise until some person or company other than the Ship Canal Co. makes an offer acceptable to the Racecourse Co. and that the Racecourse Co. will then come under an obligation to offer the land at the same price to the Canal Co., it seems clear that the Racecourse Co. have not done so. In either case the fact that the Racecourse Co. offered and sold the lands to the Trafford Park Co. at a less price than that at which they offered the lands to the Canal Co. seems conclusive. The offer to the Ship Canal Co. was not fair and reasonable, because the Racecourse Co. were willing at the very time of the offer to take a less price from the Trafford Park Co., and alternatively the Ship Canal Co. never had the refusal of the offer made by the Racecourse Co. to the Trafford Park Co. I agree with Farwell, J., that the value of the option to the Racecourse Co. to take land of the Trafford Park Co. for a racecourse is not sufficient to account for the £70,000, the difference between the cash price at which the Racecourse Co. offered the land to the Ship Canal Co. and the cash price at which they actually sold to the Trafford Park Co. I agree with Farwell, J., that there is no evidence that the option was anything like the value alleged. I do not decide that the Racecourse Co. could only negotiate with the Trafford Park Co. for an exclusively cash price; but I do decide that, even if the Racecourse Co. could negotiate for a mixed price, yet the cash price at which they offer the land to the Ship Canal Co. for acceptance or refusal must not exceed the total of the cash price at which they have offered the land to the third person *plus* the reasonable cash value of the option which they take as part of purchase price.

It only remains now to deal with a few objections urged to Farwell, J.'s, judgment. First, it was urged before us that the agreement in clause 3 was void for remoteness or uncertainty. I think, for the reasons given by Farwell, J., that every clause of the agreement has statutory validity, and that no objection can be taken on that score. Then it was objected that clause 3 could not be enforced against the Trafford Park Co., who are only alienees of the land. Farwell, J., thought that clause 3 created an interest in land, and that this objection could be thus answered. I do not think that clause 3 does create an interest in land, nor do I think that there is anything in the decisions in *Tulk* v. *Moxhay*, 2 Ph. 774, or in *London and County Banking Co* v. *Lewis*, 31 W. R. 233, 21 Ch. D. 490, which gets over the objection. It seems, however, from the decision in *Willmott* v. *Barber*, 28 W. R. 911, 15 Ch. D. 96, that the Trafford Park Co. could not obtain specific performance of a contract for sale and purchase of land if that sale would be a breach of a prior contract with a third person; and it seems to me to follow that one ought to treat this case on the basis of an action to restrain a breach of a contract threatened to be carried out in pursuance of a subsequent contract by the defendant with a third person having full knowledge of the first contract. This seems to bring the case within the principle of *Lumley* v. *Wagner*, 1 De G. M. & G. The contract here to give the Ship Canal Co. the "first refusal" involves a negative contract not to part with the land to any other person without giving that first refusal. If the action had been brought against the Racecourse Co., the party to the contract, alone, the injunction asked for could not have been granted without affecting the rights and interests of the Trafford Park Co. They are necessary parties to the action, just as Mr. Gye was a necessary party to the action of *Lumley* v. *Wagner*, for to grant the injunction in that case was to prevent Miss Wagner from carrying out her contract to sing at Mr. Gye's opera house; and, if the defendant, thus brought in, comes and insists on his right to have the second contract carried out, I do not see why the injunction should not be granted against him. *Heathcote* v. *North Staffordshire Railway* was cited to us to show that no injunction could be granted against the third person in such a case, but so it was cited in *Lumley* v. *Wagner* with the same object, but Lord St. Leonards, nevertheless, granted the injunction against Mr Gye. There are only two more objections to mention; one is that it is said that, if the agreement for the sale of the racecourse to the Trafford Park Co. is carried out, the plaintiffs will not be hurt, because the contract of sale is expressly subject to their rights. But the answer to this is, on the question of the amount of compensation to be paid on compulsory purchase, it may make a great difference to the Ship Canal Co., who are the claimants. Then it is said that the plaintiffs could not insist on the first refusal, because they could not buy without taking fresh statutory powers. It seems

to me that the answer to this is that all the parties to the contract were perfectly well aware of this at the time when the contract was made. For the reasons which I have given I think the judgment of Farwell, J., ought to be affirmed.

Appeal dismissed.

Solicitors, *Grundy, Kershaw, Samson, & Co.; L. W. Byrne*, for *Taylor, Kirkman, & Colley*, Manchester; *Ashwell, Browning, & Tutin*, for *Ashwell & Tutin*, Nottingham.

From Chan. Div. (Rigby, Vaughan Williams, and Romer, L.JJ.) — Dec. 17, 18; March 25.

GARDNER *v.* HODGSON'S KINGSTON BREWERY CO. (*a.*)

Easement—Right of way—Annual payment—Uninterrupted enjoyment for over forty years—Parol licence—Lost grant—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 5.

Where an easement is claimed under the Prescription Act, s. 2, a payment within the period of forty years may so negative the enjoyment "as of right" as to prevent the claim being established.

Where a licence to use a way was given by parol more than forty years before action brought, and such licence was subject to a small annual payment,

Held (Rigby, L.J., dissenting), on the facts, that the proper inference was that each payment was made for permission to use the way for the preceding year, and that the way had not therefore been enjoyed as of right within the meaning of the Prescription Act.

Held, also, that no lost grant could be inferred.

Decision of Cozens-Hardy, J. (48 *W. R.* 469), *reversed.*

This was an appeal from a decision of Cozens-Hardy, J. (48 W. R. 469.)

The action was brought for a declaration that the plaintiff was entitled to a right of way through a gateway at the back of certain freehold hereditaments known as No. 203, High-street, Sutton, of which the plaintiff was owner in fee, to and from a pump in a yard in the rear of the Red Lion Inn, of which the defendants were the owners, and also a right of way for carts and horses through the said gateway across the said yard to and from the High-street, and for an injunction.

The facts were as follows:

The plaintiff and her predecessors in title had for upwards of sixty years occupied No. 203, High-street, for the purposes of a saddler's business, with a yard and stables at the back, used partly as a knacker's yard and partly as livery stables. The only access to the yard and stables had been through a gateway from the plaintiff's yard, opening into the Red Lion yard, and thence across that yard into the High-street. This way had been openly enjoyed during the whole period. It was also proved that ever since the year 1855 15s. a year had been paid by the plaintiff and her predecessors for the user of this way.

On the 31st of March, 1898, the defendants served notice in writing upon the plaintiff requiring her to give up the access to the yard of the Red Lion and to close the gate, and added that "the right of going through the said yard of the Red Lion Inn, Sutton, for which you have paid us an annual rent of 15s. shall therefore be abolished as and from the 1st day of May next."

On the 19th of April, 1898, the plaintiff wrote the following reply: "Referring to your letter of the 31st of March, we are quite unable to agree to your proposal to close the gate, as, independent of the right of way, for which we pay 15s. per annum, we have a right of access to and use of the pump, which has existed for a great number of years, and we do not see how this right could be given up without our interest being affected. There is no other outlet whatever from our premises excepting through the yard. We also wish to point out that, as regards your notice to give up the right of way, we are, as you are aware, yearly tenants, and therefore one year's notice should be given as from September next."

On the 23rd of January, 1899, the plaintiff sent a cheque for 15s. for right of way through yard to September, 1898.

On the 16th of February, 1899, the defendants served a notice "to quit and discontinue the user of the yard on the expiration of the year of your tenancy, which shall expire next after the end of one half-year from service of this notice."

The defendants by their pleadings admitted the plaintiff's right of access to the pump, but denied the plaintiff's right of way across their yard to and from High-street.

Cozens-Hardy, J., drew the inference from these facts that a licence or permission to use this way across the yard was given by parol more than forty years before action brought, but was subject to the payment of 15s. a year, and he held that the plaintiff had acquired a right of way under section 2 of the Prescription Act. He was further of opinion that if necessary a lost grant ought to be presumed. He therefore gave judgment for the plaintiff.

The defendants appealed.

Macnaghten, K.C., and *G. Cave*, for the defendants, contended that the annual payment of 15s. was in respect of rent, and that the user of the way was not therefore as of right.

Micklem, K.C., and *E. S. Ford*, for the plaintiff, argued that claiming under a licence or agreement was claiming as of right, and that under the circumstances a lost grant ought to be presumed.

Macnaghten, K.C., replied.

Cur. adv. vult.

March 25.—RIGBY, L.J., said: In order to justify the conclusion that the existing state of facts is inconsistent with the acquisition under the Prescription Act by forty years' user of an absolute and indefeasible right of way, it is absolutely necessary to assume that each annual payment of the 15s. has to do at most with the right of way for one year only, so that the successive payments may be taken to involve successive permissions for one year at most. To me it appears that such an assumption, so far from being necessary, is altogether arbitrary and unwarranted. This will be shown by an examination of the probabilities of the case. Independently of the Prescription Act, the question to be solved is, how did it come about that a business should be carried on in a yard surrounded with buildings on all sides but one, and on that one side making necessary use of a cart and horse way through the adjoining property, and also use of a well of water on such adjoining property? Probably the most natural hypothesis would be that the properties at some remote former time were in one ownership, that the buildings were erected before the severance of ownership, and that on the severance, by conveyance the right of road and right to use the well were annexed to the separated property. This does not account for the annual payment of

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

the 15s., but that might have been reserved expressly, and, if so reserved, would in all probability be reserved either in perpetuity or until the owner of the servient tenement ceased to require it. Putting aside the hypothesis of common ownership, it is highly improbable and almost inconceivable that the owner of the now dominant tenement would have built all round his yard where he had no right of exit, and gone to the expense of preparing for a business requiring a supply of water and access by carriages and horses without securing both rights beforehand. Some such arrangement as the following would be probable: That he, helping to provide and maintain the well and pump, should have in perpetuity, or at least so long as he required it, the right of the water supply and the right of way for his business. The consideration of 15s. a year might at the remote period that we are postulating be a not insufficient consideration for the right of road. The arrangement might be carried out by deed which has been lost or no deed may have been executed. In the latter case there would be no legal easement either for water or roads, but, as Lord Denman pointed out in his judgment in *Tickle* v. *Brown*, 4 A. & E. 369, the want of such a legal right would in no way prevent the person claiming the easement from claiming as of right. Of course I do not say that such an arrangement as I have indicated can be taken as proved. It is, however, more likely to have taken place than a mere bargain for a right of way for a year. The hypothesis of a mere licence revocable at any time seems the most unlikely of all. There is no way of accounting for the incongruity of bargaining for a perpetual right of water, which is admitted, and neglecting to bargain for the at least equally necessary right of way not determinable at the will of the grantor. That the mere payment of an annual rent is not to be interpreted as involving an interruption of a user as of right is shown by the case of *The Plasterers' Co.* v. *The Parish Clerks' Co.*, 6 Exch. 630, where, as is pointed out by Cresswell, J., the user of light must necessarily have been as of right. Lord Campbell's judgment makes it clear that the decision that the payment did not cause an interruption in the user was founded on the construction of section 4 and applicable equally to cases within section 2 and section 3.

[The Lord Justice then dealt with the contention of the defendants that there had been an admission by the plaintiff of a yearly tenancy as to the right of road and overruled it; and he came to the conclusion that the decision of Cozens-Hardy, J., was correct, and that the appeal ought to be dismissed.]

VAUGHAN WILLIAMS, L.J. (after stating the facts as above set out), said: It is contended by the defendants that the inference drawn by Cozens-Hardy, J., is not the right inference, but that the true inference is simply that the enjoyment was by reason of permissions granted during the period of forty years, and not as of right. Now there can be no doubt but that the fact of the payment in each year is evidence, *primâ facie*, that enjoyment was not as of right; it is, to use the words of section 5 of the Prescription Act, evidence of a fact inconsistent with the simple fact of enjoyment as of right. The evidence is not offered by the defendants as evidence of an agreement. The defendants are not confessing the enjoyment as of right and avoiding the effect of such enjoyment by setting up the agreement under which the enjoyment was had; on the contrary, it is the plaintiff, the party claiming the prescriptive right, who seeks to set up the agreement and then to say, "You, the defendants, cannot take advantage of this agreement to negative my claim to a prescriptive right because the agreement which I am setting up was not in writing." This agreement which the plaintiff asks the court to infer, and which Cozens-Hardy, J., does infer, is not dependent on the lapse of forty years, it is not a statutory inference, neither is it an inference based upon some recognized legal fiction arising after the lapse of twenty or some other number of years. It is a mere inference of fact based upon the payment of 15s. a year for a long period, the origin of which payment there is no evidence to explain. But it is to be observed that the annual payments are equally consistent, or, at all events, consistent, with a fresh permission in each year. Moreover, the probability that such was the true fact, and the improbability that there was one permission or agreement covering the whole period of forty years, is enhanced by the consideration that a parol licence creates no right or interest in the licensee over the land, but is revocable by the licensor at any moment. The second and fifth sections of the Prescription Act are difficult to construe; but I believe that the true meaning of the provision that where a way shall have been enjoyed as aforesaid (as of right) for the full period of forty years the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing, is that an enjoyment which appears to be as of right, otherwise than under a right conferred by the consent or agreement of the person owning the land in respect of which the way or other easement is alleged, shall not be defeated or lose its effect by evidence that the enjoyment was permissive, unless such permission, consent, or agreement was in writing. If this is the true view it will follow that, wherever the enjoyment does not appear to be of right, the proviso has no application, and that, therefore, if it appears that there were payments for the enjoyment during the forty years the proviso cannot apply, for, the enjoyment *primâ facie* not appearing to be as of right, the landowner over whose land the way is claimed has no need or occasion to set up a consent or agreement covering the whole period of forty years. It is sufficient for him that the payments made during the forty years *primâ facie* negative the enjoyment having been as of right. It may be it is open to the person claiming the easement to go on and prove that the payments were in fact made under a parol consent or agreement made before the forty years began, and it may be that this would give the claimant an indefeasible right to the easement, but there is no evidence of such consent or agreement in fact, and I think it would be wrong to infer from the annual payments of 15s. a parol agreement made before the beginning of the forty years and remaining in force for the whole period. The inference from a payment in one year is, I might almost say admittedly, that the enjoyment in that year was not of right, and I cannot see why the inference should be different because the payment is made for a number of years in succession. In each year it seems that the payment is compensation for the past user, and as such an acknowledgment that the past year's user has not been of right. The payment on the 23rd of January, 1899, is itself evidence that the plaintiff was not enjoying the easement as of right.

The cases of *The Plasterers' Co.* v. *The Parish Clerks' Co.*, and *Bewley* v. *Atkinson*, 28 W. R. 638, 13 Ch. D. 283, to my mind, are not in point, because those cases, being light and air cases, were governed by section 3 of the Prescription Act, and, as under that section it is not necessary that the enjoyment should be of right, it was impossible to

rely on the long-continued payments as admissible in evidence to negative the enjoyment having been as of right. Moreover, in the *Plasterers' case* payments were only relied on as admissible to prove an interruption within the meaning of section 4, and the court held that the payments were no evidence of an interruption, because an interruption of a right claimed under section 3 could only be by discontinuance of the enjoyment, and Lord Campbell says on p. 634: "We are not called upon to say whether the payment might not be made use of to show that this was not such an enjoyment as was contemplated by the statute as capable to confer the right"; and Maule, J., adds, "Your argument must go to the length that an enjoyment which is paid for is interrupted; but the third section shows that there may be an uninterrupted enjoyment granted by an instrument in writing." Thereupon both these learned judges, having refused to deal with any other question except that raised by the bill of exceptions—viz., whether the ruling of the Lord Chief Baron that the demand of the rent for the lights and payments made in compliance therewith was an interruption within the meaning of the statute was right—proceeded to hold that the interruption in the third section of 2 & 3 Will. 4, c. 71, must be an actual discontinuance of the enjoyment by reason of an obstruction submitted to or acquiesced in for a year. That case, to say the least of it, leaves untouched the proposition established by *Tickle* v. *Brown* that in a case of an easement claimed under section 2 a payment within the period of twenty or of forty years may so negative the enjoyment as of right as to prevent a claim under the statute for an easement.

This is all I have to say about Cozens-Hardy, J.'s, inference that a licence to use this way across the yard was given by parol more than forty years before action brought, excepting that I wish to point out that a succession of annual payments of so-called rent for the enjoyment of an easement for a number of years in succession will not constitute a continuous licence for the whole period. The case is very different from a tenancy of land, in which case the resulting tenancy from year to year would be continuous. Cozens-Hardy, J., also, though preferring to base his judgment on the Prescription Act, alternatively bases his judgment on presumption of lost grant. I think there is no room for any such presumption. The enjoyment can be accounted for as a lawful enjoyment without reference to any such grant on the theory of payments made under a licence renewed from year to year, the payments being acknowledgments that the enjoyment of the previous year had not been as of right and not payments of rents. Moreover, there is this difficulty about the suggested lost grant—that a perpetual lease of an easement subject to an annual payment is a legal impossibility—and I doubt whether there can be a grant of an incorporeal hereditament subject to a perpetual payment in the nature of a fee farm rent. In my opinion the judgment of Cozens-Hardy, J., ought to be reversed and judgment entered for the defendants.

ROMER, L.J.—The question to be decided in this action is whether or not the plaintiff has enjoyed the way over the defendants' premises "as of right" within the meaning of sections 2 and 5 of the Prescription Act. The difficulty which arises is not one of law on the interpretation or meaning of the Act, but one depending on the inference to be drawn from the facts proved. The case of *Tickle* v. *Brown*, 4 A. & E. 369, defined "enjoyment as of right." The words of Lord Denman in delivering judgment in that case have been so often cited that I need not repeat them here. It is clear that if the enjoyment has been by permission granted by the owner of the servient tenement during the forty years, then the enjoyment is not of right. Lord Denman, besides speaking of "permission," used the phrase "by tacit sufferance." I do not quite know what he meant by tacit sufferance, but I think he was contemplating a case similar to that we have now to deal with. But it cannot now be doubted that if from the facts proved the inference be that the enjoyment during the forty years has been by permission granted during that time, then no right can be acquired under the Act in respect of that enjoyment. Of course, when I speak of the "facts proved" I exclude any attempt to establish by evidence any consent or agreement not in writing given or made prior to the forty years.

I now proceed to apply the above to the circumstances of this case. Undoubtedly the plaintiff and her predecessors have used the way claimed by her for more than the forty years in a manner which would enable her to claim the benefit of the statute had there been no yearly payment made. But she and her predecessors have at the end of each year during this period made a yearly payment to the defendants and their predecessors in respect of the user of the way during that past year. Now, it appears to me that if nothing were known of the circumstances under which, during one particular year of the forty, a certain payment had been made in respect of the user of a way for that year, the proper inference from the mere fact of payment would be that the payment was made for permission asked and granted to use the way for that year. And, indeed, I think that was one of the points decided in *Tickle* v. *Brown*, nor would it, in my opinion, make any difference that the payment was made at the end, and not at the beginning, of the year. But then comes the difficulty in the present case, about which I have felt great hesitation, especially having regard to the view taken by my brother Rigby. Is the inference that would be drawn, in the case of payment in a single isolated year, one that ought also to be drawn with regard to each payment in circumstances like the present, where the payments have been made for the whole period, and where no express application for permission during that period is shown, and the yearly payment is a small one? It is only with reluctance that I have come to the conclusion that, even in the circumstances of this case, the proper inference is that each payment was for permission to use the way for the preceding year. In the first place, the fact that the permission was not expressly asked for or given in each year is just what one would expect when the user was continued for several years. So long as the payment was made at the end of each year, and the parties did not wish that the user should cease, they would naturally proceed on the tacit understanding between them as to their relative positions shown by the payment made each year, and would not go each year through the form of expressly asking for or expressly granting permission for the user for each coming year. The application and grant would be tacitly assumed to have been made. And in the next place, I do not think much importance can be attached to the fact of the payment being small. However valuable the way may be to the plaintiff, I cannot say that the payment is so small as compared with the inconvenience caused by the user to the defendants or their predecessors that I ought to assume that they did not sooner withdraw their permission because they had no power to do so. Then, are there any other facts in the case which could prevent me drawing the inference I have? I think not. The form of the only receipt for the yearly payment which is forthcoming does

not appear to me to materially assist either side, except that it shows that the payment was in respect of the right of way for the preceding year. The words "right of way" written across it may well be referred to the right obtained by the permission. Then the inconveniences which will result to the plaintiff in her business if she fail to establish her claim to a right of way, though they account for the reluctance I have felt as previously expressed, are not grounds upon which the court ought to act in determining this case. No doubt the plaintiff may have reasonably expected, and did expect, that the permission so long given would continue, but this expectation will not support a claim as of right. [After some observations upon the pleadings his lordship continued as follows:]

I am fortified in the conclusion I have come to by the following considerations: If the yearly sum was not paid for permission to use the way, on what footing was it paid? Suppose the plaintiff had wished to cease using the way and to stop payment of the yearly sum, and had given notice to the defendants of her intention, and in accordance with her notice had not used the way for a year. Could the defendants have succeeded in an action brought by them against her to compel payment of the yearly sum for that year? I think not. It appears to me that such an action must have failed, and I think it would have failed because the court would have held on the facts now before us that the user was by permission, and that the payment was only due when the permission was expressly or impliedly sought for and obtained. The court could not from the facts proved in this case have inferred in favour of the defendants a lost grant to secure the yearly sum. Indeed, it is difficult to see what lost grant they could have suggested. It would have been hopeless to suggest that the yearly sum was in the nature of a rent-charge issuing out of the plaintiff's tenement. And I cannot see what other legal supposition could have been enforced as against the owners or occupiers for the time being of the plaintiff's house and premises.

Lastly, I think the case against the plaintiff may be put in this way: The payment of the yearly sum by the occupiers of her house for the time being was evidence of user by permission. This throws upon her the onus of proving by facts outside and beyond the mere user that the user was "of right" under the statute. This onus she fails to discharge, at any rate she does not do so to my satisfaction. The view that I have taken, while it prevents the operation of the statute in favour of the plaintiff, also negatives the idea that a lost grant can be inferred to support her claim. For these reasons I think that the appeal ought to succeed, and that the action should be dismissed so far as it seeks a declaration that the plaintiff is entitled to the right of way claimed (not being that claimed in connection with the pump in the pleadings mentioned), and so far as it claims an injunction based on that declaration. The view I have taken renders it unnecessary for me to consider the further points taken by the defendants, which depend upon the contention at one time put forward by the plaintiff, that she was in the position of a yearly tenant in respect of the user of the way, and upon the payments made by her and received by the defendants before that contention was withdrawn.

Appeal allowed.

Solicitors, *Spencer, Gibson, & Co.; Lovell & Broad.*

Appeal.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 13.

NASH *v.* HOLLINSHEAD. (*a.*)

Master and servant—Employers' liability—Accident—Compensation — Factory — Steam-engine on farm—Mill for grinding meal—"By way of trade or for purposes of gain"—Factory and Workshop Act, 1878 (41 *&* 42 *Vict. c.* 16). *s.* 93—*Workmen's Compensation Act,* 1897 (60 *&* 61 *Vict. c.* 37), *s.* 7.

A workman employed on a farm to drive a steam-engine for working a mill used to grind meal for the farm stock is not employed in a "factory" within the meaning of the Factory and Workshop Act, 1878, *so as to come within section* 7 *of the Workmen's Compensation Act,* 1897.

Appeal from an award of the judge of the St. Alban's County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was a workman in the employment of a farmer. The employer had on his farm a movable steam-engine which was used for the purpose of working a mill for grinding meal intended for food for the stock on the farm, and not for sale. It was the duty of the applicant to drive the engine and attend to the mill. While performing this duty he was accidentally injured.

The question was whether the applicant was employed on a "factory" within the meaning of the Factory and Workshop Act, 1878, and was therefore brought within section 7 of the Workmen's Compensation Act.

The county court judge made an award in favour of the applicant for a weekly payment of nine shillings.

The employer appealed.

Ellis Hill, for the employer.—The county court judge thought that the applicant was employed in a "non-textile factory" within the meaning of section 93 of the Factory and Workshop Act, 1878. But the facts of this case cannot be brought within that definition. The meal was not ground "by way of trade or for purposes of gain": *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580, [1893] 2 Q. B. 135. No "manufacturing process" at all was carried on in the farm. In *Kent* v. *Astley*, 18 W. R. 185, L. R. 5 Q. B. 19, it was held that a slate quarry was not a factory; and in *Redgrave* v. *Lee*, 22 W. R. 857, L. R. 9 Q. B. 363, it was held that cement works were not a factory. If this farm is a factory, the absurd result will follow that all the provisions of the Act, such as those contained in sections 13, 17, 22, 75, and 76, will apply to it.

C. E. Fitch, for the applicant, cited *Rogers* v. *Manchester Packing Co.*, 46 W. R. 350, [1898] 1 Q. B. 344.

A. L. SMITH, M.R.—I cannot agree with the judgment of the learned county court judge. The question is whether a tenant-farmer carries on the business of a non-textile factory within the meaning of section 93 of the Factory and Workshop Act, 1878. Certainly no one ever supposed that he did until this case was heard. It is now said that since 1878 all tenant-farmers have been carrying on the business of non-textile factories, and we are asked to hold that these farmers are subject to the Workmen's Compensation Act. The argument is this: Section 7 of the Work-

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

men's Compensation Act enacts that workmen employed in factories are within the Act, and that "factory" has the same meaning as in the Factory and Workshop Acts; and, it is said, the workman in this case was, at the time when he was injured, working on a factory within the meaning of the last-mentioned Acts, and therefore his master is liable. What was the workman's employment? His master, the farmer, had in his farmyard a steam-engine which was connected by a band over a fly-wheel with a mill which was used for the purpose of grinding meal for the farm stock. The workman was employed to drive the engine. The question is whether in law this was employment in a factory. That brings us to section 93 of the Factory and Workshop Act, 1878, which defines "textile factory" and "non-textile factory." No one says that the farm on which this engine was is a textile factory. But a non-textile factory is defined as including "(3) any premises wherein, or within the close or curtilage or precincts of which, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes, or any of them; that is to say—(a) in or incidental to the making of any article or part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and wherein, or within the close or curtilage or precincts of which, steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." Can the present case be brought within those words? Turning grain into meal is not making any article, nor is it altering, repairing, ornamenting, or finishing any article; neither do I think it is adapting any article for sale. Again, the grinding of this meal was not done "by way of trade," it was done for the purpose of feeding the farmer's own cattle. Neither was it done "for purposes of gain," which, in my opinion, means direct gain and not indirect gain. I think it would require a great straining of the language of the section to hold that it was applicable to the case with which we are dealing.

Then further it must be noticed that, if a farmer is to be held to carry on the business of a non-textile factory, all the provisions of the Act of 1878 relating to non-textile factories would apply. Section 13 puts a limit on the number of hours during which young persons and women may be employed in a non-textile factory. Section 22 provides for certain holidays. It can never have been intended that these sections should apply to persons working on a farm. Then section 75 provides for notice with regard to a factory being given to an inspector. If the word "factory" included "farm," the section would have to be read thus: "Every person shall within one month after he begins to occupy a farm, serve on an inspector a written notice containing the name of the farm, the place where it is situate, the address to which he desires his letters to be addressed, the nature of the work, the nature and amount of the moving power therein, and the name of the firm under which the business of the farm is to be carried on, and in default shall be liable to a fine not exceeding five pounds." Again, section 76 says that where an inspector by notice in writing names a public clock, or some other clock open to public view, for the purpose of regulating the period of employment in a factory, then the period of employment and the times allowed for meals shall be regulated by that clock. It is impossible to suppose that such a section could have been intended to apply to a farm. In my opinion, therefore, the appeal must be allowed.

COLLINS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitors for the employer, *Heath & Hamilton*, for *Brigg & Remon*, Harpenden.

Solicitor for the applicant, *H. W. Lathom*, Luton.

High Court of Justice.

Chan. Div. Kekewich, J. } Dec. 20; Jan. 11, 16, 28.

In re PITT-RIVERS.
SCOTT *v.* PITT-RIVERS. (*a.*)

Will—Construction—Secret trust.

A testator built a museum and laid out pleasure grounds on parts of his estate, to which he admitted the public free, reserving his private rights. By a codicil to his will he gave the museum and grounds, with £300 per annum for their maintenance, to his son and his heirs male, and also appointed two trustees for the purposes only of the museum and grounds. Evidence showed that the testator intended his son to maintain the grounds and museum as in his lifetime, but that he wished the public to acquire no rights therein, and that the son accepted the gifts on those terms.

Held, that the son took the gifts subject to a secret trust to maintain and use the museum and grounds as in the testator's lifetime, to be enforced for the benefit of the public; and that the two trustees took no estate and had no duties to perform.

The testator General Augustus H. L. F. Pitt-Rivers during his life built a museum at Farnham on a part of his estates, and also laid out another part which was called the Larmer grounds as pleasure grounds. To these he admitted the public free of charge, always carefully reserving his private rights as against the public.

The testator died on the 4th of May, 1900, and by his will dated the 12th of June, 1892, after appointing trustees and executors, devised his freehold property, including the museum and the Larmer grounds, subject to the rent-charges in favour of his wife and children, to his first and other sons successively for life and in tail male.

A codicil to his will dated the 20th of November, 1899, was as follows: (1) I bequeath my museum at Farnham, in the county of Dorset, together with its contents and the objects of curiosity in my house at Rushmore which are intended to be placed in the said museum to my eldest son A. E. L. F. Pitt-Rivers and his heirs male. (2) I bequeath my Larmer grounds, in the parishes of Farnham, &c., to my eldest son A. E. L. F. Pitt-Rivers and his heirs male. (3) I also bequeath unto my eldest son A. E. L. F. Pitt-Rivers and his heirs male the sum of £300 per annum, the said sum of £300 per annum is to be for the future maintenance of the said museum and Larmer grounds and the articles of interest therein and thereon. (4) I direct that the said museum and Larmer grounds, with the articles of interest, &c., shall be kept in a good state of preservation, and I further direct the said sum of £300 is to be a further charge upon my estates in the counties of Wilts and Dorset. (5) I appoint John Lubbock (since Lord Avebury), of, &c., and C. H. Read, of, &c., to be the trustees only for the purposes so far as necessary in connection with the future maintenance of the said museum and Larmer grounds and the objects of interest therein and thereon.

(*a.*) Reported by C. C. HENSLEY, Esq., Barrister-at-Law.

This was a summons by the executor of the will raising the questions whether the testator's eldest son took the gifts made to him by the codicil beneficially or subject to a secret trust to maintain and use the museum and Larmer grounds as in the lifetime of the testator for the benefit of the public; and as to what, if any, estate the trustees appointed by the codicil took in the museum and grounds and the £300 per annum.

Evidence as to the testator's intentions respecting the future maintenance of the museum and grounds was given.

W. R. Sheldon, for the executor of the will.

P. O. Lawrence, Q.C., and *W. M. Cann*, for the testator's eldest son.—The evidence does not establish a trust imposed on the eldest son to maintain and use the museum and grounds as in the testator's lifetime and accepted by him. The testator always intended to prevent the public acquiring any rights.

Renshaw, Q.C., and *F. L. Wright*, for the trustees of the codicil.

Warrington, Q.C., and *P. S. Stokes*, for the heir expectant.

Sir R. Finlay, A.G., and *R. J. Parker*, for the Crown.—The testator intended to create a trust in favour of the public, and his eldest son accepted it. It is a good charitable gift: *Jones* v. *Badley*, 16 W. R. 713, L. R. 3 Ch. App. 362; the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), ss. 3, 5, 8.

Cur. adv. vult.

Jan. 28.—KEKEWICH, J.—By the codicil of the 20th of November, 1899, General Pitt-Rivers gave to his eldest son, the first defendant, whom I will for brevity's sake refer to as Mr. Fox Pitt-Rivers (1) his museum at Farnham with its contents; (2) the objects of curiosity in his house at Rushmore, which were intended to be placed in the said museum; (3) his Larmer grounds; and (4) the sum of £300 per annum. All these gifts were made to Mr. Fox Pitt-Rivers and his heirs male, so that he took what was real estate as tenant in tail and what was personal estate absolutely. I think that the gift of £300 per annum falls under the latter description. It is by the same codicil charged on the testator's estates in the counties of Wilts and Dorset; but that charge does not prevent the bequest from being one of an annuity which is personal estate. The result is that Mr. Fox Pitt-Rivers can deal with the real and personal estate, thus given, as he pleases, and that, notwithstanding that the testator has directed on the face of the codicil that the museum and Larmer grounds, with the articles of interest therein and thereon, shall be kept in a good state of preservation, and has indicated his intention that the annuity of £300 shall be available and shall be used for that purpose, such direction and intention cannot interfere with the beneficial gifts of the construction of which there is no reasonable doubt. But it has been disclosed by the evidence that the testator communicated his wishes to his son, Mr. Fox Pitt-Rivers, and that his son accepted the gifts with the knowledge that they were made to him for the purpose of effecting his father's wishes; and, further, that he assured his father that those wishes should be fulfilled. This constitutes a secret trust of the property given enforceable against the son in this court. There is no need to refer to authorities or to examine the doctrine of the court on the subject, because the facts just mentioned are undoubted and the doctrine of the court, that a secret trust is under such circumstances enforceable, is perfectly well settled. Nor is there any occasion narrowly to examine the evidence to ascertain what the communicated and accepted wishes of the father were. He had established the museum and had appropriated the Larmer grounds for purposes in connection with it, and he had maintained the museum and the grounds for the benefit and instruction of the public. He had done more than that, for he had expended money and trouble in providing entertainment for the public outside and beyond what would be derived from a mere visit to the museum and grounds. It may well be that, when he exacted a promise from his son that he would maintain the museum and grounds as heretofore, he did not bind him to provide the extra entertainment to which I have just referred; but he certainly did intend him to maintain the museum and grounds and to allow the public access thereto, and the son certainly accepted the gift of both with the assurance that this should be done. So far there is no substantial difficulty. Questions might arise in detail how the wishes of the father and the promise of the son should be effected; but they would be merely questions of detail, and none of principle would be possible.

Now comes the circumstance which raises a question of difficulty on which I reserved my judgment. While giving the property already mentioned to the son for the purpose of maintaining the museum and grounds as heretofore, the testator insisted that the public should have no rights. The public were to be allowed to use and enjoy the museum and grounds, but were to acquire no rights. This notion seems to have been strongly implanted in the testator's mind, and he referred to it frequently. He, being owner in fee, was able during his lifetime to do what was necessary to prevent the acquisition of rights by the public; and he occasionally closed the museum and grounds with the express intention of showing that he retained his paramount right as owner. Probably he thought that his son could do the same, and of course, if the son had succeeded to his father's position—that is, had taken the property absolutely unfettered by any trust—the son might have adopted the same lines as his father, and prevented the enjoyment of the public as a matter of right. This could only have been done by vesting the property absolutely in the son, and leaving it to his good faith and discretion to fulfil his father's wishes, though leaving him at the same time at liberty entirely to defeat these wishes if so minded. As it is, a trust has been established, and the question arises how far that trust can be enforced consistently with the denial of rights to the public. The Attorney-General appears to support the public character of the trust. He is altogether out of court unless he represents the public, and he cannot succeed in his contention that there is a secret trust to be enforced unless he further establishes that it is a trust for the benefit of the public. The court, therefore, finds itself in this embarassing position. If it accedes to the contention of the Attorney-General that there is a secret trust to be enforced for the benefit of the public, it must ignore or defeat the express intention of the testator that the public shall acquire no rights; and on the other hand, if that contention is rejected and the trust be not enforced, the only alternative can be that Mr. Fox Pitt-Rivers will be left absolute owner of the property in question, at liberty, if he pleases, to disregard his father's wishes, and treat the property as equally at his disposal as if no trust had been communicated to and accepted by him. I have not forgotten that it may, and probably will, be possible so to provide for the management, use, and enjoyment of the grounds and museum that Mr. Fox Pitt-Rivers will be left in possession, and that for all

practical purposes he will have such privileges of ownership as were enjoyed by his father; but nevertheless, considering the legal position, one must face the two alternatives to which I have called attention, and from which, it seems to me, there is no possible escape. Whichever alternative is right, and is adopted, there will necessarily be some departure from the testator's intentions—that is, in some respects those intentions will remain unfulfilled. After full consideration I have arrived at the conclusion that the secret trust must be enforced at the suit of the Attorney-General, and for the benefit of the public. This will preserve the legal ownership of the son, which the father intended him to have; it will also fulfil his intention, as far as it can be fulfilled, that the museum and grounds shall be maintained as heretofore, and will avoid the possibility of the property being diverted from its intended purpose, which would be open if the son were declared beneficial as well as legal owner. I give credit to Mr. Fox Pitt-Rivers for honest intention to do his very best to fulfil his father's wishes; but that creates at best only an imperfect obligation; and I must take it on the evidence that this would not have satisfied the father, who desired to secure the maintenance of the museum and grounds. On the other hand, there will be something less than the complete fulfilment of the father's expressed wishes. But, in giving effect to wishes and trusts declared in the language of laymen and not in that of technical lawyers, one must be prepared to find that in some respects there will be failure and imperfection in detail, and one must be content to secure the substance even on those terms. Here the wish not to give the public rights, though strongly entertained and insisted on, may properly be regarded as a minor matter in comparison with the more important provision that the museum and grounds should be maintained as hitherto.

I propose to declare the construction of the will on the points mentioned, and further to declare that it has been established to the satisfaction of the court that the gifts to the son were made to Mr. Fox Pitt-Rivers, and were accepted by him, for the express purpose that the museum and grounds should be maintained and used as they had been in the lifetime of the testator, and so that he and those claiming through or under him will hold the property subject to a trust for such maintenance and user. If to these declarations be added liberty to Mr. Fox Pitt-Rivers or any person claiming through or under him, or the Attorney-General, to apply touching any question respecting such maintenance and user, that will suffice for the present as regards what I have thus far discussed.

There are two further questions arising on the codicil. First, it remains to be determined what are "the objects of curiosity in my house at Rushmore, which are intended to be placed in the said museum." There has been some argument on this, and some discussion of questions of law which are likely to require solution when the facts have been ascertained. Indeed, I went so far as to express an opinion on some of these questions. I think, however, that it will be better to say no more about them, but merely to direct an inquiry following the language of the codicil. It is possible and even probable that in the course of prosecuting that inquiry some of the questions to which I have just referred will fall for decision; but, nevertheless, an effort to ascertain all the facts in this way seems to me the preferable course. The other question is what, if any, interest Lord Avebury and Mr. Charles Hercules Read take in any, and what, property disposed of by the codicil. It is obvious that the testator intended them to occupy some position of trust—that is, to have some duties and responsibilities—for he appoints them trustees for the purposes so far as necessary in connection with the future maintenance of the museum and grounds, and the objects of interest thereon and therein, but he directly gives them no property of any kind; and I do not think they can be held to take any interest in the annuity of £300, which is expressly given to Mr. Fox Pitt-Rivers. In coming to the conclusion that they took no estate or interest in anything, and have no duties to perform by virtue of the codicil, I am, of course, failing to give effect to what well may be supposed to have been the testator's intention; but I do not see my way to implying any estate, interest, or duty where none is expressed. If I were now settling a scheme, I should suggest for the consideration of the Attorney-General whether it would not be right and convenient to make those gentlemen trustees for the purposes of such scheme and to give them some definite position and duties under it; but this is not at present proposed, and I must leave the matter there.

Solicitors, *Tathams & Pym; Kennedy, Hughes, & Ponsonby; C. R. Woolley; Solicitor to the Treasury.*

Chan. Div.
Cozens-Hardy, J. } Dec. 8, 19.

KNIGHT v. WILLIAMS. (a.)

Landlord and tenant — Lease—Surrender—Possession of old lease and counterpart.

Where a lease is surrendered and a new lease for the same property is granted, the lessor cannot require the lessee to hand the old lease over to him, nor can the lessee demand possession of the counterpart of the old lease.

The plaintiff in this case was possessed of a messuage and premises at Little Sutton-street, Clerkenwell, for the residue of a term of sixty-one years from the 29th of September, 1859, subject as to part of the property to an underlease to the defendant for twenty-one years from the 29th of September, 1880, at the rent of £90.

In March, 1900, negotiations were entered into between plaintiff and defendant for the grant of a new lease, and in pursuance of a contract a draft lease was prepared, approved, and subsequently executed by both parties.

At an appointment on the 9th of July, 1900, for completing the transaction and exchanging the lease and counterpart, defendant's solicitors were asked to hand over the underlease to the plaintiff, but they refused to do so unless the plaintiff handed over the counterpart thereof.

The plaintiff then refused to complete unless the old underlease was given up to him, and he refused to deliver up the counterpart to defendant's solicitors.

Eve, Q.C., and *A. St. John Clerke*, for the plaintiff.

D. Stewart Smith, for defendant, said that plaintiff had no right to the lease as defendant might be sued on it.

COZENS-HARDY, J.—The plaintiff was, in March, 1900, the reversioner of some house property of which the defendant held a lease expiring at March, 1901, at a yearly rent of £90. In March, 1900, the plaintiff agreed to accept a surrender of the defendant's lease and to grant him a new lease for a term which would expire in

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

1920 at a rent of £140. The lease and counterpart were prepared and engrossed and they were executed by the plaintiff and defendant respectively, but on the appointment for completion the plaintiff declined to deliver the new lease unless the defendant would hand over his present lease. The defendant said he would not object to do this if the plaintiff would hand over the counterpart of the present lease, but otherwise he refused. Upon this point alone the parties broke off, and an action was commenced for the purpose of deciding this sole question. It was stated by counsel that the new lease prepared and executed by the plaintiff was not expressed to be made in consideration (*inter alia*) of the surrender of the former lease, but, in the view which I take, the insertion or omission of these words would make no difference: *Doe* v. *Courtenay*, 11 Q. B. 702. The acceptance of a new lease operates as an implied surrender "by operation of law" of the old lease within the meaning of section 3 of the Statute of Frauds, but such surrender differs from an actual surrender by deed; it is not absolute, it is subject to an implied condition that the new lease is good, and if this is not so the old lease remains in force. The authorities on this point are clear: Woodfall's Landlord and Tenant (16th ed.), p 318. This being so I think the plaintiff is wrong in contending that he is in the position of an ordinary purchaser of a lease, and is at liberty to burn it if he thinks fit. The lessee, notwithstanding his surrender by operation of law, retains an interest in the lease. Moreover, when a lease is determined by re-entry, or has expired by lapse of time, the lessor is not entitled to recover the lease: *Hall* v. *Ball*, 3 Man. & Gr. 242, and *Elworthy* v. *Sandford*, 12 W. R. 338, 3 H. & C. 330. It would, I think, be wrong to put it out of the power of the defendant to take advantage of the old lease should the new lease prove to be invalid, and he is therefore entitled to retain the old lease. On the other hand the defendant cannot require the handing over of the counterpart lease, and he does not assert this as a right, though he was willing on completion to hand over the lease if he got the counterpart. The result is that, in my opinion, the defendant was not bound on completion to hand over the old lease, and I therefore make no order except that the plaintiff pay the costs of action.

Solicitors, *W. T. Boydell; Morley, Shirreff, & Co.*

Chan. Div.
Farwell, J. } Feb. 22, 26.

BURROWS *v.* MATABELE GOLD REEFS AND ESTATES CO. (LIMITED). (*a.*)

Company — Shares — Underwriting — Application of shares in payment of commission—Companies Act, 1900 (63 *&* 64 *Vict. c.* 48), *ss.* 8, 10 (4), 31.

A company agreed with the underwriters of an issue of shares to be made to existing shareholders that the underwriters should have an option to the 30th of June, 1901, *on* 15,000 *unissued shares of* £1 *each at the price of* £2 10*s. a share. The shares in fact stood at a much higher price than* £2 10*s.*

Held, that this was not an offer to the public within the meaning of the Companies Act, 1900, *section* 8 (1). *That such an allotment of shares would be an application direct or indirect of the shares in payment of commission, discount, or allowance in consideration of underwriting within the meaning of section* 8 (2), *and therefore not lawful.*

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

This was a motion for an injunction to restrain the defendant company from entering into or carrying into effect an agreement or agreements made or about to be made by the defendant company whereby in consideration of the guarantee of the issue of 60,000 shares of the company (part of an issue of 80,000 shares of £1 each now being offered by the company to its shareholders) the company agreed to give to the persons or person giving such guarantee an option to the 30th of June, 1901, on 15,000 unissued shares of £1 each of the company at the price of £2 10s. a share; or, in the alternative, an injunction to restrain the defendant company from applying or agreeing to apply any of its shares or capital money directly or indirectly in the payment of a commission or allowance to any person in consideration of his subscribing or agreeing to subscribe for all or any part of an issue of 80,000 shares of £1 each of the defendant company now being offered to its shareholders in accordance with the terms of a notice signed by the secretary of the defendant company, and dated the 1st of February, 1901.

The plaintiff, Thomas Hamilton Burrows, sued on behalf of himself and all other shareholders of the defendant company.

The Companies Act, 1900, s. 8, provides: (1) Upon any offer of shares to the public for subscription it shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission and the amount or rate per cent. of the commission paid or agreed to be paid are respectively authorized by the articles of association and disclosed in the prospectus, and the commission paid or agreed to be paid does not exceed the amount or rate so authorized.

(2) Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase-money of any property acquired by the company, or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase-money or contract price, or otherwise.

(3) But nothing in this section shall affect the power of any company to pay such brokerage as it has heretofore been lawful for a company to pay.

Upjohn, K.C., and *Eustace Smith*, for the plaintiffs.—The plaintiffs do not rely on the words "capital money" but on the word "shares" in the Companies Act, 1900, s. 8 (2). [FARWELL, J., referred to *Foster* v. *New Trinidad Lake Asphalt Co.*, *ante*, p. 119, [1901] 1 Ch. 208.]

Bramwell Davis, K.C., and *Kirby*, for the defendants.—The Companies Act, 1900, s. 8 (2), does not apply to the issue by a company to its own shareholders.

Upjohn, K.C., replied.

FARWELL, J., in giving judgment, said: The defendant company was incorporated in March, 1899, with a capital of £500,000 in £1 shares, of which £387,030 have been issued.

In February, 1901, the directors determined to issue £80,000 of the unissued capital, and on the 1st of

February, 1901, sent a circular to the existing shareholders of the company offering them an allotment of one share for every five held by them at the price of £2 10s. per share.

Prior to this the directors had entered into an agreement with certain persons to underwrite this issue to the extent of 60,000 shares, and in consideration thereof the underwriters were to have the right at any time up to the 30th of June, 1901, to subscribe for shares allotted to them at a similar price of £2 10s. per share, a portion of the unissued shares remaining after the said issue of £80,000 had been made. The fact that this option had been given is stated in the circular issued to the shareholders. The shares in fact stand at a much higher price than £2 10s., so much so that the underwriters have agreed to raise the option price to £3 15s. per share.

The plaintiff is a shareholder in the defendant company, and sues on behalf of himself and all other shareholders for an injunction to restrain the defendants from carrying out this underwriting agreement on the ground that it contravenes section 8 of the Companies Act, 1900, and for the purposes of the argument and decision of this motion I assume that the agreement has been made *bonâ fide*. [His lordship read the section, and continued:] Sub-section 1 of this section is a conditionally enabling clause, and it is admitted that if the present case falls within it the necessary conditions have not been complied with. Sub-section 2 is a general prohibitive clause extending to every application of shares or capital, except in the case excepted by sub-section 1. It was argued for the defendants that sub-section 2 applied only to the case of an offer of shares to the public, and that the Act was intended to protect that portion of the public only who had not yet become members of a company, leaving actual members unprotected, and it was said that this is not an offer to the public (a point with which I will deal presently), and therefore is not within the Act at all. I am unable to accede to this contention. The Act applies to every company, whether formed before or after the commencement of the Act (see section 31), and I can find no ground for limiting general words of prohibition, in the limited nature of the exception from such general prohibition. Nor can I see any reason why existing shareholders should not be protected as well as prospective shareholders. It was suggested rather than argued on behalf of the plaintiff that the first sub-section applies, and that the circular of the 1st of February was an offer to the public. In my opinion, this is not so. I think that the clue to the meaning of the word "public" as used in this Act is to be found in section 10, sub-section 4: "This section shall not apply to a circular or notice inviting existing members or debenture-holders of a company to subscribe for further shares or debentures, but, subject as aforesaid, this section shall apply to any prospectus whether issued on or with reference to the formation of a company, or subsequently."

"Prospectus" is defined by the Companies Act, 1900, s. 30, to be "any prospectus, notice, circular, advertisement, or other invitation, offering to the public for subscription or purchase any shares or debentures of a company." An offer is not the less made to the public because it is sent to shareholders or debenture-holders as well as other persons, or because it is not advertised in the public newspapers. But if it is sent solely to the shareholders and (or) debenture-holders of the company, there is no offer to the public. The distinction is between persons who are members or debenture-holders of the company, on the one hand, and those who are not, on the other. I therefore hold that this circular is not an offer of shares to the public under sub-section 1.

But the plaintiff rested his main contention on the second sub-section, and argued that an allotment of shares under the underwriting agreement would be an application direct or indirect of shares in payment of commission, discount, or allowance to persons in consideration of underwriting. I am of opinion that this contention is sound. Suppose that the directors were indebted to A. B. in £1,000, and they allotted to him 400 shares at par when their market price was £2 10s. premium, in discharge of the debt; they would, in my opinion, clearly have applied those shares to the payment of that debt. They could in no other way justify their action in issuing shares at par instead of obtaining a proper premium. How, then, can the directors in the present case justify the issue of shares to a favoured individual at less than the market price except on the ground of a valuable consideration issuing from that individual to the company? And what other consideration is there than the underwriting agreement? It was said by the defendants that the company might have agreed to pay a sum equal to the difference between a price of £2 10s. and the market price on the 30th of June, but that is not the present transaction. Here the underwriters will get the shares and may retain them or deal with them as they please. The shares will, in fact, be applied in paying them, and the difference between the market price and the price of £2 10s. will merely afford the reason inducing the underwriters to exercise or refrain from exercising their option to have the shares applied in payment of the consideration for their underwriting agreement. It is said that the section was intended to prevent a vendor from giving part of his shares to underwriters, but, assuming this to be so, I can see no reason from this why the words of the Act should not be applied to other transactions which are fairly within the expressed intention of the Act and the mischief intended to be thereby prevented. It was urged that the premiums could not be capital and that the consideration might be paid out of premiums. But that is not the case before me. The Act distinguishes between capital and shares and forbids the application of either in payment of underwriting commission, and I have to consider only a dealing with shares, and not with the money produced by those shares. I therefore grant an injunction in the terms of the second sub-section of section 8 of the Act, limiting it to shares.

Solicitors, *Morse, Hewitt, & Furman; Ashurst, Morris, Crisp, & Co.*

Chan. Div.
Buckley, J. } Feb. 13.

In re WHITE.
WHITE *v.* EDMOND. (*a.*)

Practice—Evidence—Presumption—Past child-bearing—Widow.

The practice of the court in the case of spinsters as to the presumption of a woman being past the age of child-bearing was adopted in the case of a widow who had had a son, but who had subsequently lived many years as a married woman without further children.

A widow, aged fifty-six and three months, who had a son thirty-four years ago, and had lived as a married woman twenty-three years subsequently without further children, was presumed past child-bearing.

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

Originating summons.

This summons raised the question as to the age at which the court will presume a widow lady, who has had a child, to be past child-bearing.

Under the will of William White, who died in 1885, the defendant, as sole trustee, held certain leasehold property upon trust to pay unto or permit the testator's daughter, Anna White (one of the two plaintiffs), to receive the rents and profits during her life for her separate use, and upon her decease upon trust for all her children who should live to attain the age of twenty-one years, and if more than one in equal shares.

Anna White was born in November, 1844, and, consequently, was fifty-six years and three months old at the hearing of the summons. In March, 1866, she married J. H. White, with whom she lived until his death in March, 1890. She did not marry again. She had one child only, a son, the co-plaintiff, J. W. G. White, who was born in the same year as the marriage. Consequently Mrs. White had lived as a married woman, subsequently to the birth of her son, more than twenty-four years without having any children.

She and her son took out this summons, under order 55, asking (among other things) that it might be declared that, in the events which had happened, she and her son were between them absolutely entitled to the leasehold premises, and that the defendant might be ordered and authorized to assign them to the plaintiffs, or as they might direct.

H. Terrell, K.C., and *Bacon*, for the plaintiffs.

Hornell, for the trustees.

The cases cited and the arguments of counsel appear in the judgment.

BUCKLEY, J.—A number of cases have been cited where the presumption of a woman being past child-bearing has been made. The material ones are, in my opinion, the following: *Haynes* v. *Haynes*, 14 W. R. 361, 33 L. J. Ch. 303, where the presumption was made in the case of a spinster lady aged fifty-three years and two months, but where it was doubted by the learned judge whether the age was not too low; *In re Widdow's Trusts*, 19 W. R. 468, L. R. 11 Eq. 408, where Malins, V.C., made the presumption in the cases of a widow aged fifty-five years and four months who had never had children, and of a spinster aged fifty-three years and nine months; *In re Millner's Estate*, 20 W. R. 823, L. R. 14 Eq. 245, a case of a married woman aged forty-nine and nine months, who had lived twenty-six years with her husband but without issue; *Davidson* v. *Kimpton*, 29 W. R. 912, 18 Ch. D. 213, a case of a spinster aged fifty-four years; and *Lyddon* v. *Ellison*, 2 W. R. 690, 19 Beav. 565, a case of a spinster aged fifty-six years. In all these cases the presumption was made at ages less than that in the case before me. No case has been cited where the lady was a widow who had had a child, such as the present case. In the case of a spinster we cannot know whether she is capable of child-bearing, while a widow who has had children has been so capable. On the other hand, where a widow who has had a child has lived many years married without bearing any more children, as in the case before me, it may be presumed that her capacity has ceased. It seems to me, therefore, that I may apply the rule followed in the case of spinsters to the case before me, and make the presumption. Two cases where the court refused to make the presumption are distinguishable from the present case; in *Croxton* v. *May*, 27 W. R. 325, 9 Ch. D. 388, the age was fifty-four years, which is substantially less, and the lady had been married only three years. In *In re Hocking*, 47 W. R. 114, at p. 115, [1898] 2 Ch. 567, at p. 571, Lord Lindley expressly excepts cases like the present from the rule he lays down in deciding against the presumption.

Application granted.

Solicitors, *Keddey, Fletcher, & Fry; Phillbrick & Co.*, for *Haynes & Co.*, Bow.

Chan. Div. Joyce, J. } Jan. 25.

MIDDLEMAS v. STEVENS. (*a.*)

Settled land — Tenant for life—Lease — Bonâ fide *exercise of power—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 53, 58 (*vi.*).

A person having the powers of a tenant for life under the Settled Land Act, 1882, *whose interest terminates on her marriage, is not entitled to grant a lease of the property to her intended husband without the consent of the remainderman or the sanction of the court.*

By his will dated the 29th of September, 1897, Robert Pennett Stevens gave to his wife, Sarah Stevens, the defendant, "the use and enjoyment, rent free, of his residence Sandfacre, wherein she then resided, for so long during her widowhood of him as she should personally reside in and occupy the same, and also the like use and enjoyment, for so long as she should so as aforesaid personally occupy the said residence, of all the furniture and household effects, and all other effects and things in, upon, and about the same, and about the buildings, gardens, ground, and premises occupied therewith.

By a codicil dated the 12th of October, 1897, the plaintiffs were made residuary legatees.

The testator died shortly after executing this codicil, and the defendant continued to occupy the house under the terms of the will.

She was now about to marry again, and proposed, before her second marriage, to grant a lease of the property to her intended husband for twenty-one years at a fair rent. It was admitted that this was done with a view of enabling the defendant to continue to reside in the house after her marriage.

The plaintiffs objected to the proposed lease, and now applied to the court for a declaration that the lease of the said premises which the plaintiff proposed to grant to her intended husband would not be a fit and proper lease or a *bonâ fide* exercise of such leasing powers (if any) that the defendant possessed, and was in violation of section 53 of the Settled Land Act, 1882.

The defendant claimed to have the powers of a tenant for life under the Settled Land Acts, and to be entitled to grant a lease on proper terms under the said Acts.

Hughes, K.C., and *A. St. J. Clerke*, for the plaintiffs.—This is not a proper exercise of the power. Under section 53 of the Settled Land Act, 1882, "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall in relation to the exercise thereof by him be deemed to be in the position and to have the duties and liabilities of a trustee of those parties." Here the tenant for life is proposing to exercise the power, not in the interest of all parties, but for her own personal advantage. Her interest in the property is infinitesimal and will cease very shortly. Such use of the power of a tenant

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

for life should therefore be restrained: *Sutherland (Dowager Duchess of)* v. *Sutherland (Duke of)*, 42 W. R. 12, [1893] 3 Ch. 169.

G. Lawrence, for the defendant.—The lease is for the benefit of the estate; as the "best rent" is reserved it does not prejudice the remaindermen. It is therefore for the benefit of the estate; that being so, the lease is none the less good because it is granted to a person bearing a particular relation to the grantor or because the tenant for life might indirectly obtain a benefit from it.

JOYCE, J.—Apart from any question as to the intended lessee, the court would look with some suspicion on any case in which a person whose interest in any settled property would cease to-morrow was insisting to-day upon granting a lease which was objected to by the remaindermen. This case, however, goes beyond suspicion. It is clear from the correspondence that the defendant's object in granting the present lease is that she may remain in occupation of the house. That is not a *bonâ fide* exercise of the powers of a tenant for life under the Settled Land Acts, and the plaintiffs are entitled to an injunction to restrain the granting of the lease except with their consent or that of the court.

Solicitors, *F. Kinch*, for *Eking & Wyles*, Nottingham; *Hind & Robinson*.

K. B. Div. (Bigham, J.) March 21, 26.

TAYLOR *v.* GREAT EASTERN RAILWAY CO. (*a.*)

Sale of goods—Stoppage in transitu—*Termination of transit—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-sections* 1, 3—*Passing of property—Acceptance.*

Goods were sold by B. to S. "on rail" at a railway station to S.'s order. No memorandum in writing of the contract was signed by S. The railway company advised S. of the arrival of the goods at the station, and that they held them, not as carriers, but as warehousemen at owner's sole risk. S. did not acknowledge the advice note or inspect the goods, but he attempted to resell them. S. having become insolvent and not having paid B., the latter claimed to stop the goods in transitu, *and the railway company redelivered the goods to B. In an action against the company by S.'s trustee in bankruptcy claiming damages for conversion,*

Held, that the transit of the goods was at an end; that the attempt by S. to resell the goods was evidence of an act done by S. in relation to the goods which recognized a pre-existing contract, and, therefore, evidence that S. had "accepted" the goods within section 4 of the Sale of Goods Act, 1893.

Semble, *noncompliance with the provisions of section 4 by a buyer of goods does not prevent the property in the goods from passing to the buyer.*

Action tried in the Commercial Court without a jury.

The plaintiff claimed, as trustee in bankruptcy of one Sanders, to recover damages for the conversion by the defendants of fifty-two quarters of barley, the property of Sanders.

The following statement of the facts is taken from the judgment:

"Sanders was a corn merchant in Essex. His practice was to buy goods delivered at different railway stations and to resell the goods to his customers as and when he could. He had no warehouse of his own, and, as the goods which he bought were frequently not resold for some time, he used the depôts of the railway companies as stores, the railway companies charging him with rent. Before the events in this action he had traded in this way with the defendants. On the 19th of October, 1900, Sanders bought of a firm of Barnard Brothers the barley in question at a cost of £68 5s. The goods were sold 'on rail at Elsenham Station' to Sanders's order. On the 24th of October Barnard Brothers gave a written order to the defendants directing them to transfer the barley 'to await the order of Mr. Sanders; charges to Sanders.' This order seems to have been given in anticipation of the arrival of the goods at Elsenham, for they apparently did not reach that place until the 29th of October, on which day the defendants received the goods from a farmer named Newport, who directed the defendants to hold them to the order of Barnard Brothers. Thus the defendants were in possession of the goods with directions from the consignor to hold them to the order of Barnard Brothers, and with directions from Barnard Brothers to transfer them 'to await the order of Sanders.' Thereupon the defendants sent to Sanders an advice note dated the 29th of October. It is headed in large type, 'Advice of outward grain received to await order.' Then the note proceeds as follows: 'Mr. G. Sanders,—The undermentioned grain consigned to wait your order having been received at this station, I will thank you for instructions to forward same as soon as possible, as it remains here and is now held by the company—not as common carriers, but as warehousemen—at owner's sole risk and subject to the usual warehouse charges in addition to the charges now advised.' The note then contained an intimation that, in case forwarding instructions were given in respect of the goods, the defendants would not assume the responsibilities of common carriers until the day following such instructions. At the foot were particulars of the quantity of barley and of the sum payable for carriage to Elsenham. After receiving this advice note Sanders tried to resell the barley, using for the purpose a sample obtained from Barnard Brothers. He was not successful in finding a buyer. He never inspected or sampled the bulk at the railway station. Towards the end of November Sanders ascertained that he was unable to pay his debts as they fell due, and he thereupon called his creditors together by a circular dated the 28th of November. The issuing of this circular constituted an act of bankruptcy, upon which he was subsequently adjudicated; the appointment of the plaintiff as trustee followed. On or about the 30th of November Barnards paid to the defendants the charges for the carriage of the goods to Elsenham and also the amount due up to that time for rent, and the defendants then, at Barnards' request, gave up the goods, taking from Barnards an indemnity against the consequences of so doing. This delivery constituted the alleged conversion."

No memorandum in writing of the contract between Barnards and Sanders had been signed by Sanders or by anyone on his behalf.

Montague Lush, for the defendants.—First, Sanders never did anything to evince an intention of taking possession of the goods, and until he did so the transit never came to an end: *Ex parte Cooper*, 27 W. R. 518, 11 Ch. D. 68; *Ex parte Barrow*, 25 W. R. 466, 6 Ch. D. 783. There is no evidence of any agreement between Sanders and the defendants that they should hold the goods as warehousemen. Barnards were therefore in the circumstances entitled to exercise their right to stop the goods *in transitu*,

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

Secondly, assuming that the transit came to an end, this action nevertheless must fail, because the property in the goods never passed to Sanders. There was no compliance with the provisions of section 4 of the Sale of Goods Act, 1893 (see *Taylor* v. *Smith*, 40 W. R. 486, [1893] 2 Q. B. 65; *Nicholson* v. *Bower*, 1 E. & E. 172), 7 W. R. C. L. Dig. 39, and therefore there was no binding agreement upon which Sanders could have been sued for the price of the goods or for damages for non-acceptance.

D. Stephens, for the plaintiff—The true inference to draw from all the facts is that the defendants held the goods as warehousemen and not as common carriers. The transit was therefore at an end: *Kendal* v. *Marshall, Stevens, & Co.*, 31 W. R. 597, 11 Q. B. D. 356; *Dixon* v. *Baldwen*, 5 East 175; *Rodger* v. *Comptoir d'Escompte de Paris*, 17 W. R. 468, L. R. 2 P. C. 393. As to the second point, non-compliance with the provisions of section 4 of the Sale of Goods Act does not prevent the property from passing. The section only says that in such a case the contract shall not be enforceable, but it remains a good contract under which the property in the goods can pass to the buyer: *Leroux* v. *Brown*, 1 W. R. 22, 12 C. B. 801. There was, however, in fact an "acceptance" of the goods by Sanders within the meaning of the section, because the attempt to resell the goods was a clear recognition of a pre-existing contract, and therefore evidence of an acceptance: *Abbott* v. *Wolsey*, 43 W. R. 513, [1895] 2 Q. B. 97.

Cur. adv. vult.

March 26.—BIGHAM, J., read the following judgment: This is an action brought by the trustee in bankruptcy of one Sanders to recover damages for the conversion of a quantity of barley, and the question is whether at the date of the alleged conversion, the plaintiff was entitled to the possession of the goods. [His lordship stated the facts as set out above, and continued:] The first question is whether Barnard Brothers were on the 30th of November entitled to stop the goods as being still *in transitu*. I am of opinion that they were not. The *transitus* was over as soon as a reasonable time had elapsed for Sanders to elect whether he would take the goods away or leave them in the defendant's depôt on rent. Such a reasonable time had elapsed, and, having regard to the fact that it was the practice of the defendants to hold goods for Sanders as warehouse-keepers at rent when they were not removed after arrival at the stations, I find that, by agreement between Sanders and the defendants, the goods were, at the time when Barnards took them away, in the possession of the defendants as warehouse-keepers for Sanders. I should have been of the same opinion even if there had been no course of business, for I do not think that after service of a notice such as that used in this case it is competent for a consignee by silence indefinitely to fix upon a railway company the onerous responsibilities of common carriers. I am satisfied that, if the defendants had sued Sanders for rent, Sanders could not have successfully resisted the claim. It was argued that the words in the advice note "the grain is now held at owner's sole risk and subject to the usual warehouse charges" meant that the goods were held by the defendants on account of whom it might concern, and that "owners" did not necessarily mean Sanders, but might mean Barnards or any one else who should turn out to be the owners. I do not think there is anything in this point. The advice note is addressed to Sanders for the purpose of affecting him, not for the purpose of affecting any one else, and, moreover, Sanders was the owner of the goods; a right in the vendor to stop *in transitu* does not prevent the buyer from being the owner of the goods; in fact, it necessarily supposes him to be the owner.

Two cases were relied upon by the defendants—*Ex parte Cooper* and *Ex parte Barrow*. The first laid down in clear terms that the transition does not end until by agreement between the carrier and the consignee the former holds as warehouse-keeper for the latter. The second case, which involved only a question of fact, determined that in the particular circumstances of that case no such an agreement ought to be inferred. I fully accept the law laid down in the first case, and my decision in no way conflicts with it, for I have found that the necessary agreement did exist; and as to the second case I would point out that, before any advice note could be served on the consignee, he had absconded and there were no facts which could justify a conclusion that the goods were being sold for him otherwise than in transit. In the present case, to use the words of Lord Ellenborough in *Dixon* v. *Baldwen*: "The goods had so far gotten to the end of their journey, that they waited for new orders from the purchaser to put them again in motion," and without such orders they would have remained stationary; and furthermore, whatever the defendants may now say to the contrary, the goods were being held by them as warehouse-keepers for the consignee. In such circumstances I must find the transition to have ended.

But the defendants relied on another defence. It appeared that although Barnard Brothers had signed a sufficient memorandum of the contract of sale within the meaning of section 4 of the Sale of Goods Act, Sanders had not, and it was said that he had neither paid any part of the price (which was true), nor accepted any part of the goods. In these circumstances it was argued, as I understand, that the property in the goods had not passed from Barnards to Sanders, and that, therefore, Barnards were entitled to possession. I may say at once that this contention, whatever it may be worth in law, is not well founded in fact. I am of opinion that the goods had been accepted by Sanders. He had certainly received them; but, of course, receipt does not necessarily involve acceptance. But after receiving them he had obtained a sample, not, it is true, by drawing it from the bulk at the station, but by asking the vendors to let him have a sample which was in their possession. By means of this sample he had tried to sell the goods. He had, moreover, kept them for a month. These circumstances, in my opinion, amount to an acceptance. The words in section 17 (now repealed) of the Statute of Frauds were, "except the buyer shall accept part of the goods so sold and actually receive the same." Many cases are to be found in the reports dealing with the meaning of these words; but it is unnecessary to examine them; their effect is to be found sufficiently, and in my opinion accurately, stated on pp. 149 and 150 of the third edition of Mr. Chalmers's book on the Sale of Goods Act; and the new Act contains what the Statute of Frauds did not contain—viz., a definition of the word "acceptance" in this connection. Sub-section 3 of section 4 provides that "there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." Now, I think there could not be a clearer act recognizing a pre-existing contract of sale than the attempt by Sanders to resell. If he had in fact resold, would that not have been sufficient? And if an actual sale, then why not also an attempt to sell?

Can any one suppose that Sanders could have successfully resisted an action for the price? The defendants referred to and relied on a decision under the old Act in 1892, *Taylor* v. *Smith*. That case was dealt with by the court as merely involving a question of fact. This appears from an examination of the judgments. I see by a footnote that the case was reported in the *Law Reports* about a year after it was decided "in deference to representations from various quarters." I think the editor would have done well to have resisted those representations, for the case declares no principles of law, and is, in my opinion, of no general application. It was held there that the buyer did not by looking at the goods at the wharfingers' and by saying "I reject them" in fact accept them. For my part I agree, but it by no means follows that I think in the present case that the buyer did not "accept" the goods. I think he did, and I think, therefore, that though there was no memorandum in writing signed by Sanders, yet the provisions of the statute were sufficiently complied with to make the contract of sale binding upon him.

The view which I take of the facts makes it unnecessary to consider the point of law, but I should like to say a word or two about it and about the case of *Nicholson* v. *Bower*, which was cited by Mr. Lush in support of it. I think that the absence of a memorandum in writing and of the other conditions mentioned in section 4, sub-section 1, of the Sale of Goods Act does not make a contract void or even voidable. The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable, and the contract being good all the legal consequences of a contract follow; so that if the contract is for the sale of specific goods the property in the goods passes to the buyer. It may be asked what happens if the buyer after making the purchase refuses to fulfil any of the statutory conditions which alone will make the contract enforceable against him. The property in the goods has passed to him, and it may be that he has received the goods themselves, yet he cannot be sued for the price. My answer is that the seller may call upon the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller, and entitle him to resume possession.

As to the case of *Nicholson* v. *Bower* it was an issue to try whether certain wheat was the property of the plaintiff, who was the assignee of one Pavitt, a bankrupt, or the property of the defendant, who had sold the wheat to Pavitt. Pavitt had not complied with the requirements of the statute, so that the contract of sale never was enforceable against him; and it seems to have been decided that, on this ground, there was no binding contract between the vendor and the vendee, and that, therefore, the property never legally vested in the buyer. If that is the true ground of the decision, I do not think it was right, nor do I think it is in accordance with the later cases decided under the statute. The seller had sold the goods, and was already bound by the contract, and the buyer had bought the goods although he could not be sued for the price if he chose to insist on the statutory defence. In such circumstances it would not be true to say that the property had not passed. I think, however, upon a careful examination of the facts of the case, the decision may be justified on the supposition that, before the assignee's title could be said to have arisen, the vendor and vendee had rescinded the contract so that the property had revested in the former, and this appears to have been the ground upon which the judgment of Erle, J., proceeded.

I think there must be judgment for the plaintiff for £68.

Judgment for the plaintiff.

Solicitors for plaintiff, *Beaumont, Son, & Rigden.*

Solicitors for defendants, *Timbrell & Deighton.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, M.R., and Collins and Romer, L.JJ.) — April 1.

THE KING v. COCKERTON. (*a*.)

Education—Elementary school—School board—Science and art schools or classes—Provision out of rates—Day schools—Evening continuation schools—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 3, 5, 7, 8, 53, 54, 74—*Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86), *s.* 13—*Education Code* (1890) *Act*, 1890 (53 & 54 *Vict. c.* 22), *s.* 1.

It is not within the power of a school board to pay out of the rates levied under the Elementary Education Acts the expenses of maintaining in their day schools or evening continuation schools science and art schools or classes registered under the Science and Art Department.

Judgment of Wills *and* Kennedy, JJ. (ante, *p.* 252, [1901] 1 *Q. B.* 322), *affirmed.*

Appeal from a judgment of a Divisional Court (Wills and Kennedy, JJ.), discharging a rule *nisi* for a writ of *certiorari* (*ante*, p. 252, [1901] 1 Q. B. 322).

The rule *nisi* was granted at the instance of three members of the School Board for London, and it called upon T. B. Cockerton, an auditor of the Local Government Board, to show cause against the issue of a writ of *certiorari* to bring up and quash three certificates of disallowance and surcharge made by him as against the applicants on the audit of the accounts of the school board for the half-year ending the 29th of September. 1898.

By an order of the court the facts were stated in the form of a special case, and by further orders leave was given to the Corporation of the City of London and to the Camden School of Art and Science Corporation to show cause against the issue of the writ.

The facts as stated in the special case are sufficiently set out *ante*, p. 252.

The question was whether the London School Board were justified in paying out of the rates levied under the Elementary Education Acts the expenses of maintaining in their day schools and evening continuation schools science and art schools or classes registered under the Science and Art Department.

The Divisional Court were of opinion that it was not within the power of the school board to pay such expenses out of the rates, and they accordingly discharged the rule.

The applicants appealed.

Asquith, K.C., and *Llewelyn Davies*, for the applicants.

Sir Robert Finlay, A.G., and *H. Sutton*, for the auditor.

Lord Robert Cecil, K.C., and *M. M. Macnaghten*, for the Camden School of Art and Science Corporation.

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Danckwerts, K.C., and *Loehnis*, for the Corporation of the City of London.

Cur. adv. vult.

April 1.—A. L. SMITH, M.R., read the following judgment: This is an important case, for it affects the education of a large portion of the population in this country; and although the excellent arguments which have been addressed to us have ranged over a considerable area of ground, this has been occasioned not so much by reason of the magnitude of the real point in the case, but because of the discussion of the numerous Codes, Directories, and Acts of Parliament relating to education which have come into existence since the passing of Mr. Forster's Act of 1870 (33 & 34 Vict. c. 75), intituled "An Act to provide for public elementary education in England and Wales." The title is a good clue to what will hereafter be found in the Act. If the arguments had taken place shortly after its passing, in my opinion the case would have been comparatively short; and even now, notwithstanding all that has happened during the thirty years since 1870, the same question still remains, which is the great question in the case—viz., what was the true construction of the Act when it received the Royal Assent upon the 9th of August in that year. My brothers Wills and Kennedy in the Queen's Bench Division have upheld certain disallowances and surcharges made by an auditor upon the accounts of the School Board of London in respect of payments made by that board out of moneys obtained from ratepayers towards the cost of certain education. The learned judges have held that no Act has authorized these payments, and the School Board of London appeals.

Before I come to the Act itself I must point out the condition of things in relation to two institutions which were, and had been for some years, in operation in this country in and prior to the year 1870, for these institutions play an important part in the consideration of this case. There then existed at South Kensington a body corporate under the name of the Department of Science and Art, which corporation was for the furtherance of science and art and generally to do any act or thing that might be conducive to the attainment of the objects for which the department was formed. Its funds were obtained by means of a Parliamentary grant, for which a distinct and separate vote was taken in Parliament. It issued periodically minutes of the matters to be taught in its schools. These minutes became known as the South Kensington Directory. There also existed a branch of the Privy Council called the Education Department. This was unincorporated, and carried on its work at Whitehall. Its funds were obtained by means of a Parliamentary grant for which a distinct and separate vote was also taken in Parliament. It issued periodically minutes of matters to be taught in the schools to which it made grants, and these minutes became known as the Whitehall Code. The system of education prescribed by the Directory and the Code respectively is radically different. Although there are some few matters in the Code and Directory which somewhat overlap, no objection in this case is taken to the teaching by the school board with ratepayers' money of those matters which appear in the Code. It is the teaching of the education prescribed by the Directory with the ratepayers' money which is objected to. After the elaborate and exhaustive judgment of Wills, J., it is wholly unnecessary, and would be mere waste of time, to again narrate in detail that which the learned judge has so clearly and adequately done as regards the essential difference between the Department of Science and Art at South Kensington with its Directory and the Education Department at Whitehall with its Code. It is now sufficient for me to say that the South Kensington Department and the Whitehall Department have always been, and are, separate and distinct institutions. They have a different registration of scholars, different examiners, different grants, and different inspectors; and the South Kensington Department deals by means of its Directory with a high and very advanced system of education, while the Whitehall Department, by means of its Code, deals with an education of a lower and of a much less pretentious character. I may say without going through the details of the South Kensington Directory that no effort of imagination can describe the system of education therein set forth as elementary education; and for the purposes of this case, but only for this case, it is to be taken by admission of the Attorney-General that the education prescribed by the Whitehall Code is elementary education within the meaning of the Act of 1870; and I am not asked in this case to say whether the Code embraces more than elementary education, but I may say it appears to me to embrace elementary education up to its high-water mark.

The concrete question now raised is, Can the School Board of London lawfully pay the expenses of schools and classes for teaching the education prescribed by the South Kensington Directory out of moneys of the ratepayers of London? Prior to the passing of Mr. Forster's Act in 1870 no ratepayer *qua* ratepayer was under any obligation whatever to contribute towards the expenses of any kind of education. No rates were applicable thereto. The moneys which the South Kensington Department and the Whitehall Department respectively received from Parliament, and which were respectively dealt with by them, were moneys obtained from the taxpayers by means of Imperial taxes and not from ratepayers by means of local rates. The Act of 1870 for the first time set up school districts and school boards therein, and for the first time made the education of children between the ages of five and thirteen compulsory, and it, for the first time, enacted that rates should be levied in order to contribute to the expense of education. It is beyond dispute that if the School Board of London, or, indeed, any other school board (they are all corporations created by statute), is to justify the payment of the expense of education out of the money of the ratepayers, this must be done by producing some Act of Parliament, or Order in Council having the force of an Act of Parliament, which enacts that the ratepayers' money shall be levied and applied to that purpose. Neither a Code nor a Directory has any such force.

Now, what was the scheme which was brought into being by Mr. Forster's Act of 1870, and whereby rates were to be applied to the cost of education? And what were the requirements of the State which then called forth the Act? Was it a scheme whereby the ratepayers should be called upon to contribute towards the expenses of the elementary education of the children in their districts, or was it a scheme that they should be called upon to contribute to the expenses of a high and advanced system of education such as that to be found in the Directory of the Science and Art Department at South Kensington, and were persons other than children to be educated at the expense of the ratepayers? What the State then required and what the consequent scheme of the Act was can only be found by a study of the Act itself, and to the true construction of this Act I now come. In my opinion, if it were not for the definition given in section 3 of the term "elementary school"—not, it will be noticed, of the term "public

elementary school"—which definition Mr. Asquith for the school board very happily described as his sheet anchor, and to which if he could not ride he frankly owned that he must go to the bottom (and with this I agree), there would, in my opinion, for the reasons which will appear, have been but little to argue about. To clearly understand the object and scope of this definition, which, in my opinion, has been entirely misapprehended, I will first go through the Act without the definition to see whether in any part of the Act without the definition it can be said that the Act applies to anything else than the elementary education of children; for it is to the education which is to be found in the Act that the ratepayer is called upon to contribute, and to no other.

In the first place, as before stated, the Act is intituled "An Act to provide for public elementary education in England and Wales." This title is to be read as part of the Act itself: *Fielding* v. *Morley Corporation*, 47 W. R. 295, [1899] 1 Ch. 1, *per* Lindley, M.R., and Chitty and Collins, L.JJ. It will be noticed it is not an Act to provide for public education in general, but for public elementary education in England and Wales, which is clearly something less than education in general. By section 1 it is enacted that the Act may be cited as the Elementary Education Act, 1870. By section 3 "parent" includes guardian and any person who is liable to maintain, or has the actual custody of, any child. By section 5 it is enacted that "there shall be provided for every school district a sufficient amount of accommodation in public elementary schools . . . available for all the children resident in such district for whose elementary education efficient and suitable provision is not otherwise made, and where there is an insufficient amount of such accommodation, in this Act referred to as 'public school accommodation,' the deficiency shall be supplied in manner provided by this Act." It will be seen that this accommodation, whatever the word may mean, is to be provided for children for whose elementary education efficient and suitable provision is not otherwise made. Mark the words "children" and "elementary education." By section 7, every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act, and every public elementary school shall be conducted in accordance with the following regulations: It shall not be required, as a condition of any child being admitted into or continuing in the school that he shall attend or abstain from attending any Sunday-school, and that any scholar may be withdrawn by his parent from religious observances. This is the section by which an elementary school becomes and is called a public elementary school—that is, a board school. A point was made on behalf of the school board, that, as the word "scholar" was used, the education in a board school was not confined to children. I do not agree; for the word "scholar" and the word "child" will be found indiscriminately used both in the Education Acts and in the Codes. By way of example, I would refer to section 7 of the Act of 1870, to section 8 of the Free Education Act of 1891, and to section 17 of the Act of 1870, which two last sections must be read together, and to the Code of 1898, p. 18, in which infants are described as scholars. By section 8 of the Act of 1870 the Education Department—*i. e.*, Whitehall—is to cause returns to be made, and then to take into consideration every school, whether public elementary or not, and whether actually in the district or not, which in their opinion gives, or will when completed give, efficient elementary education to the children of the district. Again, we find the words "elementary education to children," and the department to ascertain this is Whitehall and not South Kensington. By section 17 every child attending a school provided by any school board shall pay such weekly fee as may be prescribed by the school board with the consent of the Education Department—here again Whitehall—with power to the school beard from time to time to remit the whole or any part of such fee in the case of any child when they are of opinion that the parent of such child is unable from poverty to pay the same. This section applies to a child and no one else except its parent. Section 30 provides for the formation of school boards, and they are by this section made bodies corporate. Section 37 deals with school boards in the metropolis, and I find no distinction in the Act upon the point I am now inquiring into between the School Board of London and the other school boards in the kingdom. Sections 53 and 54 enact how the expenses of a school board are to be paid. Section 53 is as follows: "The expenses of the school board under this Act shall be paid out of a fund called the school fund. There shall be carried to the school fund all moneys received as fees from scholars"—this means the fees the board is entitled to receive under section 17 from every child attending school (note the words scholar and child used indiscriminately)—"or out of moneys provided by Parliament or raised by way of loan or in any manner whatever received by the school board, and any deficiency shall be raised by the school board as provided by this Act." And by section 54 it is provided that "any sum required to meet any deficiency in the school fund whether for satisfying past or future liabilities shall be paid by the rating authority out of the local rate." Here is to be found for the first time in the history of education in this country an enactment applying rates towards defraying the expenses of education. By section 67 the local authority once a year are to send to the Education Department, Whitehall, a return containing particulars with respect to elementary schools and children requiring elementary education in their district. By section 74, which is under the heading of "Attendance at School," it is enacted that every school board with the approval of the Education Department, Whitehall, may make by-laws for, amongst other, the following purposes: Requiring the parents of children of such age not less than five years nor more than thirteen years, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school; and by a proviso to this section it is enacted that as regards a child between ten and thirteen years of age, such child need not attend school if one of his Majesty's inspectors—that is, from Whitehall—certifies that such child has reached a standard of education specified in the by-law.

Having now gone through the Act apart from the definition of the term "elementary school" in section 3, can it be said with any regard to truth that this Act deals with any education other than the elementary education of children? I think certainly not. In addition to what is set forth above, it should not be lost sight of that the Act of 1870 over and over again refers to the Education Department—that is, Whitehall—which for the purpose of this case is admitted to be the authority as to elementary education, and elementary education alone, and it is admitted that from first to last the Act of 1870 makes no reference whatever to the Department of Science and Art at South Kensington with its high and advanced system of education. That the recipients of the education mentioned in the Act are children, and children only, cannot be denied, for I would ask who else can be found pointed at

throughout the Act to receive the education the Act prescribes other than children.

I now take the definition in section 3 of the Act of 1870 of the term "elementary school." It is as follows: "In this Act the term 'elementary school' means a school or department of a school at which elementary education is the principal part of the education there given, and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed 9d. a week." It is argued for the school board that this definition constitutes a statutory enactment whereby a board school or a department of a board school is empowered to give the highest and most advanced education of the South Kensington Directory at the ratepayers' expense, if the principal part of the education given in such school or department of such school is elementary. As to this contention the first observation to be made is that this definition of the term "elementary school" is not an enactment providing for the giving of any education at all, and much less an enactment that a school board in a public elementary school is thereby empowered to give the education prescribed by the Directory of South Kensington at the expense of the ratepayers. This seems to me to be an answer to the school board's contention. But, if the contention really be that it is a statutory enactment such as the board contends for, what is the meaning of the last part of the definition—"and does not include any school or department of a school at which the ordinary payments in respect of the instruction from each scholar exceed 9d. a week"? I heard no reason given as to this by the learned counsel for the school board. It is common knowledge that prior to the Act of 1870 there was in this country a vast amount of education of all descriptions, elementary and non-elementary, carried on by schools supported by voluntary contributions, and, indeed, at the present day there still exists a considerable amount of such education. These schools have come to be known as voluntary schools. It was not the object of Mr. Forster's Act to destroy these voluntary schools and thus cast upon the rates their enormous cost, which was being provided for by voluntary contributions. What Mr. Forster's Act enacted was that the school board should supply and the ratepayer should pay for the elementary education of children if, taking into consideration every school, whether public elementary or not and whether situated in the school district or not (section 8), the elementary education which was then being provided was not sufficient. The object and meaning of the definition clause in my judgment is that, inasmuch as all kinds of education were then being taught in these voluntary schools, those outside schools only should come within the Act and derive the benefits by way of grants and otherwise conferred by the Act at which elementary education was the principal part of the education therein given; and, in addition, that only those outside voluntary schools should come within the Act if they were schools at which the ordinary payments therein in respect of the instruction from each scholar did not exceed 9d. a week apiece. That voluntary schools are referred to in the Act of 1870 as "elementary schools" in my opinion is apparent from, amongst others, section 23, section 12, sub-section 2, section 9, sub-section 2, and section 7. The object, meaning, and scope of the definition was to select out of these voluntary schools those which had these two attributes—viz., that the principal part of the education was elementary, and that the scholars paid no more than 9d. apiece a week. If there was not this definition, I do not see why all voluntary schools could not have claimed the benefit of the Act, no matter what was their teaching, if they conformed to the requirements of the Act as regards religious teaching and otherwise. This definition, in my judgment, instead of being a statutory enactment that the highest education prescribed by the Directory should be taught by a board school at the expense of the ratepayers, is a definition whereby a limit is placed as to those voluntary schools which should become public elementary schools within the Act of 1870 and obtain its benefits; and, in my opinion, this definition has no such effect as that contended for on behalf of the school board. What I have above said as to the true construction of the Act of 1870 I will not repeat, for what I have already said upon the Act equally applies whether the definition in section 3 is taken or not.

I now come to the next Education Act which was passed—namely, the Elementary Education Act, 1873, by section 2 of which it is enacted that "This Act shall be construed as one with the principal Act" (that is, of 1870), "and the expression 'this Act' in the principal Act shall be construed to include this Act." In other words, the Act of 1873 is made part and parcel of the Act of 1870, which Act is to be read as if the Act of 1873 had been contained therein. Now what do we find in this Act of 1873? Section 13, in my opinion, is decidedly of importance. It enacts, "A school board shall be able and be deemed always to have been able to be constituted trustees for any educational endowment or charity for purposes connected with education . . . and to have and always to have had power to accept any real or personal property given to them as an educational endowment or upon trust for any purposes or connected with education; provided that (1) nothing in this section shall enable a school board to be trustees for or accept any educational endowment, charity, or trust the purposes of which are inconsistent with the principles on which the school board are required by section 14 of the principal Act to conduct schools provided by them." (This is the section relating to the non-teaching of religion distinctive of any particular denomination.) "And (2) every school connected with such endowment, charity, or trust shall be deemed to be a school provided by the school board, except that nothing in this section shall authorize the school board to expend any money out of the local rate for any purpose other than elementary education." Here in this section, as it seems to me, which, be it remembered, forms part and parcel of the Act of 1870, is an emphatic declaration by the Legislature that the school board is not to expend any money out of a local rate for any purpose other than elementary education. In fact, it enacts in short and positive terms that which is the whole tenor of the Act of 1870, as I have above endeavoured to show.

In my opinion, the many Acts which were subsequently passed down to and including the year 1891 have no real bearing on the point I have to decide, except that they show that the Legislature was throughout dealing with the elementary education of children and nothing else. I will very shortly go through them, for they have been referred to. In 1876 an Act was passed as to the employment and education of children called the Elementary Education Act, 1876. By section 4 it enacted that it was the duty of the parent of every child to cause such child to receive efficient elementary instruction in reading, writing, and arithmetic, and that in default he should be liable to a penalty. By section 48 "a child in this Act means a child between the ages of five and fourteen years." In 1879 an Act was passed relating to the powers of school boards in relation to industrial schools. In 1880 an Act was passed to make further provision as to bye-laws respecting the attendance of

children at school under the Elementary Education Acts. In 1885 an Education Act was passed foreign to this case. In 1890 an Act was passed for the purpose of making operative certain articles in the Code of 1890. This Act, by section 1, enacted that, "it shall not be required as a condition of a Parliamentary grant to an evening school that elementary education shall be the principal part of the education there given, and so much of the definition of the term 'elementary school' in section 3 of the Elementary Education Act, 1870, as requires that elementary education shall be the principal part of the education given in the elementary school shall not apply to evening schools." So that, although an evening school need not have elementary education as the principal part of its education to thereafter get a Parliamentary grant (this has nothing to do with rates and moneys therefrom), yet, if the school was one at which the ordinary payment in respect of instruction for each scholar exceeded 9d. a week, an evening school, it would seem, is still left with that fetter, and will not get a Parliamentary grant. This is the first Act to which my attention has been called in which an evening school is mentioned. By section 3, sub-section 2, of the Act of 1890, the Elementary Education Acts, 1870 to 1876, and the Elementary Education Act, 1880, and this Act may be cited collectively as the Elementary Education Acts, 1870 to 1890. In 1891 an Act was passed to make further provision for assisting education in public elementary schools in England and Wales. By section 1 a grant called a fee grant was passed by Parliament in aid of the cost of elementary education in England and Wales at the rate of 10s. a year for each child of the number of children over three and under fifteen years of age in average attendance at any public elementary school in England and Wales not being an evening school; and by section 13 (1) the Act might be construed as one with the Elementary Acts, 1870 to 1890, and (2) the Acts may be cited collectively as the Elementary Acts, 1870 to 1891.

So much for the Acts ranging from 1870 to 1891; and I can find no indication in any of them that education other than that embraced in the Act of 1870 was to be taught by a school board at the expense of the ratepayers; and the education which a school board is by statute authorized to teach at that expense, in my judgment, is the same whether it be taught in the daytime or the evening. There is one other Act to which I must make reference, for it was much relied upon by the school board. It was not one of the Elementary Education Acts of 1870 to 1891, which form a code of themselves; but is one of the Technical Education Acts, 1887 to 1891, which form a distinct code of themselves. The Act is called the Technical Instruction Act, 1889 (52 & 53 Vict. c. 76). It is an Act to facilitate the provision of technical instruction. It is said that this Act contains a legislative recognition that the higher education of South Kensington, and not merely the elementary education provided by the Code, can be taught by school boards and be paid for out of rates. This Act, by section 1, sub-section 1 (*a*), enacts that a local authority (this is not a school board, but a town or county council) may out of a local rate (this is not an education rate) supply or aid technical or manual instruction, but shall not out of the local rate supply the same to scholars receiving instruction at an elementary school in the obligatory or standard subjects prescribed by the minutes of the Education Department, Whitehall. The reason for this seems pretty obvious, because to the scholars in those standards the Education Department might well give elementary, technical, or manual instruction, and that the local and school board authorities were not to clash. Then comes a provision about making a local rate, by a local authority, which has nothing to do with a school board. It is there provided, sub-section 1 (*g*), that the rate to be raised in any one year by a local authority is not to exceed 1d. in the pound, and yet, according to the argument of the school board it may levy for technical and manual instruction a rate to any amount it may require. Sub-section 3 enacts "nothing in this Act shall be construed so as to interfere with any existing powers of school boards with respect to the provision of technical and manual instruction." As before stated, it seems to me that there may well be technical and manual instruction of an elementary kind which the school board may well teach as being elementary education. Then comes this (section 3): "The conditions on which Parliamentary grants may be made in aid of technical and manual instruction"—*i.e.*, to the local authority—"shall be those contained in the minutes of the Department of Science and Art," the department, as before shown, with which the Elementary Education Act of 1870 has nothing to do. I have gone far enough in this Act to show that it has nothing to do with the true construction of Mr. Forster's Act of 1870, and with just referring to the novelty of the attempt to interpret one Act by another Act passed nineteen years afterwards, upon another and different subject-matter, I will conclude by saying that the Act of 1889 is not a legislative recognition of the right of the school board to teach the Directory education and make the ratepayers pay for it.

I now answer the questions put to me, but I will answer (1) and (2) together. (1 and 2) I say it was not within the powers of a board as a statutory corporation to provide science and art schools or classes of the kind referred to in this case, either in the day schools or in evening continuation schools, out of the school board rate or school fund. (3) That the rule *nisi* should not be made absolute in regard to any of the disallowances and surcharges, for, in my judgment, for the reasons above given, they were correctly made by the auditor. I may add that, if the school board is to have the powers it seeks, these must be obtained by legislation, for the powers it desires to have do not exist in any statute or its equivalent already passed. This appeal must be dismissed.

Appeal dismissed.

Solicitor for the applicants, *C. E. Mortimer.*

Solicitors for the auditor, *Sharpe, Parker, & Co.*

Solicitor for the Camden School of Art and Science Corporation, *F. W. Hales.*

Solicitor for the Corporation of London, *The City Solicitor.*

High Court of Justice.

Chan. Div.
Kekewich, J. } March 12-14; April 1.

MOFFATT & PAIGE (LIMITED) v. GILL & SONS (LIMITED) AND MARSHALL. (a.)

Copyright—School edition of Shakespeare—Colourable imitation—Common sources of knowledge—Injunction, when granted.

An author dealing with a subject already treated by another is at liberty (1) *to use all common sources of information,* (2) *to use the work of that other as a guide to those common sources, and* (3) *to use that other's work to test the completeness of his own.*

Where there has been no extensive copying, and no extraction of the vital part of the plaintiff's work, the court will not grant an injunction.

Jarrold *v.* Houlston, 3 *K. & J.* 708, 6 *W. R. Ch. Dig.* 19, *and* Pike *v.* Nicholas, 18 *W. R.* 321, *L. R.* 5 *Ch. App.* 251, *considered.*

This was an action brought by Messrs. Moffatt & Paige (Limited) against Messrs. Gill & Sons (Limited) and the Rev. Francis Marshall as publishers and editor respectively of an annotated edition of Shakespeare's "As You Like It." Both firms are largely concerned in the publication of books for the use of schools.

In the year 1893 the plaintiff company published an edition of the play by Thomas Page, and in 1898 the defendant company published a similar work edited by the defendant Marshall. Upon the plaintiff company commencing an action on the ground that the last-named work was an infringement of their copyright, the proceedings were stayed on the terms of the defendant company agreeing to pay a sum by way of damages and to destroy all copies of their book. To this agreement the defendant Marshall was not a party.

In March, 1900, the defendant company published what purported to be a second edition of their work. This edition the plaintiff company declared to be a colourable imitation of their work and an infringement of their copyright. In particular they claimed that the general arrangement, the sketches of character, the literary notes and glossary, and the illustrative quotations were largely copied from their book, and were not the result of independent research. They claimed damages, an injunction to restrain the infringement of their copyright, and the delivery up of all copies of the book which were in the defendants' possession. The claim was restricted to the second edition.

By his defence the defendant Marshall denied that he had done more than make a legitimate use of the plaintiffs' book in common with the works of other commentators, but admitted that, for the sake of convenience, he had copied out of the plaintiffs' book a quotation from another writer.

Warrington, K.C., and *Henry Lynn,* for the plaintiff company.

J. A. Hamilton, K.C., and *A. à B. Terrell,* for the defendant company.

P. O. Lawrence, K.C., and *Percy Wheeler,* for the defendant Marshall.

KEKEWICH, J.—This case stands alone, and must stand alone, unless and until another is concerned with a critical work on one of the plays of Shakespeare. In saying this I do not forget that the Bible is often classed with Shakespeare in our list of books in the English language. Biblical literature is far more extensive than Shakespearian, and it may safely be asserted that more has been written and spoken on one book of the Bible than has been written and spoken on any one play of Shakespeare; but, as regards Shakespeare's plays, we have, in addition to what has been written and spoken, the traditions of generation after generation resting on the dramatic performance of the plays, or at least of a large number of them, and the constant domestic discussion of such performances which have rendered the plots and characters, and even the language, familiar to all classes of educated English men and English women. The issue to be decided is simply whether the second edition of the defendant Marshall's book is an infringement of the copyright of which the plaintiffs are the proprietors in Mr. Page's book. I accentuate the words second edition because on them much depends. Yet I think the plaintiffs are entitled to know my opinion on the question whether, on the assumption that the first as well as the second edition is before me, the copyright has been infringed. That the first edition infringed the copyright is scarcely open to doubt. I count for nothing the consent judgment (to which Mr. Marshall was no party); but the admissions extracted from him in cross-examination show that, especially as regards the sketch of the character of Rosalind, he not merely derived great benefit from Mr. Page's book, but practically in many particulars copied it. I accept his statement that Mr. Page's book was not before him—that is, not lying open on the table so that he could refer to it—but I also accept his statement that he had read it carefully, and that with an excellent memory he could and did have present to his mind Mr. Page's treatment of the subject and the language in which that treatment was expressed. When preparing the second edition he read Mr. Page's book again in order to see what passages required to be deleted (which passages he at once struck out), and with his memory thus refreshed he rewrote certain characters, including Rosalind, so far as this operation rendered rewriting necessary. I think it was impossible for Mr. Marshall to compile a second edition on the same lines as the first which should not infringe the copyright. I think it was impossible for him to divorce his mind sufficiently for that purpose from the book which he knew well and from which he had largely borrowed, especially when he had been obliged to consult it afresh and with some special care. Avoiding the use of Mr. Page's language was wholly insufficient to enable Mr. Marshall to escape from the difficulty in which he had placed himself. If, therefore, I were at liberty to treat the first edition as the subject of complaint, or to regard the second as springing from it, I should not hesitate to find on this ground alone that the plaintiffs' copyright had been infringed, or to give them the full rights to which such infringement would entitle them in this court. It was agreed by counsel on either side that the liberty of an author dealing with a subject already treated by another is properly and completely stated by Mr. Scrutton in his book on the law of copyright. His statement on p. 116 of the third edition, which I willingly adopt, is this: He may (1) use all common sources of information; (2) use the work of another as a guide to those common sources; (3) use another's works to test the completeness of his own. Accepting this, the question is whether Mr. Marshall has to any, and what, extent gone beyond that, or in other words, to apply the test given by Lord Eldon in *Wilkins* v. *Aikin,* 17 Ves. 422, and quoted by Wood, V.C., in *Spiers* v. *Brown,* 6 W. R. 352,

(a.) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

whether he has or has not made "a legitimate use of the plaintiffs' publication in the fair exercise of a mental operation deserving the character of an original work." The cases cited in argument, which include the two to which I have just referred, and which, of course, are only a careful selection from many, both ancient and modern, to be found in the books, are only illustrative of general principles applied by different judges to the different facts and different classes of books before them, with observations suggested by those facts and books. All their observations are valuable and instructive, and I must endeavour to use them with reference to this particular case as best I can; but, as already said, this particular case is one of such peculiarity that after all it has to be treated on its own lines. It bears some resemblance to cases respecting dictionaries, such as *Spiers* v. *Brown*, to cases respecting educational works, such as *Jarrold* v. *Houlston*, 3 K. & J. 708, 6 W. R. Ch. Dig. 19, and to cases respecting handbooks and directories, such as *Murray* v. *Bogue*, 1 W. R. 109, 1 Drew. 353, and *Morris* v. *Wright*, 18 W. R. 327, L. R. 5 Ch. 279; and yet under the circumstances and for the reasons above stated it is distinguishable from all, and stands alone. The plaintiffs were ordered to give further the better particulars than those mentioned in the statement of claim, and they delivered particulars extending to twenty printed pages. Those particulars are, to my thinking, extravagant, and the plaintiffs' counsel, though he did not abandon any, necessarily and properly limited his comments to a small part of them. I must make some remarks on each of the five different heads of the printed particulars, but, for reasons which will presently appear, I shall not take them altogether in the order adopted by the particulars themselves. The plaintiffs first object to the general arrangement of Mr. Marshall's book as compared with that of their own. My study of the two books does not lead me to the conclusion that in this respect Mr. Marshall has done anything wrong. Volumes such as those issued from the Clarendon Press, which, though noticing peculiarities of style, language, grammar, and the like, do not devote themselves to this side of the subject, but treat the play more on the lines on which a general reader would wish it to be treated, do not supply the materials required for purely educational purposes, which probably no one thought of collecting in bygone years. On the other hand, there are other works (notably Abbotts' Shakesperian Grammar) which do supply a vast body of materials, and merely because those materials are alike found to be used in two books I cannot arrive at the conclusion that Mr. Marshall copied Mr. Page unless I can further detect such a correspondence in arrangement and treatment as makes that conclusion necessary. I fail to do this. There is nothing in Mr. Marshall's book which may not have been fairly derived from common sources of information with the exercise of that liberty of reference which was open to him under the second and third head stated by Mr. Scrutton. I cannot doubt that Mr. Marshall is largely indebted to Mr. Page, but dealing at present only with the first objection in the particulars, I do not think that he can be held to have made an unfair use of the latter's work.

Under this first head of complaint the particulars call special attention to Mr. Marshall's glossary, which, it is alleged, corresponds closely in plan with Mr. Page's etymological notes. I have taken some pains to test the truth of this. No book on Shakespeare, or on any other particular play, would be complete without a glossary of some kind. It may be merged in general notes, as in the Clarendon Press volume, or it may be found elsewhere, but somewhere there must be available to the student an explanation of Shakespeare's language sufficient to enable him to understand what he reads. That there is a glossary by whatever name called in each of these books is therefore of no moment, and that they are to some extent alike in plan and in detail follows as a matter of necessity. I can discover no reason for concluding that Mr. Marshall has here transgressed the limits allowed him by law, and, indeed, I doubt whether in this particular part of his book he has consulted Mr. Page as much as elsewhere. His far more diffuse style and his restricted list of references point in this direction.

I pass over the second complaint in the plaintiff's particulars to notice the third, which deals with a passage in Lady Martin's essay on Rosalind, copied by Mr. Page into his book, and occurring also word for word in Mr. Marshall's book. That gentleman says that he was aware, as I have no doubt he was, of that passage in Lady Martin's essay, but that for convenience sake he copied it from Mr. Page's book. This was slovenly in editorship, and wrong in point of law.

The fourth complaint in the particulars deals with literary notes, which are alleged to have been copied by Mr. Marshall. There is no doubt a striking similarity between the criticism of language made by the two authors, and they to a great extent select the same language for criticism. Mr. Marshall arranges his criticisms under heads different from those of Mr. Page, and he apparently thought that herein consists a broad distinction between the two books. I do not agree with him in that; and if I thought that he had in fact copied Mr. Page I should have no difficulty in holding him to have infringed the latter's copyright, notwithstanding that his remarks are distributed on a different plan. Here comes in the paramount importance of the observation made above, respecting the common knowledge of Shakespeare's language and the many criticisms of it. Reading the extracts, I can myself recognize many remarks and illustrations as familiar, and I can discover nothing that strikes me as original.

Now I must turn back to the character sketches, and first to that of Rosalind. There is a great general resemblance between Mr. Page's sketch and that of Mr. Marshall, but each of them expresses what has been written again and again by many writers, including, of course, Lady Martin; and, with one exception, I do not find any striking correspondence in language. The exception is found in the use by Mr. Marshall of the words "without malice" in the description of Rosalind's wit.

On the whole, although believing that Mr. Marshall is far more indebted to Mr. Page than he has been willing to admit, I do not think that he has done anything coming up to what Kindersley, V.C. in *Murray* v. *Bogue*, 1 Drew., p. 369, styles "an extraction of the vital part." In other words, I do not think that if all borrowed by Mr. Marshall from Mr. Page were cut out of his book it would be a whit the worse or in any wise a different book or less useful for the purpose for which it is designed. This conclusion rests mainly on two considerations which have been already fully stated, but which by reason of their weight on my mind I deem it worth while to repeat. First, I am much impressed with the extraordinary abundance of common sources of knowledge, and as said by the Lord Chancellor in *Pike* v. *Nicholas*, L. R. 5 Ch. App. 261, 6 W. R. Ch. Dig. 19: "When once it was established that there were common sources it would be naturally expected that there would be great similarity in the statements of the facts which were narrated from those common sources,"

This opinion coincides with that of Wood, V.C., in *Spiers* v. *Brown*. In the commencement of a judgment which has never seemed to me to have attracted the attention it deserves, he dwells on this, and towards the end apparently relies on it as largely assisting the conclusion at which he arrived—that there had been no illegitimate use by the defendant in that case of the plaintiff's work. It may be that I have attributed too much weight to this consideration, and yet my conclusion that the plaintiffs' copyright has not been infringed is still sound. Secondly, I have treated the second edition of Mr. Marshall's book quite independently of the first edition for the purpose of comparison with the plaintiffs' book. If in this my judgment is erroneous, it cannot, according to my own view, be supported at all.

The question then arises whether, holding that Mr. Marshall has borrowed some language in particular passages from the plaintiffs' book, I am bound to grant an injunction. It was well urged by Mr. Hamilton, on behalf of the publishers, that where you find a phrase copied here and there, but there is nothing to show extensive copying or extraction of the vital part, the severe remedy by injunction ought not to be applied. It is strange how little authority is to be found on this point. It was discussed in *Jarrold* v. *Houlston*, 3 K. & J. 708, apparently formed the mainstay of Sir Hugh Cairns's argument, and was dealt with by the Vice-Chancellor in his judgment (p. 722), but that case was decided on motion for an interlocutory injunction and at a time when the Court of Chancery only granted an injunction in aid of a legal right when that legal right was not in question or had first been established in an action at law. A similar remark applies to the two cases noticed by the Vice-Chancellor—*Bell* v. *Whitehead*, 3 Jurist 68, and *McNeill* v. *Williams*, 11 Jurist 344. But in *Pike* v. *Nicholas*, the court was dealing with a decree made on the hearing of the cause, and on p. 269 Giffard, L.J., uses language which maintains the discretion of the court in granting or refusing the particular remedy. He was brought to the conclusion that there had been really no such use made by the defendant of the plaintiff's book as entitled the plaintiff to an injunction, though the defendant was much more indebted to the plaintiff's book than he had at all admitted. And it seems to me that on principle the court must have that discretion and is bound to exercise it with reference to the particular facts and circumstances of each case brought before it. The main question which one has to put to oneself is whether there is evidence of *animus furandi*. I think there is not, and that therefore no injunction should be granted. The plaintiffs, of course, formally ask for damages, but it follows from what has already been said that damages, if granted, could only be nominal, and I see no reason for granting them such relief. There remains the question of costs. I cannot give any to the defendant Marshall. He has avowedly done one thing reprehensible in any editor, even though dealing with such a subject as this, and even though quoting from such a well-known book as that of Lady Martin. Moreover, he has made no acknowledgment of his indebtedness to Mr. Page, and, as regards his second edition, he has not had the generosity to make any admission in the witness-box. The defendants George Gill & Son (Limited) stand in a somewhat different position. They are, of course, responsible for the publication of Mr. Marshall's book and for his errors, but they have already been sued by the plaintiffs and have been condemned in damages as regards the first edition, and it would be hard to deprive them of costs when they have been successful in defeating the plaintiffs' claim as regards the second edition. The plaintiffs must pay their costs.

Solicitors, *Harvey Clifton; T. L. Yates; J. Woodhouse*, for *C. H. Marshall*, Huddersfield.

Chan. Div. } March 20.
Farwell, J. }

In re SELOUS.
THOMSON *v.* SELOUS. (*a.*)

Joint tenancy—Settled estate—Trustees—Tenancy in common—Assignment — Commensurate estates, legal and equitable—Merger.

A leasehold property settled by a testator on his two daughters in equal shares as tenants in common was, at their request, assigned by the trustee to them as joint tenants for the residue of the lease, they entering into a joint covenant with him to pay the rent, &c., and to indemnify him. One of the daughters having died,

Held, that the assignment created a joint tenancy, the original tenancy in common not raising a presumption against the merger of the equitable estate of such tenancy in common in the legal estate; the entirety, therefore, belonged to the surviving daughter.

The rule that one person cannot be trustee for himself (Selby *v.* Alston, 3 *Ves.* 339) *applies also to a case of two or more absolute owners.*

Originating summons.

The testator bequeathed a leasehold messuage to a trustee in trust for two of his daughters in equal shares as tenants in common. He died on the 24th of September, 1890.

By an indenture dated the 24th of June, 1895, and made between the trustee of the one part, and the daughters of the other part, after reciting the above bequest, and reciting that the daughters had requested the trustee to execute such assignment to them of the said messuage as was thereinafter expressed, it was witnessed that the trustee at the request and by the direction of the daughters assigned the messuage to the daughters as joint tenants for the residue of the lease, the daughters entering into a joint covenant with the trustee to pay the rent and perform the covenants of the lease, and to indemnify the trustee against all claims on account of the same.

One of the daughters having died on the 15th of September, 1900, this summons was taken out to determine, among other questions, whether one moiety of the leasehold messuage belonged to her estate, or whether the entirety belonged to the surviving daughter.

Jason Smith, for the executors of the deceased daughter.—There is nothing unusual in the form of the assignment of the 24th of June, 1895. The equitable estate of the tenancy in common was not extinguished or merged in the legal joint tenancy, for the two estates (equitable and legal) were not commensurate or of the same quality.

T. Method, for the surviving sister.—The equitable estate became merged in the legal estate by virtue of the assignment, leaving a joint tenancy. The rule in *Selby* v. *Alston*, 3 Ves. 339, applies; see also *Lee* v. *Lee*, 25 W. R. 225, 4 Ch. D. 175, and *In re Douglas, Wood* v. *Douglas*, 33 W. R. 390, 28 Ch. D. 327.

R. Goddard and *C. E. Bovill*, for other parties to the summons.

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

FARWELL, J.—In my opinion this is a joint tenancy. [Here his lordship stated the facts as above, reading the recitals in the assignment and also the joint covenant.] For the executors of the deceased daughter it was argued that only the legal estate was conveyed. In my opinion that is not the true view. The true rule, as laid down in *Selby* v. *Alston*, is not confined to one person only. The rule that one person cannot be trustee for himself applies to the case of two absolute owners; two persons cannot be trustees for themselves, any more than one can for himself. My only doubt was whether the advantage of a tenancy in common raises a presumption against merger. I think that the difference in interest between a joint tenancy and a tenancy in common is so small and shadowy that it is not enough to raise the presumption, even if it could be raised. But I decide on the point that two persons cannot be trustees for themselves.

Solicitors, *R. S. Taylor, Son, & Humbert*, for all parties.

Chan. Div.
Buckley, J. } March 5.

In re MORRISON. (*a*.)
MORRISON *v.* MORRISON.

Trustee—Investment—Sale and conversion—Shares in partnership—Conversion into limited company—Unauthorized investment—Jurisdiction.

The court has no jurisdiction to authorize trustees of a testator, who was a member of a partnership carrying on a business, to agree to take shares in a limited company into which it is proposed to convert the business, in exchange for the interest of the testator therein, where such shares are not investments authorized by the will or by law; and the court will not consider whether such a course is beneficial for the estate of the testator or not.

The cases where the court has approved of such agreements have been benevolent cases.

The testator in this case was a partner in an iron foundry business, and this was a summons by his trustees asking for the sanction of the court to an agreement entered into by them with the surviving partners to accept shares in a limited company into which it was proposed to convert the business, in exchange for the interest of their testator.

Mr. Morrison, the testator, being entitled to one-fourth share of the said business, which he carried on in conjunction with five other partners, by his will devised and bequeathed all his real and personal estate to the plaintiffs, who were also his executors, upon trust for sale and conversion, for payment of his funeral and testamentary expenses and debts, and for investment of the residue of the proceeds of sale. He directed his trustees to carry on his farming business, and gave them power to postpone the sale and conversion (except as to shares in unlimited companies), and to continue to hold his (then) present investments so long as they thought fit; and in addition to the securities mentioned in the Trustee Act, 1893, or any statutory modification thereof, he gave his trustees power to lay out the trust funds in the purchase of freehold and copyhold estates in England and Wales. The will contained no further power of investment. The iron foundry business was not mentioned. The beneficiaries under the will were the defendants, the testator's widow and his six infant children. The testator died in February, 1900.

(*a*.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The surviving partners desired to turn the business into a limited company, and it was proposed that the company should take over the business in exchange for the issue of 40,000 fully paid-up shares of £1 each, and £20,000 worth of £5 per cent. debenture stock (that being the whole of the stock to be issued), and the company were to indemnify the vendors of the business against all debts and liabilities. The plaintiffs were to have one-fourth of the shares and one-fourth of the stock in respect of their testator's interest. The surviving partners and the plaintiffs had entered into an agreement in July, 1900, to carry out the above proposals, subject to the approval of the court being obtained. This summons was taken out by the trustees against the widow and infant children asking the court to approve of the agreement as beneficial for the infants, and to authorize the trustees to carry it out. Affidavits were made showing that the proposed arrangement would be beneficial for the testator's estate.

Ingpen, K.C., and *Fischer Williams*.—It is not the trustees who are turning the business into a company, but the surviving partners. The whole transaction may be looked upon as a step in the process of converting the assets into money under the trust for sale and conversion. Such transactions have been sanctioned by the courts on previous occasions, as in the cases of *Lord* v. *Seddon*, *Sir Titus Salt's Estate*, and *Bryce* v. *Bullard*, mentioned in Palmer's Company Precedents (7th ed.), p. 613. [BUCKLEY, J., referred to *West of England and South Wales District Bank* v. *Murch*, 31 W. R. 467, 23 Ch. D. 138, and to *In re Crawshay*, 33 SOLICITORS' JOURNAL, 126, 60 L. T. R. 357.]

H. C. Hawkins, for the beneficiaries, referred to *In re Crowther*, 43 W. R. 571, [1895] 2 Ch. 56.

BUCKLEY, J.—The course proposed amounts in substance either to a sale of the property, and an investment of the proceeds in unauthorized securities, or to an exchange of the testator's property for property of a kind which his trustees are not authorized to hold. The trustees have no power to adopt either of these courses, and the court also in administering the estate has no such power. There have no doubt been cases where the court has made orders of this kind. One was made by Sir George Jessel in the case of the estate of the late Sir Titus Salt, in 1881, a case of an extraordinary nature. But I have been referred to no principle as laid down in those cases upon which the jurisdiction of the court was founded. They were all benevolent cases. Only two cases upon this question are reported. One is *West of England Bank* v. *Murch*. In that case Fry, J., treated the transaction as a compromise with creditors, and as coming under section 30 of Lord Cranworth's Act (23 & 24 Vict. c. 145). The other is *In re Crawshay*, where the court was asked to sanction the business being turned into a limited liability company, and the acceptance by the trustees of shares and debentures in the company in exchange for the shares of the testator in the business; and North, J., held that even if the scheme was a beneficial one, he had no jurisdiction to sanction it. I feel myself in the same position. I have not heard the evidence as to the advantage of the proposed arrangement, but I do not think that, even if it is beneficial, there resides any jurisdiction in the court to sanction the trustees doing that which the will does not allow them to do.

Application refused.

Solicitors, *Tarry, Sherlock, & King*, for *Trotter, Bruce, & Trotter*, Bishop Auckland.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 20.

FOULGER v. ARDING. (a.)

Landlord and tenant—Lease, construction of—Covenant to pay taxes, &c.

Under a demise of premises for sixteen years the lessee covenanted that he would "pay and discharge all taxes, rates, including sewers and main drainage assessments, and impositions whatsoever which now are, or which at any time or times hereafter may during the continuance of the said term hereby granted, be taxed or rated, assessed, charged or imposed upon or in respect of the said premises or any part thereof, on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair on either side.

Held, that expenses incurred by the landlord in complying with a notice of the sanitary inspector to abate a nuisance by the execution of structural alterations on the premises were not expenses which he was entitled to charge to the lessee under the covenant.

Appeal from the decision of the judge of the Wandsworth County Court.

The plaintiff was the owner of a lease dated the 5th of March, 1891, of premises known as Parklands, Tooting Graveney Common, granted by B. J. Aspinall, the freeholder of the premises, to Sir Henry Doulton, who transferred to the plaintiff.

The defendant was the tenant of the same premises under an underlease dated the 27th of June, 1892, granted by Sir Henry Doulton to Robert Ellwood, which underlease was transferred to the defendant in June, 1896.

The underlease, which demised the premises for a term of sixteen years, contained the above covenant.

By a notice dated the 25th of August, 1900, the plaintiff was required by the sanitary inspector for the parish of Streatham to abate a nuisance arising on the above premises from a foul and offensive privy, defective soil-pipe or connections to water-closets, and other defective sanitary arrangements, by removing the old foul and offensive privy and all contaminated soil and excreta, building a new water-closet strictly in accordance with the bye-laws of the London County Council, laying a new 4-inch drain properly ventilated, making good the defects in the soil-pipe or branches, and by executing other works of a like character necessary to prevent a recurrence of the nuisance.

The plaintiff executed the work required by the notice at a cost of £35, and demanded that amount from the defendant, who refused to pay. Thereupon the plaintiff brought an action in the county court claiming the above sum as damages for breach of the above covenant.

The learned county court judge gave judgment for the plaintiff.

The defendant appealed.

Colam, for the appellant.—The words of the covenant do not extend to these expenses. In *Tidswell* v. *Whitworth*, 15 W. R. 427, L. R. 2 C. P. 326, the tenant covenanted that he would "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property tax) which should become payable in respect of the demised premises," and it was held that the covenant did not cover paving expenses which the landlord had been required to pay under a local Improvement Act. In *Rawlins* v. *Briggs*, 27 W. R. 158, 3 C. P. D. 368, the terms of the covenant were almost precisely similar to the terms of the present covenant, and it was held that the tenant was not liable to pay under it expenses to which the landlord had been put in complying with a notice to abate a nuisance: see also *Badcock* v. *Hunt*, 37 W. R. 205, 22 Q. B. D. 145. In *Brett* v. *Rogers*, 45 W. R. 334, [1897] 1 Q. B. 525, and *Farlow* v. *Stevenson*, 48 W. R. 213, [1900] 1 Ch. 128, the covenant included the term "duties," and the cost of drainage work required to be done by the local authority which was held to be covered by the covenant came under that term.

Clavell Salter, for the respondent.—The covenant is one by means of which it is intended that the landlord should have his rent clear, and things are put in it which are usually borne by the landlord. The words "imposition . . . imposed upon or in respect of the premises" covers these expenses: see *Thompson* v. *Lapworth*, 16 W. R. 312, L. R. 3 C. P. 149; *Hartley* v. *Hudson*, 4 C. P. D. 367, 28 W. R. Dig. 119; *Smith* v. *Robinson*, 41 W. R. 588, [1893] 2 Q. B. 53.

Colam, in reply.—The words "imposition whatsoever" must be read *ejusdem generis* with the preceding words. The covenant is a rates and taxes covenant, and must not be construed so as to make it indirectly a covenant to repair.

Lord ALVERSTONE, L.C.J.—These cases have always presented to my mind a very great difficulty, a difficulty not, I think, so much arising from a question of law as from the fact that these covenants have from time to time been modified in order to put greater or less—and generally greater—liabilities upon the tenant, and it is extremely difficult in these cases to find the governing principle.

We think that we are obliged to reverse the judgment of the learned county court judge; but I say, speaking for myself, that I do consider the case to be one of very considerable difficulty, and in which it may well be that minds may differ as to the view to be taken of the covenant in question. The lease was for sixteen years from 1892. Neither landlord nor tenant undertook any obligation to do anything as to repairs. I agree that if the words of the covenant are clear, the fact that there is no repairing covenant may be regarded as immaterial, but I think in this case, as in all other cases, you are entitled to consider the position of the parties from the point of view of repair when you have words which are, to say the least of it, doubtful or ambiguous.

Now, as far as I can extract a principle from the many cases that have been cited it seems to me to be this, that you have to find in the covenant a contract or undertaking by the tenant to indemnify the landlord against a particular charge which he, the landlord, has been called upon to pay, and that you are to construe the covenant and fix the obligation of the tenant by looking as far as you can at the whole terms of the covenant, and you should also look at the lease to see whether or not the terms import a contract by the tenant to indemnify in respect of the particular expense. It is for that reason that I think that the authorities have divided themselves—not very satisfactorily in my opinion—into two groups—the one a group of authorities in which the covenants, whatever the words, were held to be sufficient to throw upon the tenant the obligation of indemnifying the landlord against the discharge of a duty or obligation; the other a group of authorities where the covenant was so construed that the tenant was held only to have undertaken to indemnify the landlord

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

against specific charges that were made upon the premises or upon him in respect of the premises. By charges I do not mean charges in the sense of obligations, but money charges. I agree and I have already said that the authorities are difficult to distinguish and are not altogether satisfactory. For instance, in *Brett* v. *Rogers*, in which the tenant was held liable, the words were "to pay the land tax, sewers rates, and all other taxes, rates, duties, assessments, and impositions." It is true there was in that case a covenant to pay the rent clear from land tax and all other taxes, rates, assessments, and impositions whatever, parochial or otherwise, now rated, charged, or imposed upon the premises." As is pointed out in the very admirable book of Mr. Foa nobody seems to have noticed the curious words "to pay duties," and if we looked at the covenant grammatically it would rather seem that the word "duty" there, if taken to be the object of the verb "to pay," must have been used in the sense of a money payment rather than an obligation. I only state that to show the difficulty there is in endeavouring to use one case as an authority in favour of one view or the other. It has been properly pressed upon me by Mr. Colam that it is a case in which the word "duty" is relied upon, but I think if the covenant is looked at grammatically the fact that it was a duty to pay might have been looked at from the other side.

We have, then, on the one hand cases starting from *Tidswell* v. *Whitworth* and—without referring to other intermediate cases—*Rawlins* v. *Briggs*, and, finally, *Farlow* v. *Stevenson* (which was a case in the Court of Appeal), from which the principle to be evolved is that you must find a covenant by the tenant to indemnify the landlord against either the payment he has to make or the obligation or duty which is cast upon him. On the other hand, in the cases beginning with *Thompson* v. *Lapworth*, and passing through *Hartley* v. *Hudson* and—again omitting several intermediate cases—*Smith* v. *Robinson*—which Mr. Salter has very properly pressed upon us as being near the present case—we find a series of decisions with varying words which are summed up by Wright, J. (a judge of the greatest experience in these matters), in the following words: "Tenants have got off in cases where no such word has occurred as 'charge,' 'duty,' or 'outgoings,' or where there have been no words extending to charges upon the owner, or where there are words indicating an intention that the landlord is to pay; but where the words are sufficient we must hold the governing intention to be that the owner shall get his rent clear of all deductions."

Now I endeavour to apply these different *dicta*, and this principle which I have with more or less success evolved from the *dicta* to the particular covenant here. I have already mentioned that there is no covenant to repair upon either side, and no language in the covenant for payment of rent has been pressed upon us, nor does the learned county court judge rely on any other covenant. To take the strongest argument—and I thought it was an extremely ingenious argument, and an argument which requires to be met—in favour of the landlord was the one which was put by Mr. Salter, apart from the authorities—namely, that you are entitled to say it was an imposition charged upon or in respect of the premises. I think the answer to that is that the words "impositions charged upon the premises" do not *primâ facie* purport to refer to any duty to be performed by the landlord or tenant. I am not relying upon the *ejusdem generis* argument alone, though I do not know that it ought to be disregarded, because the governing words are "taxes, rates including," and I think that the word "including" did include imposition; but so far as I can, endeavouring to clear my own mind upon this troublesome point, I think there is not in that covenant sufficient language to show that the tenant had undertaken to indemnify the landlord against the neglect by the landlord to fulfil a statutory duty that was put upon him, which was not a rate or a tax or an imposition in the sense of something charged or imposed upon the premises. Of course a very little would have made all the difference. Any word, as Wright, J., pointed out, which would have indicated that the tenant was to indemnify the landlord against a duty which the landlord had to perform or which the landlord had to fulfil would have been enough. I come to the conclusion with very great hesitation, having regard to the learned county court judge, who has taken an opposite view, that these words are not sufficient.

I will only add one word more upon the lease. This was a structural defect—it was not a nuisance caused by the tenant or any act of his—it was a structural defect which by statute the local authority could call upon the owner to remedy. I think where there is no covenant to repair, and where there is no question of shifting or discharging a liability which the tenant has undertaken, you ought, in a lease in which there is no covenant to repair by the tenant, to find clear words in the indemnifying covenant to put upon the tenant an obligation to indemnify the landlord. It is with regret that I have to come to the conclusion that the learned county court judge was wrong, and that judgment ought to be for the defendant.

LAWRANCE, J.—I quite agree.

Solicitor for the appellant, *G. Aplin Nichols.*

Solicitors for the respondent, *Foulger & Robinson.*

K. B. Div. (Darling and Channell, JJ.) — March 20, 21.

GUARDIANS OF THE POOR OF WEST HAM UNION (*Appellants*) *v.* LONDON COUNTY COUNCIL (*Respondents*). (*a.*)

Poor law—Settlement—Pauper lunatic—Amalgamation of part of one parish with whole of another parish—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act,* 1879 (42 & 43 *Vict. c.* 54)—*Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5).

Where a pauper has acquired a settlement in a parish, and subsequently a part of another parish is added to and amalgamated with the former, so that there results one enlarged parish, the pauper's settlement is not lost.

Reg. *v.* Inhabitants of Tipton, 3 *Q. B.* 215, *and* Dorking Union *v.* St. Saviour's Union, 46 *W. R.* 309, [1898] 1 *Q. B.* 594, *distinguished.*

Special case.

This was a case stated by the London Quarter Sessions on an appeal by the Guardians of the Poor of the West Ham Union against the order of two of the justices in and for the county of London, dated the 15th of May, 1900, whereby it was adjudged that the place of the last legal settlement of one Elizabeth Heritage, a lunatic pauper then confined in the Claybury Lunatic Asylum of the London County Council at Woodford, in the county of Essex, was in the parish of West Ham, in the county of Essex, and whereby the Guardians of the Poor of the West Ham Union were

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

ordered to pay the treasurer of the said asylum for the maintenance of the said pauper.

The appeal was heard on the 6th of July, 1900, at the Clerkenwell Quarter Sessions and was allowed.

The facts of the case as stated are as follows:

Elizabeth Heritage was born in Stephenson-street, Canning Town, in the parish of West Ham, in the West Ham Union, on or about the 11th of February, 1852, and resided at 3 and 5, Widdicombe-terrace, in the said parish, for about seventeen years until the month of August, 1888.

She resided at the aforesaid address in such manner, and under such circumstances during the whole of the said period of seventeen years, and in each of such years as to render her irremovable from the parish in which such residence took place.

By an order of the Local Government Board, dated the 24th of August, 1886, and made under the Divided Parishes and Poor Law Amendment Act, 1876, as amended and extended by the Poor Law Act, 1879, it was ordered as follows: "All that part of the said parish of Wanstead which is included in the borough of West Ham shall cease to be part of that parish, and shall be amalgamated with the said parish of West Ham." This order took place on the 28th of March, 1887.

The said address at which the said Elizabeth Heritage so resided as aforesaid was situate in the parish of West Ham as constituted previously to the date of the said order, and not in any part of the parish of Wanstead.

Elizabeth Heritage left the parish of West Ham in the month of August, 1888, and did not thereafter acquire a settlement in any parish.

She was afterwards found in the hamlet of Ratcliff, in the Stepney Union, in the county of London, and was sent therefrom to the said Claybury Lunatic Asylum.

By an order of two of the justices of the peace acting in and for the county of London, dated the 14th of February, 1900, the said pauper lunatic was, under section 290 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), adjudged to be chargeable to the county of London.

On the 15th of May, 1900, the London County Council procured from two of the justices of the peace acting in and for the county of London the aforesaid order of that date, whereby amongst other things the said pauper lunatic was adjudged to be settled in the West Ham Union.

On the above facts the justices at quarter sessions were of opinion that they were bound by the case of *Dorking Union* v. *St. Saviour's Union*, 46 W. R. 309, [1898] 1 Q. B. 594, and that in their opinion the decision in that case applied not only to a district where the parish is divided, but also where a district is destroyed by reason of amalgamation. They therefore allowed the appeal of the Guardians of the Poor of the West Ham Union.

From this decision the London County Council now appealed.

Daldy, for the London County Council.—The question here is as to the settlement of a pauper lunatic. In 1886 a small portion of the parish of Wanstead was added to the parish of West Ham and the justices at the quarter sessions have held that that has had the effect of destroying all pauper settlements in West Ham before 1886. That decision is wrong. The present case is distinguishable from *Dorking Union* v. *St. Saviour's Union*. There it was decided that if a parish were divided and two new parishes made out of it under the Divided Parishes Act all the settlements in the old parish are gone. In the present case no new parish is created, but only a part of one parish added to another whole parish. The *Dorking case*, which decided that the old law in the case of *Reg* v. *Tipton*, 3 Q. B. 215, must still be acted on, therefore does not apply here. In the case of *Reg.* v. *The Inhabitants of St. Martin, New Sarum*, 9 Q. B. 241, governs the present case. There a pauper gained a settlement in a parish which was afterwards united with another parish, and it was held that the pauper was settled in the united parishes. The meaning of that case is that where you unite parishes a settlement existing in either of the previous parishes which are united is not lost. So here where a part of another parish is added to a whole parish a settlement existing in that whole parish, previous to the addition of the part of the other parish, is not lost.

Counsel also referred to the case of *Bristol Guardians* v. *Guardians of the Barton Regis Union*, 66 L. T. Rep. 190, 40 W. R. Dig. 171.

J. C. Earle, for the Union of West Ham.—Where a pauper becomes chargeable, there he must be kept and maintained unless the parish in which he is settled can show a liability somewhere else. The pauper in the present case, it may be, loses no right of settlement in West Ham, but the London County Council cannot remove a pauper to West Ham, because there is no power under which they can do so. The part of Wanstead which is joined on to West Ham has never been under any liability to maintain this pauper. As long as it is impossible for the London County Council to remove a pauper to West Ham without fixing the liability on that part of Wanstead, then they cannot do it at all. In the *Tipton case*, 3 Q. B. 215, the pauper could not be removed into the old parish, and, *a fortiori*, here he cannot be so removed, for to do so would be to also remove him into something else. A liability cannot be imposed on part of a parish, by removing a pauper there, which has never been under any liability hitherto with reference to that pauper. The *New Sarum case* has no bearing upon this case. In that case the whole question turned upon the construction of the terms of a particular Act of Parliament. It is not enough here to say that the parish is still called the parish of West Ham. It is not a question of names, it is a question of substance, and as a matter of fact the parish is no longer the same parish of West Ham because it has been altered by the addition of a part of another parish.

Daldy was not called upon to reply.

DARLING, J.—I think in this case our judgment must be for the London County Council. What happened appears to have been this: By virtue of the Acts of Parliament which have been cited to us, and of the order of the Local Government Board, a part of the parish of Wanstead was added to the parish of West Ham and was, in the words of the order, amalgamated with it. It was not a question of merely joining one to the other, but they were amalgamated in the sense that they became one. The parish of West Ham from that moment exists with its old overseers, the only difference being that the authorities of West Ham have authority over the area of what was their old parish and also over the portion joined to it and amalgamated with it, which was part of Wanstead.

The pauper in question in this case had a birth settlement in West Ham. and it is said that that settlement is lost and gone by reason of the amalgamation with West Ham of a part of Wanstead, and in support of this proposition the case of *Reg.* v. *Tipton* is cited. What happened in that case was this, and it is stated exactly by Lindley, M.R., in his judgment in the case of *Dorking Union* v. *St. Saviour's Union*,

where he says: "As I understand the law, it seems now to be established that a settlement gained by birth is a settlement gained in the parish and not in any particular part of the parish, and if that parish is subdivided, the old parish ceases to exist, and the settlement goes with it. No settlement in the portion made into a new parish can be implied in favour of a person who had acquired a birth settlement in the old parish which had passed away." Now, the *Tipton case* has been followed with a good deal of reluctance by the judges. I do not myself, in the least, wish to say anything which would suggest that in my opinion it was not properly decided, but I think that this case does not come within *Reg.* v. *Tipton* at all. The reason why the pauper in that case lost his birth settlement was because he had been born in a parish which had passed away. In the present case the pauper was born in West Ham, and West Ham, in my opinion, has not passed away. West Ham has been amalgamated with a small portion of another parish, which has been joined on to and amalgamated with it; but West Ham, in my judgment, still remains, and the parish in which the pauper was settled still remains, although the boundaries of it have been enlarged. In the case of *Reg.* v. *The Inhabitants of St. Martin, New Sarum* the pauper gained a settlement in parish J., and afterwards, by Act of Parliament, that parish was united for all but ecclesiastical purposes with parish B., by the title of the united parishes of J. and B. and it was held that the pauper was settled in the united parishes of J. and B. That would have been an authority, it seems to me, for this—that if all West Ham and all Wanstead parishes had been joined together with the title of the united parishes of West Ham and Wanstead, the paupers of both would have kept their settlements in the united parishes. But what has happened here is that a portion has been taken off Wanstead and amalgamated with West Ham. Has that destroyed West Ham so as to bring it within the *Tipton case*? I do not think so. It may have destroyed Wanstead, and I do not say that it has not done so, and by reason of the *Tipton case* the paupers situate in Wanstead may have lost their settlements, but although one may think that that is so, I do not see that that forces us to extend the doctrine, which has been reluctantly accepted by the judges in many cases, and which is laid down in that case, and to say that a parish is destroyed, or has ceased to exist, when you take a part of something else and add that part to it. It is quite enough to say that the *Tipton case* settled that if you took away something from the parish you destroyed that parish, but it has not yet been settled that adding something to a parish equally destroys it. Then there is the authority of the case of *Reg.* v. *The Inhabitants of St. Martin, New Sarum* for saying that adding one parish to another parish does not destroy either of them.

It seems to me, therefore, that this case is not brought within the rule which has been laid down in the *Tipton case*, and unless it comes within that rule the pauper is not deprived of her settlement, and for that reason I think the London County Council succeeds as against the parish of West Ham, where the pauper still remains, in my judgment, settled.

CHANNELL, J.—I am of the same opinion. It seems to me to come to this, that where settlements have been acquired in a parish, and that parish is destroyed, that then the settlements are gone unless the authority which has destroyed the parish has made some provision for the settlements, which, of course, ought to be done. When that is not done it is because it has been overlooked; but there is a provision which I think meets the case under the Divided Parishes Act, and which, as far as I can see, is acted upon now, because the point has been before the courts and is therefore now foreseen. But where the settlements are not in fact provided for by the authority which destroys the parish, there the settlements are gone. In that case the question which one has to consider is, what is a destruction for the purpose of producing that result. Now, it has been decided in the *New Sarum case* that the adding to one parish the entirety of another parish does not destroy for the purpose of settlements the parish to which the entirety of another parish is added. What we have to say is, whether adding to one parish, not the entirety of another parish, but a portion of another parish, destroys the former parish. Inasmuch as the adding of the entirety would not destroy it, I do not see how it can be said that the adding of a part does so. Upon that ground I am able to decide that in the present case the pauper's settlement is not gone.

Appeal allowed.

Solicitor for the London County Council, *W. A. Blaxland.*

Solicitors for the Guardians of West Ham Union, *Hillearys.*

Q. B. Div. (Div. Court). (Kennedy and Darling, JJ.) — Dec. 17, 18.

HANSON v. WALLER. (a.)

Master and servant—False imprisonment—Arrest by servant—Liability of master.

The plaintiff, a barman, who was employed by the defendant, the owner of a public-house, was given into custody on the charge of stealing whisky belonging to the defendant by M., who was the manager of the said public-house and the servant of the defendant. M., in giving the plaintiff into custody, acted under a complete misapprehension, and withdrew the charge as soon as they arrived at the police-station.

There was no evidence that any whisky had been stolen, or that it was necessary to give the barman into custody in order to protect the property of his master. The defendant was in the habit of visiting his public-house nearly every day.

The plaintiff brought an action against the defendant for false imprisonment.

Held, that no action lay against the defendant, and that, under the circumstances of the case, there was no evidence that there was any implied authority on the part of the manager to give the plaintiff into custody.

Appeal by the plaintiff from an order for a nonsuit by the deputy county court judge, F. B. Fitzroy Cowper, Esq., sitting at Marylebone.

The action was brought for false imprisonment.

The plaintiff was a barman in the employ of the defendant, who was the proprietor of a public-house.

The defendant employed one Moseley as manager, but he was himself in the habit of visiting the house nearly every day.

On the 15th of June, 1900, the plaintiff was at work in the cellar of the house, when the manager entered, accompanied by two policemen, and, having made a remark as to catching the plaintiff thieving, gave him into the custody of the policemen on a charge of running whisky from the cellar into a cart which was standing at the door and was delivering mineral waters.

The plaintiff was taken to the police station.

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

On the way there the manager found that he had made a mistake, and told the constables so.

On arrival at the station he withdrew the charge and the plaintiff was released. No whisky had in fact been stolen, and the manager had acted under a complete misapprehension.

The plaintiff then brought an action for false imprisonment against the defendant, his employer.

The learned deputy-judge nonsuited him on the ground that there was no evidence that the manager in causing him to be arrested was acting within the scope of his authority.

From this decision the plaintiff now appealed.

Stuart Sankey, for the appellant.—The manager had an implied authority to act as he did, and it was necessary for him as manager of a public-house to have such authority, and what he did was to protect the interests of his master, and was within the scope of his employment.

Counsel referred to *Stedman* v. *Baker & Co. & Another*, 12 *Times* L. R. 451, and *Moore* v. *Metropolitan Railway*, 21 W. R. 145, L. R. 8 Q. B. 36.

Lincoln Reed, for the respondent.—Even assuming that there is an implied authority in the manager of a public-house to give persons into custody, yet here the real motive of the manager was to punish the barman and not to protect his master's property. The nonsuit was right. There is no difference between this case and that of *Jones* v. *Duck* (Times, 16th of March, 1900). There is, however, no implied authority for the manager's action, and his master, therefore, cannot be held liable for what the manager did. This is abundantly clear from the cases decided.

Counsel cited *Abrahams* v. *Deakin*, 39 W. R. 183, [1891] 1 Q. B. 516; *Stedman* v. *Baker*; *Allen* v. *South-Western Railway Co.*, 19 W. R. 127, L. R. 6 Q. B. 65; *Edwards* v. *London and North-Western Railway*, 18 W. R. 834, L. R 5 C. P. 445.

Stuart Sankey replied.

KENNEDY, J.—In this case the plaintiff brings an action for false imprisonment against the proprietor of a public-house whose manager gave him into custody on the charge of stealing whisky. It was argued below that there were no circumstances in this case such as would give the manager an implied authority to act as he did. The learned deputy-judge thereupon nonsuited the plaintiff, and I think he acted quite rightly in doing so. I think this is a case the application of the law to which is a matter of some difficulty though the law itself is quite clear in principle. In each case it is a question of the particular circumstances. This is not a case where a person has been appointed to an agency which includes, as in cases relating to railway bye-laws, the duty of arresting, if necessary, nor is it a case of a person within whose ordinary duty it falls to give persons into custody. The question for us to decide, therefore, is whether the circumstances of this case are such that we can say the manager had an implied authority to act as he did. The law is clearly stated in *Jones* v. *Duck*, which was a similar case to this one. There A. L. Smith, L.J., said: "The cases showed that a servant had an implied authority to give a person into custody if it was necessary to do so in order to protect his master's property. But that did not apply here, because the master's property was safe before the plaintiff was given into custody. The cases also showed that a servant might have such an implied authority derived from the exigency of the particular occasion."

That statement of law is binding on us. It is, however, not new law.

Then, also, in the case of the *Bank of New South Wales* v. *Owston*, 4 App. Cas. 270, 27 W. R. Dig. 156, Sir Montague Smith, in delivering judgment, says at p. 288: "In none of the cases referred to did the question of the authority of a manager or agent entrusted with the general conduct of his master's business arise. They were all cases of particular agencies where the agents had been appointed to a special sphere of duty. The result of the decisions in all these cases is that the authority to arrest offenders was only implied where the duties which the officer was employed to discharge could not be efficiently performed for the benefit of his employer unless he had the power to apprehend offenders promptly on the spot; though it was suggested that possibly a little authority might be implied in the supposed cases of a servant in charge of his master's property arresting a man whom he had reason to believe was attempting to steal or had actually stolen it. In the latter of these cases it is part of the supposition that the property might be got back by the arrest, but in such a case the time, place, and opportunity of consulting the employer before acting would be material circumstances to be considered in determining the question of authority."

That decision was adopted in *Abrahams* v. *Deakin*. In that case Lord Esher, M.R., referring to *Bank of New South Wales* v. *Owston*, says: "Though we are not bound by that decision, I have no intention of differing from it; on the contrary, I adopt it in every respect."

We next come to the case of *Stedman* v. *Baker*, before Lord Esher, M.R., and Kay and A. L. Smith, L.JJ. In that case the Master of the Rolls says: "It might be that if the manager saw a person taking away the property of his master he could take that person into custody or give him into custody for the purpose of protecting the property of his master. The court refused to decide that point in *Abrahams* v. *Deakin*, and we refuse to decide it now."

Now in the present case is there any evidence to show that the defendant is liable for the act of the manager? In my opinion there is not. Were there any such circumstances as are mentioned by Sir Montague Smith in his judgment in *Bank of New South Wales* v. *Owston*? I think not. This is not a case where the protection of the property could only be effectually carried out by giving the barman into custody. There was no evidence that any whisky had been stolen or that any might be saved by an arrest. There was no evidence that it was within the manager's duty to arrest persons or to decide whether a person should be arrested. There was ample opportunity for the manager to consult his master, who visited the house every day. There were, in my opinion, no circumstances of time or place rendering the arrest necessary.

For these reasons I think that the judgment of the learned deputy-judge was right and that this appeal must be dismissed.

DARLING, J.—I am of the same opinion. It is perfectly settled law that a servant may in certain circumstances give a man into custody in order to protect his master's property. But that is not the case here. There is no question here of either protecting the master's property or of getting it back. The supposed thief was not running away. Under these circumstances it was not necessary to give him in charge, and unless there can be shown to be some such necessity the master cannot be held responsible for the act of his servant.

Appeal dismissed.

Solicitors for the appellant, *Baker & Francis.*

Solicitors for the respondent, *Gibson, Usher, & Co.*

IN BANKRUPTCY.

K. B. Div. (Wright and Darling, JJ.) March 25.

In re BETTS.
Ex parte OFFICIAL RECEIVER. (*a.*)

Bankruptcy — Rescission of receiving order — Debtor's petition—Abuse of process of the court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 8.

Where a receiving order has been made upon a debtor's petition, the court may rescind such receiving order upon proof that the presentation of the petition was an abuse by the debtor of the process of the court.

In re Painter, 43 *W. R.* 144, [1895] 1 *Q. B.* 85, *distinguished.*

Appeal from an order of the registrar of the county court at Brighton refusing to rescind a receiving order made upon the debtor's own petition.

The debtor had been three times bankrupt between 1891 and 1897, and had not obtained his discharge in any of the three cases. He had an income of £1,100 a year under his marriage settlement, which went over to his wife upon bankruptcy.

Upon the 1st of September, 1900, he was arrested under an order made in the county court at Brighton for non-payment of a debt of £12 3s. 7d.

Upon the 3rd of September the debtor filed his own petition, and a receiving order having been made thereon he obtained his release from prison.

The official receiver thereupon applied to the registrar to rescind the receiving order on the ground that the debtor was abusing the process of the court.

The registrar delivered a written judgment in which he expressed a very unfavourable opinion of the debtor's conduct, but concluded that he was bound by the case of *In re Painter*, 43 W. R. 144, [1895] 1 Q. B. 85, to refuse to rescind the receiving order.

The official receiver appealed.

Muir Mackenzie, for the appellant, read *In re Painter*, and was stopped by the court.

The debtor appeared in person, but did not oppose the appeal.

WRIGHT, J.—There is no doubt as to the correctness of the law laid down in *In re Painter*, that where a debtor files his own petition the bankruptcy is not to be stopped merely because he has done it for the purpose of escaping from an order under the Debtors Act. I do not question that decision in any way. Still, there must be a limit, and if in fact the debtor is in the habit of filing petitions and renders the bankruptcy law auxiliary to frauds on his creditors, there must be some means of stopping him. A case like the present, where, as the registrar has found in fact, the debtor obtains credit and then avoids payment by presenting petitions in bankruptcy, must be an abuse of the process of the court. The receiving order must be rescinded.

DARLING, J.—I am of the same opinion. It seems to have been found as a fact that the debtor has adopted a regular scheme for avoiding payment of his debts or committal to prison for their non-payment. I do not think that he ought to be allowed to reduce committal orders to a nullity. The receiving order in this case was an abuse of the process of the court and must be rescinded.

Appeal allowed.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

K. B. Div. (Wright, J.) March 19.

In re CHILD.
Ex parte CHILD. (*a.*)

Bankruptcy — Practice — Costs — Appeal — Security for costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52)—*General Rules*, 1886, 1890, *r.* 131.

The deposit of £20 which an intending appellant is required by Bankruptcy rule 131 *to lodge in the High Court as security for the cost of his appeal may be applied to satisfy the costs of an unsuccessful application to diminish or dispense with such security, as well as to the costs of the actual appeal.*

Appeal from the taxing-master in Bankruptcy.

In November, 1900, Child, the debtor, had given notice of appeal to the Divisional Court sitting in Bankruptcy from an order of a county court. It became therefore necessary for him to comply with the terms of rule 131 of the Bankruptcy Rules of 1886—1890, which are as follows: "At or before the time of entering an appeal, the party intending to appeal shall lodge in the High Court the sum of twenty pounds to satisfy, in so far as the same may extend, any costs that the appellant may be ordered to pay. Provided that the Court of Appeal may, in any special case, increase or diminish the amount of such security or dispense therewith."

On the 22nd of November Child applied to the court to dispense with the security, but his application was dismissed with costs. On the 26th of November he paid the deposit of twenty pounds and entered his appeal, which was eventually dismissed with costs. When the costs of the appeal were taxed the taxing-master directed that the costs of the application to dispense with security, as well as the costs of the actual appeal, should be paid out of the deposit of twenty pounds.

Child appealed.

H. J. Turrell, for the appellant.—By rule 131 a deposit of twenty pounds has to be lodged in court to satisfy "any costs that the appellant may be ordered to pay." This can only apply to the costs of proceedings after the money has been lodged in court, not to costs incurred before the deposit has been paid. It has been held that this deposit is security only for the costs of the appeal in respect of which it has been paid, not for the general costs of the bankruptcy: *In re Scott and Mitchell*, 39 W. R. 32, 7 Morr. 178.

Neilson, for the respondent.—The costs of the application to dispense with security form part of the costs of the appeal, and should be paid out of the sum lodged in court: see *Kevans* v. *Joyce*, [1897] 1 Ir. 1, *per* Fitzgibbon, L.J., at p. 5, "Costs of the appeal mean additional expenses first incurred in the litigation which is started by the notice of appeal—extra expense incurred by reason of the appeal being taken."

Turrell replied.

WRIGHT, J.—It is clear from the wording of rule 131 that the deposit is to be paid into court as security for any costs of or in relation to the appeal. The only question, therefore, is whether the costs of the application to dispense with security were costs in relation to this appeal. I am of opinion that they were. The applicant was an intending appellant, and the application certainly was in relation to this appeal. I can see nothing in the wording of the rule to limit the application of the deposit to future costs

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

only. I think, therefore, that the taxing-master's decision must be upheld.

Appeal dismissed.

Solicitor for the appellant, *Behrendt.*

Solicitors for the respondent, *Ward, Perks, & McKay.*

Prob. Div. & Adm. Div. Probate. } Feb. 12; March 11.

In the Goods of BELHAM.
RICHARDES *v.* YATES. (*a.*)

Probate — Practice — Administration bond—Creditor—Right to retain—Not "unduly" preferring.

Quære, *whether a creditor, having given an administration bond to administer the estate rateably, is not bound not to prefer his own debt, despite the decision of Romer, J., in* Davies *v.* Parry, 47 *W. R.* 429, [1899] 1 *Ch.* 602.

This was a motion on behalf of Roderick Clement Richardes for the variation of an administration bond granted to the defendant Joseph Graham Yates.

The deceased died on the 28th of October, 1898, having left incomplete certain building contracts.

He was at the time of his death indebted to the defendant Joseph Graham Yates.

On the 25th of November, 1898, a grant of letters of administration was issued to Mr. Yates, a bond with two sureties being entered into by him.

The bond provided, *inter alia*, that the defendant should administer the estate according to law, "rateably and proportionably and according to the priority required by law, and not unduly preferring his own debt."

Bargrave Deane, K.C., and *Griffith Jones*, in support of the motion, relied on *In the Goods of Brackenbury*, 25 W. R. 698, 2 P. D. 272, and argued that since the judgment of Romer, J., in the case of *Davies* v. *Parry*, 47 W. R. 429, [1899] 1 Ch. 602, the construction of the bond had been altered. The court there held that the bond gave the administrator the power of preferring his own debt so long as he did not do it unduly. That the bond still left it open to the administrator to retain his own debt so long as the law allowed him the right of retainer, and so long as he did not in that respect act unduly. In consequence of this judgment the defendant had sought to swamp the estate with his own debt to the detriment of other creditors.

Ingpen, K.C., and *Whinney*, for the defendant, contended that there was no jurisdiction to revoke the grant, and even if it was revoked the revocation would be ineffectual, as the defendant had a right of retainer which was a vested right in him and could not be thereby divested: *In re Rhoades*, 47 W. R. 561, [1899] 2 Q. B. 347. Neither ought the court to act in a high-handed way and force a new contract upon the defendant. The fact that the defendant had got a benefit which had not been contemplated when the contract was made was no ground for depriving him of it.: *In the Goods of Brackenbury.*

The cases of *In re Jones*, 34 W. R. 249, 31 Ch. D. 440; *Blackborough* v. *Davis*, 1 Salk. 38; *In the Goods of Baddeley*, 60 L. T. R. 237, 37 W. R. Dig. 6; and Williams on Executors were also cited.

BARNES, J., in delivering judgment, said that the question raised a matter of some interest and of no little difficulty. The motion was brought by Mr. Richardes, a creditor of the deceased, in order that the bond in question might be varied by striking out the word "unduly," or otherwise varied so that the estate might be administered without the administrator unduly preferring his own debt, or, in the alternative, that the grant should be revoked. The deceased died intestate in October, 1898, and letters of administration were granted on the 25th of November to Mr. Yates as a creditor of the deceased, the widow having renounced. The bond given by the creditors was dated the 23rd of November, 1898, two days prior to the grant. That was all done in the usual way. On the 29th of January, 1899, the applicant took out an originating summons against all other creditors, and it appeared that the total debts of the deceased amounted to £3,350 10s., Mr. Yates's quantum aggregating to £950. The assets of the deceased amounted to £452 7s. 10d., which had been paid into court, though there was now a further sum of £520, so that the total assets amounted to a little more than the whole of the administrator's own debt. If, therefore, he was entitled to retain, practically speaking there would be nothing left for the other creditors. The question therefore raised for the consideration of the court was whether a creditor under such circumstances could successfully retain or was he bound to distribute rateably? The claim that he made in the administration suit he based upon the decision of Romer, J., in the case of *Davies* v. *Parry*. A small question of fact had also arisen in the course of the case, and that was as to the time when he first put forward his claim to retain, and his solicitor said that it was when he was before the master in Chambers, between the 21st of October, 1899, and January, 1900. The court felt that the decision of *Davies* v. *Parry* was binding upon it, and it had not been argued that that decision was wrong; but the question being indirectly raised the court had felt it incumbent upon it to make careful research to appreciate aright the considerations found therein. If that case were questioned, then this motion would be unnecessary; but could it be successfully made in face of that case?

Now the practice of this court appeared to be that a creditor has no right to a grant of administration except by the practice of the court, and administration is granted to him if there is no one else to take it. In the case of *In the goods of Brackenbury* the grant was made to a creditor, no bond to pay *pro rata* being applied for, but if other creditors petitioned in future then the court would compel him to enter into articles to administer rateably. In Fonblanque on Equity, 1820, Book IV., Part II., p. 407, it is said "administration to a creditor generally granted on condition that he claims no preference in respect of the administration." Again, in Toller on Executors, 1822, at p. 105, it is said, "Where on the renunciation of the next-of-kin several creditors apply for administration, though the court may prefer any one of them, yet on the petition of the others it will compel him to enter into articles to pay debts of equal degree in equal proportions without any preference of his own." In Coote and Tristram's Probate Practice, on p. 43, a form is given, and no doubt that form was taken from the old forms in use in the Ecclesiastical Courts; but hitherto those who have searched on behalf of this court have not been able, owing to the lapse of time, to procure an actual bond given by those courts to a creditor. In the 1896 edition of Coote and Tristram's Probate Practice, at p. 718, a form is also given, but it is substantially the same as the one above referred to; but in a note thereto it is said, "This form of bond

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

pro rata is supplemental to the ordinary bond which the creditor administrator gives, but it is now the practice to incorporate in the ordinary administration bond the special clause to pay *pro rata*." In 1877, in *Brackenbury's case*, administration with the will annexed was granted to a creditor of the deceased, but no application was at that time made to the court by any other creditor to order the administrator to give a bond conditional to divide the estate rateably amongst all the creditors; but the other creditors of the deceased instituted proceedings in Chancery for the administration of the estate under the direction of the court. The application, however, failed in that case, because the other creditors had failed to take a *pro rata* bond. In all future cases, however, since then every creditor taking a bond took it *pro rata* until the case of *Davies* v. *Parry*. The decision of that case is that the personal representative may still retain his own debt, notwithstanding the present form of a creditor's administration bond which provides for due course of administration rateably and proportionably and according to the priority required by law and not unduly preferring his own debt or the debts of any other of the creditors of the deceased. Referring to the words "not unduly preferring his own debt," Romer, J., is there reported to have observed that those words were put in on purpose to exclude the right of retainer, and that the bond there in question was settled in its then form in consequence of the decision in *In the Goods of Brackenbury*. His attention, however, did not appear to have been drawn to the old practice of the court, which inserted the words for the very purpose of preventing a creditor from preferring his own debt. Moreover, in coming to this decision the learned judge who tried the case observed, "I have been so reluctant to allow this claim of retainer, and personally feel it so unjust, that I have had this case re-argued to see if I can find any ground on which I could base a judgment that the right of retainer ought not to be allowed" Now I have read that judgment with very great care, and more than once, but there was no case therein cited where there had been a *pro rata* bond, and it appears that the judgment pronounced was confined to criticisms of the actual wording of the bond itself. Now it appears to me that the reason for that judgment is that the administrator ought to be allowed to pay such debts as he knew of, because he is in a difficult position; but I fail to appreciate the hardship of the position if he chooses to take the bond on those terms. Moreover, he could protect himself by a Chancery suit to administer the estate under section 29 of 22 & 23 Vict. c. 35, and under the Bankruptcy Acts. The effect of that decision is to render the whole of the *pro rata* clause nugatory, as the basis of the decision is that there is no necessity to administer rateably and proportionably. If, however, a number of creditors had petitioned it could not be contended that the administrator could prefer any one of those creditors; why, then, should he be allowed to prefer himself? *Lyttleton* v. *Cross*, 3 B. & C. 317. Although it is probable that the purport of the subsequent words "unduly preferring" were thus intended in the Ecclesiastical Court, and though I have made research into the matter, it is too remote to ascertain. However, in order that the position of the creditor might be made more clear, the form of the bond has now been altered; and in the *Weekly Notes* of the 23rd of December, 1899, the President is reported to have said that, although the words "not unduly preferring his own debt" were understood, no doubt, wrongly, to have the effect of preventing an administrator appointed in the ordinary course of law from preferring himself and paying his own debt, even though the estate should be insolvent, Romer, J., in the case of *Davies* v. *Parry*, 1 Ch. 602, decided that the effect of that provision in the bond was to enable the administrator to pay his own debt in priority to others, since, although a preference, it was not by law an undue preference. "In future," said the President, "the word 'however' will be substituted for 'unduly,' so that the bond will read, 'not, however, preferring.'" It is with very great diffidence and all possible deference to the decision of Romer, J., that I comment upon it, but at present, being bound by it, I feel it my duty to do so, for if it is not supported in the Court of Appeal this motion is an unnecessary motion. The court is asked to do one of two things, but as it is I think that I can do neither one thing nor the other. I do not think that I can alter the bond, for the court cannot make a new contract with the administrator. Nor can I effectively do what was suggested in *In the Goods of Brackenbury*. No doubt the court has power to revoke the grant, but I cannot see that the creditor and administrator has acted improperly. There still remains this difficulty also. In Williams on Executors, 503, it is said, "If administration be committed to a creditor and afterwards be repealed at the suit of the next-of-kin, the creditor shall retain against the rightful administrator and his disposal of goods even pending his citation till sentence of repeal is good": *Blackborough* v. *Davis*. Further, in *In re Rhoades*, Lindley, M.R., said, "The older common law authorities go far to show that if an executor was a creditor of his deceased testator and had assets in his hands sufficient to pay his debt (and all others of a higher degree if any), such debt was treated as extinguished." Therefore, even if I revoked the grant of administration, it would not destroy the right of retainer. For these reasons I cannot accede to this motion, but will give the applicant every facility, if he so desires it, to go to the Court of Appeal; and I have sought to so deal with this case that that court may have all the materials before it. Following *In the Goods of Brackenbury*, the costs must be paid out of the estate.

Solicitors, *Woosnam & Smith; H. B. Worrell & Son.*

Court of Appeal.

From K. B. Div. (Collins and Stirling, L.JJ.) April 22.

BARTLETT *v.* HIGGINS. (*a.*)

Practice — Costs—Taxation—Party and party costs—Depositions taken on examination before trial not used at trial—Ord. 65, r. 27 (29).

Where, under an order for examination, a witness is examined before trial, but the witness is present at the trial and his depositions are not read, the costs of his examination may be allowed if, having regard to the state of affairs at the date of the examination, they were reasonably and properly incurred.

This was an appeal from the decision of Ridley, J., refusing to review the taxation of a bill of costs by the master.

The action in connection with which the taxation arose was brought in respect of certain money-lending transactions.

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

The plaintiff, who was an officer in the militia, was the only person present at certain interviews with the defendant, and it was admitted that his evidence was essential to his case.

Several months prior to the hearing of the action the plaintiff volunteered for the war in South Africa, and was informed by his commanding officer that he might expect to receive orders to proceed to the front on very short notice, and he consequently obtained three days' leave of absence in which to wind up his affairs.

Under these circumstances his legal advisers, having previously obtained the necessary order for the examination of the plaintiff, had his depositions taken in the usual manner. The plaintiff, however, did not proceed to the front, and was present in person at the trial, but he was not called as a witness, as the defendant, after hearing the opening speech of counsel, consented to judgment against him, with costs, upon certain terms.

When the costs came to be taxed the master disallowed the costs of the examination of the plaintiff, holding himself bound by Ord. 65, r. 27 (29), and by the decision in *Ridley* v. *Sutton*, 11 W. R. 314, 32 L. J. Exch. 122, and Ridley, J., reluctantly held himself bound by the same decision.

Bray, K.C. (*W. B. Allen* with him), for the appellant.—The case of the *Duke of Beaufort* v. *Earl of Ashburnham*, 11 W. R. 267, 32 L. J. C. P. 97, is clearly in our favour. That was followed at an interval of a few days by *Ridley* v. *Sutton*, which the master and Ridley, J., have considered binding upon them. Each case must be decided on its merits. No hard-and-fast rule has been laid down by these cases. Such costs may be allowed, although the witness examined appears at the trial: *Delaroque* v. *S. S. Oxenholme & Co.* (1883), W. N. 227. The question was of vital importance to the plaintiff, as the defendant held his entire property as a security.

Rufus Isaacs, K.C. (*Montague Shearman* with him).—As a fact, it was not necessary to have taken the plaintiff's evidence. The examination was merely a luxury: per Malins, V.C., *Smith* v. *Buller*, L. R. 19 Eq. 473, at p. 475, 24 W. R. Dig. 187. In *Delaroque* v. *S. S. Oxenholme & Co.*, a new allegation had been inserted in the defence, and this necessitated the calling of the witness. In both the *Duke of Beaufort* v *Earl Ashburnham* and *Ridley* v. *Sutton* the court followed the decision of the master. Moreover, the master exercised his discretion under Ord. 65, r. 27 (29), and the court will not disturb his decision.

COLLINS, L.J.—I am very loath to treat this case as a question of discretion, but I think the master has not used his untrammelled discretion in the matter, as he thought himself bound by the decision in *Ridley* v. *Sutton*. I do not think that is really a decision in point. That case was decided in 1863 under 1 Will. 4, c. 22. The Court of Exchequer came to the conclusion, under that Act, that the costs could not be claimed unless the evidence so taken was used at the trial. At the same time the Court of Common Pleas in the *Duke of Beaufort* v. *Earl Ashburnham* thought they had a discretion in the matter. Now, under the Judicature Acts, by Ord. 65, r. 27 (29), quite a different rule is laid down. "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party." Whether the course adopted was "necessary or proper" must be gauged not by the event which ultimately happened, but by the state of facts existing at the time when the legal advisers had to make up their minds in the matter. The test is, was the advice given due to over-caution or to negligence; was it reasonable or necessary? The case is on all fours with *Delaroque* v. *S. S. Oxenholme & Co.* The introduction of a new plea in that case is immaterial. In *Smith* v. *Buller* Malins, V.C., was dealing with what was a mere luxury. The evidence in this case was vital; and the plaintiff's advisers would have been negligent had they not so taken his evidence.

STIRLING, L.J.—My only difficulty throughout this case has been whether we ought to overrule the decision of the taxing-master. In my judgment it is not correct to say that costs ought not to be allowed merely because in the event they prove to be unnecessary. The question is, were they properly incurred viewing the matter at the time when the examination took place? In my opinion they were eminently proper at that time.

Appeal allowed.

Solicitors, *Chinners; Hores, Puttison, & Bathurst.*

From K. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) April 2.

DUXBURY AND OTHERS v. BARLOW AND ANOTHER. (a.)

Practice—Costs—Action founded on contract—Separate causes of action against two defendants—Sum not exceeding £50 recovered against one—Ord. 65, r. 12.

The plaintiffs, who were trustees of a friendly society, brought an action in the High Court against two defendants claiming, as against the first defendant, the treasurer of the society, a sum of £90 as money had and received by him for the society, and as against both defendants the sum of £50 upon a joint and several bond for that amount in favour of the society for the due performance by the first defendant of his duties as treasurer. At the trial the plaintiffs recovered judgment against the first defendant for £90, and against the two defendants on the bond for £50.

Held, that, under ord. 65, r. 12, the plaintiffs were not entitled, as against the second defendant, to costs on the High Court scale.

Appeal from an order of Grantham, J., at chambers.

The plaintiffs were the trustees of a friendly society, of which the defendant Barlow was the treasurer. The defendant Barlow and the defendant Richardson, as his surety, had executed a joint and several bond in favour of the plaintiffs in the sum of £50 for the performance by Barlow of his duties as treasurer. Barlow having received the sum of £90 9*s.*, the moneys of the society, for which he had not accounted, the plaintiffs brought an action in the Queen's Bench Division against both defendants to recover £50 on the bond, and against the defendant Barlow to recover £90 9*s.* as money had and received to the plaintiffs' use.

At the trial the judge entered judgment for the plaintiffs for £50 as against both defendants on the bond, and for £90 9*s.* against the defendant Barlow, with costs against Barlow and such costs against Richardson as the plaintiffs were entitled to. The learned judge refused to make a special order giving the plaintiffs costs as against Richardson on the

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

High Court scale, and the master refused to tax the costs as against him on the High Court scale.

On appeal, Grantham, J., directed him to do so.

Richardson appealed.

J. Brooke Little, for the defendant Richardson.—The causes of action against the defendants were separate and distinct. Upon the cause of action against Richardson the plaintiffs only recovered £50, and therefore as against him they are not entitled to High Court costs by reason of ord. 65, r. 12: *Millington* v. *Harwood*, 40 W. R. 481, [1892] 2 Q. B. 166. The case is covered by *Solomon* v. *Mulliner*, *ante*, p. 364, [1901] 1 Q. B. 76, though that case was decided on section 116 of the County Courts Act, 1888.

W. Ellis Hill, for the plaintiffs.—Section 116 of the County Courts Act, 1888, does not apply. Unless the case comes within ord. 65, r. 12, the plaintiffs are entitled to High Court costs. There was only one judgment in the action against both defendants. The plaintiffs have recovered by that judgment a sum exceeding £50, as they have recovered by the judgment £90 9s.; ord. 65, r. 12, therefore does not apply. *Solomon* v. *Mulliner* is not in point, as the only judgment was against Mulliner for £2.

A. L. SMITH, M.R.—In my opinion the order of the learned judge is wrong. The plaintiffs brought an action against Barlow and Richardson to recover £50 on the bond. Richardson was liable in that action for £50 at the most. In that action the plaintiffs also put forward a claim for £90 9s. against Barlow for money had and received. Those were two separate and distinct causes of action. At the trial the plaintiffs recovered judgment against both defendants—that is to say, against Barlow and Richardson on the bond for £50, and against Barlow for £90 9s. The learned judge at the trial refused to make an order giving the plaintiffs High Court costs against Richardson, leaving them to recover any costs which the law allowed. The question, therefore, which we have to decide is whether the plaintiffs are entitled as against Richardson to High Court costs. In my opinion they are not. By ord. 65, r. 12, "in actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding £50, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the court or a judge otherwise orders." In my opinion that means that the plaintiff is to be entitled to no more costs as against the defendant, against whom he recovers judgment for a sum not exceeding £50, than he would have been entitled to had he brought the action in the county court. The plaintiffs only recovered £50 as against Richardson, and therefore they are not entitled to High Court costs as against him.

COLLINS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiffs, *Jaques & Co.*, for *J. C. Malcolm*, Leeds.

Solicitors for the defendant, *Vincent & Vincent*, for *Peckover & Scriven*, Leeds.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — Feb. 8, 11, 12, 18; April 1.

TAYLOR v. LONDON AND COUNTY BANKING CO.

LONDON AND COUNTY BANKING CO. v. NIXON. (*a.*)

Mortgage—Priorities—Trust—Fraud of trustee—Legal estate—Tabula in naufragio—*Relation back.*

The rule that an equitable mortgagee without notice may gain priority by getting in the legal estate, even though in the interval he has received notice of a prior incumbrance, does not apply where there is an express trust for the incumbrancer whose equity it is sought to displace.

As between purely equitable titles, that one will have priority which has the better right to call for the legal estate.

Conduct which will postpone an incumbrancer considered.

This was an appeal from a decision of Farwell, J.

The facts, which are more fully set forth in the judgment, were as follows:

Prior to the year 1897 Frederick Talbot Tasker, of the firm of Talbot & Tasker, solicitors, was a customer of the plaintiffs at their Holborn branch, and as such became largely indebted to them.

The plaintiffs required him to give them some security, and, accordingly, on the 14th of August, 1897, he deposited with the plaintiffs four indentures of mortgage relating to house property in the county of Middlesex, and on the same day, by a deed of charge, he charged in favour of the plaintiffs all his interest in the property comprised in the deposited indentures as a security for the payment on demand of all moneys owing from him to the plaintiffs.

By this document Tasker undertook on request to execute a legal mortgage to the bank, or such person or persons as they might appoint. And he declared that during the continuance of the security he would hold all his present and future estate thereby charged "in trust for you as such mortgagees as aforesaid, and will convey the same as you shall direct." And he authorized the bank during the continuance of the security by deed to remove him or any other person from being a trustee in respect of the trust thereinbefore declared, and to appoint themselves, or any persons or person, to be trustees or a trustee in respect of the said trust, and thereupon to make a declaration vesting all his said estate in such new trustees or trustee. And Tasker thereby irrevocably appointed the then head manager, the chief accountant, and the country manager of the bank, and every two and one of them, or the persons for the time being holding those respective offices, and every two and one of them jointly and severally, his attorneys and attorney for him, and on his behalf and as his act and deed, to make, execute, and deliver every or any such further mortgage or mortgages as aforesaid.

By an indenture dated the 5th of April, 1898, and expressed to be made between F. T Tasker of the one part and the plaintiffs of the other part (executed on behalf of F. T. Tasker by officials of the bank as his attorneys), the several principal sums owing on the security of the mortgages were assigned and conveyed by F. T. Tasker, as beneficial owner, to the plaintiffs, and the hereditaments and premises comprised were granted and conveyed to the plaintiffs as a security for the payment of all moneys secured by the deed of charge of the 14th of August, 1897.

The five mortgages deposited with the plaintiffs were held by F. T. Tasker as trustee of a marriage

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

settlement, called the Tasker settlement, and formed part of the funds thereby settled.

From 1890 to 1895 he was sole trustee, but on the 25th of February in the latter year the defendant Samuel Nixon was appointed his co-trustee.

In March, 1898, F. T. Tasker absconded, and was afterwards adjudicated bankrupt.

On the 10th of February, 1900, Richard F. K. Guswell was appointed a trustee of the settlement in the place of F. T. Tasker, and the trust estate was duly vested in the defendants.

When the document of the 14th of August was executed the bank had no notice that Tasker was a trustee of the property, but they had received notice of the trust before they executed on his behalf the mortgage of the 5th of April, 1898.

Both parties in this action claimed priority over the charge or security of the other in the matter of the mortgages.

Farwell, J., held that the defendants were entitled to priority over the bank.

The bank appealed.

Warmington, K.C., Bramwell Davis, K.C., and *Edward Chitty*, for the bank.

Badcock, K.C., and *Edward Ford*, for Nixon.

Levett, K.C., and *G. Cave*, for Taylor.

Cur. adv. vult.

April 1.—STIRLING, L.J., read a written judgment, with which RIGBY and VAUGHAN WILLIAMS, L.JJ., agreed. He said: These are three appeals which raise questions of priority between three sets of claimants (viz., the trustees of two marriage settlements and the London and County Bank) to four mortgages for sums amounting to £1,400, which were originally made in favour of one Frederick Talbot Tasker, a solicitor, who has absconded after dealing with the mortgages in such a way as to give rise to the present contest. The facts as now established differ in one important respect from those on which the case was dealt with in the court below, and are as follows: On the 14th of February, 1882, Tasker advanced out of his own moneys to one R. Ward the sum of £1,400 on the security of four indentures of mortgage by which four leasehold houses were assured by way of subdemise to Tasker as security for £350 and interest. In December, 1889, Tasker and C. W. Chubb were trustees of a settlement dated the 12th of April, 1850, made on the marriage of R. T. Brockman. In that capacity Tasker received on behalf of himself and his co-trustee a sum of £1,000 which had been invested on a mortgage given by King and Brown, who had paid it off. Tasker appears to have applied to his own use £700 part of this sum. In respect of it he paid to the beneficiaries under the Brockman settlement the half-yearly sum of £17 10s. by way of interest. In Tasker's books of account, under the heading of "Trustees of R. T. Brockman's Income Account," the interest on the £1,000 lent to King and Brown was entered half-yearly down to February, 1889: "By half-year's interest £1,000 King and Brown." Opposite the last entry of this kind is a pencil memorandum "now £700 Ward." Subsequently to 1889 the half-yearly payments of interest are entered in most cases "By half-year's interest on £700 Ward," though in the year 1891 the entries are "By half-year's interest on £700." Some of the earlier entries are open to suspicion as alterations have been made in them; but those made in 1893 and following years do not fall within this observation. Farwell, J., has held that, although Tasker executed no formal declaration of trust, and still less any legal assignment of the mortgages or any of them, nevertheless these entries establish that previously to 1895 Tasker had appropriated £700, part of the mortgage debt of £1,400 due to himself from Ward to answer the £700 which he had taken from the Brockman settlement funds. It does not appear that this appropriation was ever communicated by Tasker to his co-trustee. Further, there is no evidence that the appropriation was communicated to any of the beneficiaries previously to 1896, but in that year it certainly became known to one of them, Mr. Brockman, a solicitor, who acted on behalf of the others. All these beneficiaries were in 1889 *sui juris*, and entitled to absolute interests in possession in the trust funds. Mr. Brockman made no inquiries on the subject of this £700 mortgage, and the explanation he gave was that he did not suspect anything wrong. It is to be inferred that Mr. Brockman did nothing to relieve either trustee from any responsibility he had incurred. At this point arises a question of fact. Was an appropriation actually made by Tasker or did it rest only in intention? Speaking for myself, I am unable to differ from the conclusion of Farwell, J. I place no reliance either on the pencil memorandum or on the earlier entries to which I have referred, but I think the entries in 1893 and 1894 show that an actual appropriation was made, and that the case is brought within the decisions in *Middleton* v *Pollock*, 2 Ch. D. 104, 24 W. R. Dig. 88, and *New, Prance, & Garrard's Trustee* v. *Hunting*, 45 W. R. 577, [1897] 2 Q. B. 19, affirmed in the House of Lords under the name of *Sharp* v. *Jackson*, [1899] A. C. 419, which establish that such a transaction may be good though not communicated by a trustee to his beneficiaries. At the same period—viz., December, 1889—Tasker and J. K. Blake were trustees of another settlement, dated the 18th of April, 1873, made on the marriage of William Tasker. Blake died on the 18th of July, 1890, and thenceforth until February, 1895, Tasker was sole trustee of the settlement. In that month Mr. Nixon was applied to to become co-trustee with Tasker of the Tasker settlement. Thereupon Nixon inquired what the funds subject to the trusts were, and Tasker furnished him with a list in which he included as one of the investments "£1,400 lent to Mr. Ward on mortgage of houses in Park-terrace. Kensal-road." Nixon subsequently went to Tasker's office to see the securities for this sum, and had produced to him the four leases and mortgages, and he required that these should be transferred into the joint names of Tasker and himself. It has been proved before this court by the evidence of a clerk of Tasker's that transfers were prepared accordingly and were executed by Tasker. These transfers have been searched for and cannot be found, but completed drafts of them have been produced, and it must be taken that the mortgages were legally transferred and became vested in Tasker and Nixon as joint tenants. The appointment of Nixon as trustee of the Tasker settlement bears date the 25th of February, 1895, but appears to have been executed later. The transfers were executed in June, 1895. All this took place before the appropriations in favour of the Brockman settlement was communicated to the beneficiaries

The leases and mortgages remained in the possession of Tasker, who in August, 1897, deposited them with the London and County Bank by way of security; he also executed an instrument under seal on a printed form which on the face of it appears to be one used by the bank where security is given by a single member of a firm for the debt of the firm, but so as also to cover the private account of the partner giving the security. [His lordship then read the clauses of the instrument.] On the 26th of March, 1898, Tasker was adjudicated bankrupt. By an indenture of

the 5th of April, 1898, the attorneys appointed by the deed of the 14th of August, 1897, in the name and on behalf of Tasker purported to convey the leaseholds as a security to the bank for all moneys secured by the deed of the 14th of August, 1897. When the last-mentioned deed was executed the bank had no notice of the title either of the Brockman trustees or of the Tasker trustees; but before the 5th of April, 1898, the bank had acquired notice of that of the Tasker trustees, but not of that of the Brockman trustees. In August, 1898, the plaintiff Taylor was appointed trustee of the Brockman settlement in the place of Tasker and along with C. W. Chubb. In February, 1899, the plaintiff W. L. Chubb was appointed a new trustee of the Brockman settlement in the place of C. W. Chubb.

On the 6th of February, 1899, Taylor and Chubb, as such trustees, commenced an action against the bank, Nixon, and Tasker claiming to have the mortgages transferred to them as security for £700 and interest. At the trial Nixon failed to prove the execution of the transfers of the mortgages to Tasker and himself, and by the judgment it was declared that the plaintiffs were entitled to a charge in respect of the sum of £700 and interest on the sum of £1,400 secured by the four mortgages, and that the sum of £700 had priority over the claim of the Tasker trustees, but was subject to the charge in favour of the bank. On the 25th of April, 1900, the bank commenced an action against the trustees of the Tasker settlement, and claimed priority to the charge of the defendants, who counterclaimed priority over the bank. At the trial the defendants succeeded in proving the execution of the transfer, and by the judgment the bank's action was dismissed, and it was declared that the defendants had priority over the plaintiffs. Upon the hearing of the appeals further evidence was, by leave of the court, adduced as to the execution of the transfers, with the result already stated.

Although a mortgage debt is a *chose in action*, yet where the subject of the security is land the mortgagee is treated as having an interest in land, and priorities are governed by the rules applicable to interests in land and not by the rules which apply to interests in personalty. The reason is stated by Sir William Grant in *Jones* v. *Gibbons*, 9 Ves. 407, at p. 410; see also *Wilmot* v. *Pike*, 5 Hare, 14. Leaseholds are real estate for the purposes of this rule: *Wiltshire* v. *Rabbits*, 14 Sim. 76; *Union Bank of London* v. *Kent*, 37 W. R. 364, 39 Ch. D. 238. In dealing, therefore, with these appeals, the first point to be determined appears to be the state of the legal title. It must now be taken that previously to the 14th of August, 1897, this was vested in Tasker and Nixon as joint tenants. On that day Tasker executed the instrument already stated, and it becomes necessary to ascertain the legal effect of it. As has been pointed out it is in a form adapted for use in a particular class of cases. It is intended to be employed with the view of creating a security on property in which the estate and interest of the person giving the security may differ widely in different cases. This accounts for the generality of the language found in the operative part. In construing that language great weight must be attributed to the title disclosed by the scheduled deeds which form the basis of the whole instrument. In the present case those deeds showed a good legal title in Tasker, and in my judgment Tasker intended to declare himself a trustee of that legal estate, and to authorize the officers of the bank as his attorneys to execute a proper mortgage of it to the bank. The case of *Fausset* v. *Carpenter*, 2 Dow. & Cl. 232, might appear at first sight to be an authority for a different conclusion, but regard being had to the criticisms to which that case was subjected by Lord St. Leonards in *Drew* v. *Norbury*, 3 Jo. & Lat. 267, at p. 284, and by Lord Hatherley in *Carter* v. *Carter*, 3 K & J. 617, 6 W. R. Ch. Dig. 48. it must be taken to have been decided on its own peculiar circumstances, which differ widely from those now under consideration. In *Drew* v. *Norbury* Lord St. Leonards states the general rule applicable in such cases. In my judgment the deed of the 5th of April, 1898, operated in execution of the authority conferred on the officers of the bank by the deed of the 14th of August, 1897, and is effectual to the same extent as if it had been executed by Tasker himself, and consequently the joint tenancy subsisting between Tasker and Nixon was thereby severed, and an undivided moiety of each of the legal terms created by the mortgages became vested in the bank, the other moiety remaining vested in Nixon.

It is next to be considered to what extent the bank and Nixon can avail themselves of the legal titles which have thus become vested in them. A legal mortgagee who makes an advance without notice of a prior equitable title is a purchaser for value without notice. From such a purchaser a court of equity takes away nothing which he has honestly acquired: *Pilcher* v. *Rawlins*, 20 W. R. 281, L. R. 7 Ch. App. 259; *Heath* v. *Crealock*, 23 W. R. 95, L. R. 10 Ch. App. 22, at p. 33. Further, an equitable mortgagee who has made an advance without notice of a prior equitable title may gain priority by getting in the legal title, unless there are circumstances which make it inequitable for him so to do. One case which falls within this exception is where the mortgagee has notice that the legal title at the time when it is so got in is held on an express trust in favour of persons who assert a claim to the property: *Saunders* v. *Dehew*, 2 Vern. 271; *Allen* v. *Knight*, 5 Hare, 272, 11 Jur. 527; *Sharples* v. *Adams*, 11 W. R. 450, 32 Beav. 213; *Taylor* v. *Russell*, 41 W. R. 43, [1892] A. C. 244, at p. 259. Now in the present case the legal title was not got in by the bank by the instrument of the 14th of August, 1897. No doubt Tasker thereby declared himself a trustee of the mortgages for the bank, but the legal title such as it then existed remained undisturbed, and Tasker had previously made himself along with Nixon an express trustee of the mortgages for the beneficiaries under the Tasker settlement to the full extent of £1,400; and of this and Nixon's claim the bank had notice before the 5th of April, 1898. In my judgment it was inequitable in the bank to get in the legal title against Nixon or the Tasker beneficiaries; and against neither ought the bank to be allowed to gain priority by virtue of it.

It was contended that the deed of the 5th of April, 1898, related back to the 14th of August, 1897, and the cases of *Cooke* v. *Wilton*, 9 W. R. 220, 29 Beav. 100, and *London and County Bank* v. *Goddard*, 45 W. R. 310, [1897] 1 Ch. 642, were cited; but in neither had the equitable mortgagee notice of any express trust affecting the legal title at the time when it was got in. Further, these cases do not support the proposition for which they were cited, and in the absence of authority the contention appears to be wholly without foundation.

As regards Nixon the cases of *Thorndike* v. *Hunt*, 7 W. R. 246, 3 De G. & J. 563, and *Taylor* v. *Blakelock*, 34 W. R. 175, 32 Ch. D. 560, establish that he must be treated as a purchaser for value on the ground that by accepting the transfers he gave up a right of action which he had against Tasker for the £1,400. It is not alleged that Nixon had himself any actual knowledge or notice of the appropriation made in 1889 by Tasker in favour of the beneficiaries under the Brockman settlement,

but it is contended that he had constructive notice thereof either personally or through Tasker, who, it is said, acted as solicitor in the preparation of the transfers. In this respect the case is governed by the Conveyancing Act, 1882, s. 3. That section has been to some extent judicially construed in *Bailey* v. *Barnes*, 42 W. R. 66, [1894] 1 Ch. 25, where Lindley, L.J., says, "Ought here does not impose a duty or obligation; for a purchaser need make no inquiry. The expression 'ought reasonably' must mean as a matter of prudence having regard to what is usually done by men of business under similar circumstances" Now, applying the Act to the present case as regards sub-section 1 by means of what possible inquiries or inspections on the part of Nixon would the prior appropriation have come to his knowledge? All that could be suggested by counsel in argument was an inquiry whether the mortgages were subject to any incumbrances; but it is now settled that a vendor is not bound to answer such a general inquiry: *In re Ford & Hill*, 27 W. R. 371, 10 Ch. D. 365. As regards sub-section 2 though the appropriation was perfectly well known to Tasker still it did not come to his knowledge as Nixon's solicitor, nor in the same transaction with respect to which the question of notice arises. Again, if Nixon had employed an independent solicitor what inquiries or inspections ought reasonably to have been made which would have brought the appropriation to his knowledge? It is said that an independent solicitor ought to have called for an abstract of Tasker's title, and that such an abstract would have disclosed the appropriation. But I fail to see why in the case of a title so simple an abstract should be called for, or if called for it would have disclosed the appropriation.

In support of the contention that Nixon had notice of the appropriation were cited two cases: *Freeman* v. *Laing*, 48 W. R. 9, [1899] 2 Ch. 355; *Boursot* v. *Savage*, 14 W. R. 565, L. R. 2 Eq. 134. But the former was decided on the law relating to tacking, and the latter was decided before the Conveyancing Act, 1882, which has introduced very considerable modifications. In my opinion Nixon became purchaser for value without notice. It was not contended that he has been guilty of anything which would deprive him of priority, nor, having regard to *Northern Counties Insurance Co.* v. *Whipp*, 32 W. R. 626, 26 Ch. D. 482, could such a contention succeed.

The result therefore is that as regards the undivided moiety legally vested in Nixon he and his beneficiaries under the Tasker settlement are entitled to priority over both the bank and the beneficiaries under the Brockman settlement, while as regards the undivided moiety legally vested in the bank the latter gains no priority as against Nixon and his *cestuis que trust*.

I next proceed to consider the order of priority between the purely equitable titles. This is governed by order of time, unless there has been some act or omission by the owner of the prior equitable title such as to cause his title to be postponed. The rules which govern the postponement of a prior legal estate to a subsequent estate were laid down in *Northern Counties Insurance Co.* v. *Whipp*, already referred to. In *Taylor* v. *Russell*, 39 W. R. 81, [1891] 1 Ch. 8, Kay, J., carefully considered the law with respect to the postponement of a prior to a subsequent equitable interest and came to the conclusion that the same rules as those laid down in *Northern Counties Insurance Co.* v. *Whipp* applied to the case before him. On appeal his lordship's decision was reversed on another ground, and the House of Lords, 41 W. R. 43, [1892] A. C. 244, affirmed the Court of Appeal on the same ground, but Lord Macnaghten took occasion to remark that he was not satisfied of the correctness of the view taken by Kay, J. I am not aware that the precise point considered by Kay, J., has since arisen for decision and I do not think it necessary to decide it in the present case. The ground of postponement relied on in this case is that the prior equitable claimants allowed Tasker to remain in possession of the deeds, including the mortgages to himself. There are undoubtedly cases (*Waldron* v. *Sloper*, 1 Drew. 193; *Farrand* v. *Yorkshire Banking Co.*, 37 W. R. 318, 40 Ch. D. 182), where an equitable mortgagee who has allowed his mortgagor to retain or regain possession of the title deeds has been postponed to a subsequent equitable incumbrancer who has obtained possession of the deeds. But where the relationship between the equitable incumbrancer and the person in possession of the deeds is not merely that of mortgagee and mortgagor but is of a fiduciary nature, such as *cestuis que trust* and trustee or client and solicitor, there is a great body of authority to show that the equitable incumbrancer is not to be deprived of his priority by reason of the improper acts of the person intrusted with the deeds, so long at all events as the incumbrancer had no grounds to suppose that there was any want of good faith on the part of the custodian of the deeds. The leading authorities on this point are *Cory* v. *Eyre*, 1 De G. J. & S. 149; *Shropshire Union Railway Co.* v. *Reg.*, 24 W. R. 709, L. R. 7 H. L. 496; *In re Vernon Ewens & Co.*, 35 W. R. 225, 33 Ch. D. 402. The same principle was applied in *Carritt* v. *Real and Personal Advance Co.*, 37 W. R. 677, 42 Ch. D. 263, and I think it must also be applied here.

So far as the title of Nixon or the beneficiaries under the Tasker settlement is equitable only, he and they were entitled to rely on Tasker for the performance of his duty as trustee. In my judgment the bank is not entitled to say that the Tasker trustees have lost priority in respect of their equitable title. The same principle applies as between the Tasker trustees and the Brockman trustees so far as the title of the former is equitable only. It was contended on behalf of the Brockman trustees that as between them and the Tasker trustees they are prior in point of time, and although they may not be entitled to priority as between themselves and the bank, they ought to the extent of their charge to be allowed to stand in the place of the Tasker trustees in accordance with the rule applied to the priority of judgment creditors in *Benham* v. *Keane*, 10 W. R. 67, 3 De G. F. & J. 318, and treated in *In re Wyatt, White* v. *Ellis*, 40 W. R. 177, [1892] 1 Ch. 188, at p. 208, as applicable between incumbrancers. Now a purchaser for value without notice is entitled to the benefit of a legal title not merely where he has actually got it in, but where he has a better right to call for it: *Wilkes* v. *Bodington*, 2 Vern. 599. It has accordingly been held that if a purchaser for value takes an equitable title only, or omits to get in an outstanding legal estate, and a subsequent purchaser for value without notice procures at the time of his purchase the person in whom the legal title is vested to declare himself a trustee for him, or even to join as party in a conveyance of the equitable interest, although he may not formally convey or declare a trust of the legal estate, still the subsequent purchaser gains priority: *Maundrell* v. *Maundrell*, 10 Ves. 246, at p. 270; *Stanhope* v. *Verney*, 2 Eden 81; *Wilmot* v. *Pike*, *Rooper* v. *Harrison*, 2 K. & J. 86, at p. 106, 4 W. R. Ch. Dig. 86. Here Nixon on being appointed a trustee of the Tasker settlement insisted that the mortgages for £1,400 should be legally transferred to himself and Tasker as trustees of that settlement. Tasker was not merely a formal but an actual conveying party to the instruments by which this was done. By accepting the transfers Nixon gave

up a right of action which he had against Tasker and became a purchaser for value without notice of any prior incumbrance. There was no suspicion attaching to Tasker at this time, and it would have been a breach of trust to vest the legal title to these securities in any persons other than Tasker and Nixon, the duly constituted trustees of the Tasker settlement. Everything, therefore, was done that could be done to deal with the legal title in such a way that the securities should be vested in the proper persons, and be held on behalf of the Tasker beneficiaries. The position of the Brockman trustees and beneficiaries is very different. They got no declaration of trust from Tasker nor any assignment of the legal title. None of them gave up any right whatever against Tasker or gave other valuable consideration for what Tasker did. The securities were never legally vested in the Brockman trustees as such, and the appropriation made was the voluntary act of Tasker and of Tasker alone. In my judgment the Tasker trustees have acquired a better right than the Brockman trustees to call for the legal title which prior to the 5th of April, 1898, was vested in Tasker. The result is that the Tasker trustees are entitled to the mortgages in priority to the other claimants.

Appeal dismissed.

Solicitors, *Harries, Wilkinson, & Raikes; Freeman & Son; White, Borrett, & Co.*, for *A. D. & L. J. D. Brockman*, Folkestone.

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) Feb. 6, 7.

In re DE FALBE.
WARD *v.* TAYLOR. (*a.*)

Fixtures—Tenant for life and remainderman—Tapestry.

Trade fixtures and articles affixed to the freehold for purposes of ornamentation are exceptions to the rule, "Quicquid plantatur solo, solo cedit," *equally in the case of a landlord and tenant and in the case of a tenant for life and remainderman.*

Where tapestry had been affixed by a tenant for life to the walls of a mansion-house it was held that the affixing was only for the better enjoyment of the tapestry, and not for the purpose of increasing the value of the freehold. Consequently, the legal personal representatives of the tenant for life were entitled to the tapestry as against the remainderman.

D'Eyncourt *v.* Gregory, 15 *W. R.* 186, *L. R.* 3 *Eq.* 382, *and* Norton *v.* Dashwood, 44 *W. R.* 680, [1896] 2 *Ch.* 497, *commented on.*

This was an appeal from a decision of Byrne, J.

The question in dispute was as to the ownership of certain valuable tapestries which, at the time of the death of the late Madame de Falbe, were in the mansion-house at Luton Hoo, of which she had been tenant for life.

The tapestries in question consisted of ten pieces, three in the hall and seven in the large drawing-room of the mansion-house.

The three pieces in the hall were hung in a manner similar to that adopted for hanging heavy pictures and pier glasses, and could be removed without injury to the wall. The seven pieces in the drawing-room were fixed as follows: Small strips of wood were fixed in the wood on the walls by means of nails and screws, and over these wooden strips canvas was stretched and nailed, and the tapestries were fastened to these strips and over the canvas by very small tacks which did not penetrate the strips.

After the tapestries were put up, white and gold mouldings made for the purpose were fixed round the strips of wood by thin wire nails and screws some of which were long enough to penetrate, and did in fact penetrate the face of the wall.

The tapestries formed an essential feature of the general decoration of the room; and though the ceiling and frieze remained as before, the rest of the walls of the room were altered and decorated so as to suit the tapestries.

On the death of Madame de Falbe these tapestries were claimed on the one hand by those now interested in the mansion-house as part of the settled estates, and as representing the freehold interest, and on the other hand by the executors and residuary legatees of Madame de Falbe.

Byrne, J., came to the conclusion that the three pieces of tapestry in the hall were not attached to the wall or fabric of the house in such a way as to constitute permanent additions to the mansion-house, and that those three pieces were therefore chattels belonging to the estate of Madame de Falbe. As to the seven pieces in the drawing-room, his lordship held that, from their position, importance, and the essential part they played in the decoration of the room, they had been in effect annexed to the mansion-house, and passed with it to the persons interested in the settled estates.

The residuary legatees and legal personal representatives of Madame de Falbe appealed as to the tapestries in the drawing-room. There was no appeal as to the tapestries in the hall.

Norton, K.C., and *Wilkinson*, for the residuary legatees.

Howard, for the legal personal representatives of Madame de Falbe.

Levett, K.C., and *Methold*, for the remainderman.

Norton, K.C., replied.

The following cases were referred to in the course of the argument: *D'Eyncourt* v. *Gregory*, 15 W. R. 186, L R. 3 Eq. 382; *Norton* v. *Dashwood*, 44 W. R. 680, [1896] 2 Ch. 497; *Hill* v. *Bullock*, 45 W. R. 587, [1897] 2 Ch. 55; *Lawton* v. *Lawton*, 3 Atk. 13; *Beck* v. *Rebow*, 1 P. Wms. 93; *Cave* v. *Cave*, 2 Vernon 507; *Lord Dudley* v. *Lord Warde*, Amb. 113; *Squier* v. *Mayer*, Freeman's Chanc. Rep. 249; *Harvey* v. *Harvey*, 2 Strange 1141; *Elwes* v. *Maw*, 2 Smith's L. C. 183; *Holland* v. *Hodson*, 20 W. R. 990, L. R. 7 C. P. 328; *Monti* v. *Barnes*, *ante*, p. 147, [1901] 1 Q. B. 205; *Bulkeley* v. *Lyne Stephens*, 11 Times L. R. 564.

RIGBY, L.J.—The question arises in the present case between a tenant for life of an estate, including a mansion-house, and the remainderman. The tenant for life being dead, her claim is represented by her executors, but it is not in any sense a case between heir and executor as that is understood in the authorities. It is a question between the representatives of the tenant for life, who must be taken to be in the same position as the tenant for life herself would have been, and the remainderman. With reference to the question of fixtures, we all know that there was a time when everything fixed to the freehold was held to go with the freehold, and it was only by slow degrees that that unbending rule was modified. For instance, in *Herlakenden's case*, 4 Co. 62, hangings and wainscot, although fastened in such a way that they might be removed, nevertheless went with the freehold, but in modern times there have come to be important exceptions to that rule; one being in favour of a person who has put up what are

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

now called trade fixtures—that means removable fixed things for the purposes of trade, entitling him to remove them, and that exception is not confined in any way to a case of landlord and tenant, meaning thereby the owner of the immediate reversion and a tenant for years only. That exception extends equally, as is shown by *Dudley* (*Lord*) v. *Warde* (*Lord*), to the case of a tenant for life and the person who comes into possession of the estate upon his death. There is another equally important and equally well-established exception from the rule in the case of articles which are fixed to the freehold, not with the object of enhancing the value of the freehold, but for the purposes of ornamentation. Objects so fixed are removable, and counsel for the respondent is obliged to allow that, in the case, for instance, of chimney glasses, it would not be only as between landlord and tenant for years that the exception would apply, but as between a tenant for life and a person in remainder or reversion who takes the estate subject to the life tenancy. Now, if that exception as to articles affixed for the purpose of enjoyment or ornamentation is to apply in one case—that is to say, in the case of a chimney glass, I cannot see why the same exception is not to be of general application, and I shall assume that it is.

Then the question comes to this, whether these tapestries which are now in question were so affixed as to become part of the house, or so affixed as to remain removable at the will and pleasure of the person who affixed them, or failing her doing so during her lifetime, by her executors after her death? Now a great deal of time has been spent on the point as to how these tapestries were affixed to the freehold. It is said they are as firmly fixed as they could be. I pass that by. They were quite as firmly affixed, I dare say, as they would be by a person who intended them to remain there always, but I do not think that is of much importance. The courts in such cases fortunately are not given to inquiries whether screws which fix an object to a wall are one inch or two inches or three inches long, or whether there were half-a-dozen or a dozen of them, or whether they penetrated into the mortar of the wall or did not. In all cases of this kind it appears that the object, whatever it is that is affixed for the purposes of ornamentation, is affixed, but then comes the exception which says it may be removed. Now, numerous cases have been cited, and amongst others *D'Eyncourt* v. *Gregory*, which is a decision of Lord Romilly, and *Norton* v. *Dashwood*, which is a decision of Chitty, J. As to the first case I have no hesitation in saying that I have great difficulty in accepting it, owing in part to what I consider the very inconclusive reasoning which is used by the learned judge in support of his decision, because he talks about paper and panelling and other matters of that kind as if they really concluded the case. Paper, he says, is part of the wall, and so, of course, it is. Then he says it cannot be taken away. That I question altogether. If there be a paper which a tenant for life does not like, I conceive that the right of the tenant for life is to take away that paper and substitute another, and if it is not worn out a tenant for life is under no obligation to wait until the first paper is worn out, but if it becomes distasteful or displeasing, or if another paper pleases the tenant for life better, he may scrape away the earlier paper and put on another one which he likes better. With regard to the panelling I am by no means satisfied that the law has changed since Lord Hardwicke laid it down in *Lawton* v. *Lawton* that whatever originally might have been the rule about wainscot fixed with screws, in the year 1743, the time when he was speaking, it had become recognized as removable. I might go on through other instances which were cited by Lord Romilly, especially, for example, one of them about a grindstone—that is, the upper loose stone. He considered that applicable—I do not consider it applicable at all. I consider that the finding as to tapestries in that case cannot be maintained or supported unless there was some proof (which I do not see in the report of the case) that the house was fitted to the tapestry rather than the tapestry to the house, and in that way, although I do not say it would even then be clear, it might be possible to support the decision by saying that the tenant who affixed the tapestry had shown a plain intention to add it irrevocably and permanently to the house. At any rate I am of opinion that the decision in *D'Eyncourt* v. *Gregory* is not right if it is applicable to the case now before us, and for the purpose of the present case and as far as may be necessary for that purpose I should hold that that case ought to be overruled. Then there is the case of *Norton* v. *Dashwood*. That case is also in its circumstances very different from the present. There tapestries which had for 100 years belonged to and formed part of the decoration of the mansion-house were held under very special circumstances to be attached to the house and not removable. I may say that I am not quite satisfied that those circumstances were sufficient to authorize the finding, but they are, at any rate, very different from the circumstances in the present case. Here we have a tenant for life purchasing a number of tapestries. I think there were seven which are called French tapestries and three which are called Flemish tapestries. The three Flemish tapestries, it is suggested, were of a kind fit to be put into frames without stretching, but the seven French tapestries, according to the evidence of people who understand these things, require to be stretched, and they were chosen to be put up in the drawing-room. [His lordship described what was done, saying that the result was very much in the nature of a picture frame round about each piece of the tapestry, and that he could see nothing to indicate anything else than the natural intention of the owner of beautiful objects to set them up for the purpose of the ornamentation of the room, and continued:] It is said that the tapestries formed part of the wall. I agree in a sense they were part of the wall. They were rigidly affixed to the wall, and no doubt affixed in such a way as in earlier days would have been held to make them inseparable parts of the wall, but the question is whether they were not made fixtures, meaning objects fixed to the wall, which might be removed at the will of the person who fixed them, and I am of opinion they were of the last-mentioned character. I can see no other reason in any one of the things done than the wish of the tenant for life to get beautiful and valuable objects placed in such a position as might please the eye and satisfy her desire for ornament. I see no reason why she should not have the right to take them down. The argument for the remainderman amounts to this: that the moment she had once placed them there she—as well as every one claiming through her — would be absolutely bound to leave them there, and, if the argument is sound, might have been restrained by an injunction from taking down the tapestries on the ground that they were part of the wall and the building. I altogether dissent from any such suggestion. The tenant for life happened to retain them there during her life. It is quite conceivable that she might have fallen in with better specimens of tapestry, and if she had done so I think she would have been entitled at once to remove those which she had already placed there for the purpose of replacing them by others, or she might if she had

been tempted by an enhanced offer have agreed to sell them, and taken them down for the purpose of sale. I do not think the fact that she would first have had to take down the mouldings, and then to undo the fastening by tacks and nails, makes any difference at all. I think she had a perfect right to take them down at any time, and I think that right passed on to her executors. As a matter of fact she made a bequest of these tapestries, and the legatee has appeared here to argue on his own behalf. The executor has also appeared. The executor must be taken to have been supporting the legatee, and I think the pair of them are right. There were one or two other cases cited by counsel for the appellant which I have not taken the time or the trouble to go into because it is not necessary to do so. The case falls within the broad principle that decorative objects—that is, objects set up for the purpose of ornamentation—fall within the exception to the rule that things fixed to the freehold must belong to the owner of the freehold. On that broad ground I wish to decide the case.

VAUGHAN WILLIAMS, L.J.—I entirely agree. The question in this case is a question with respect to the right to remove certain tapestries which have been affixed to the freehold. I do not mean to say, and no one would say, that, as a matter of history, all the cases upon the subject of removability of fixtures are absolutely consistent. They are not. But there is this amount of consistency in the cases: that, starting from the absolute rigid rule *quicquid plantatur solo, solo cedit*, there has been a consistent progress towards relaxation of that rule, and it is impossible, according to my view, to show that there has been ever any substantial period of relaxation. Now, having said that, I wish to add that this is a case in effect between the executors of the tenant for life and the remainderman. I want to state one fact which is really the basis of my judgment. The matter in respect of which this question has arisen is certain tapestries, certain chattels. I have not the very faintest doubt myself upon this evidence that these tapestries or these chattels were affixed to this freehold for the purpose of the enjoyment of these chattels, and in no sense and in no way for the improvement of the freehold. I do not suppose that it would be denied that when one has to deal with the question of fixtures sometimes it becomes a material question to consider the object and purpose of the annexation. That does not mean to consider the motive of the person annexing, but to consider the object and purpose of the annexation to be inferred from the circumstances of the case. That being so, let us see how it is that that question comes to be material. It will not be denied, and has not been denied, in argument that amongst the exceptions from the rigid rule *quicquid plantatur solo, solo cedit* there come two broad exceptions—one, the exception in respect of trade fixtures, the other, the exception in respect of ornamental objects which have been annexed in some way or another to a freehold. Counsel for the respondents in his argument suggested that the latter exceptions did not apply excepting in the case of landlord and tenant. Now here again is one of the instances of the progression of the law, but without considering the relaxation in favour of trade fixtures, about which I have not got to say anything because no such question arises here, with regard to this question of ornamental fixtures it seems to me that the authorities are substantially all one way. We find cases as early as *Squier* v. *Mayer*, which was a case between the executors and the heir, where the exception in respect of ornamental fixtures was applied as against the heir. On the contrary, the heir is always supposed to be the most favoured. I do not consider it necessary to go through the various cases in which that exception has been applied since that time. All I do say is that if the cases are looked at during the whole of the period since *Squier* v. *Mayer* it will be found from time to time that this exception or relaxation in respect of ornamental fixtures has been recognized, and also the authorities seem to me to make it clear that it has been recognized in cases other than cases as between landlord and tenant. That being so, it is impossible to say that the only matter to be taken into consideration is the *quantum* of fixture—how much and in what manner the chattel has been affixed to the freehold. No one, of course, would say that that is not a material fact to be taken into consideration. There may be such an incorporation of the chattel with the freehold that it might be absolutely impossible to deny that the chattel has become part of the freehold and absolutely impossible to apply these exceptions. Therefore the *quantum* of fixture is important, but that is not the only fact that has to be taken into consideration; one has to ask oneself, Is there any more fixing here than was necessary for the enjoyment of the chattel? If you have a heavy object like a heavy ormolu clock and you fix it to the wall of some room, of course you may have to use, in order to make the thing safe, very substantial fittings. You may have to drive an iron bar right through the wall of the house, and to rivet it at the back. You may have to apply a sort of fixing that in many cases would be conclusive of incorporation of the chattel in the freehold; but that inference does not arise the moment you come to the conclusion that that fixing which was done was a fixing which was absolutely necessary for the enjoyment of the chattel. That seems to me the right conclusion in this case. The tenant for life has tapestries—expensive tapestries—which she has bought and wishes to enjoy, and the mode of enjoying them necessarily is by hanging them on the walls of the house, and she wishes to hang them in such a way that they shall not be torn. To drive nails through the tapestry into the wall would spoil the tapestry and make indelible marks all round the edges of the tapestry. That is avoided by putting laths or thin pieces of wood against the wall and then affixing the tapestry to those thin pieces of wood by small nails which do not tear the tapestry, whereas the use of nails to affix the tapestry to the wall would involve the use of much bigger nails which would tear the tapestry. In my judgment it is perfectly obvious that everything which was done can be accounted for as being absolutely necessary for the enjoyment of the tapestry, and when I come to that conclusion that is an end of the case so far as my judgment is concerned, notwithstanding the remaining objections that counsel urged, whether the objection went to denying the exception in favour of ornamental tapestries or to denying its application as between tenant for life and remainderman. I think when one has fairly arrived at the conclusion that there was only such a fixing as was necessary for the enjoyment of the chattels one is bound to decide the case in favour of the executor of the tenant for life.

I want to say one word about *D'Eyncourt* v. *Gregory* and *Norton* v. *Dashwood*. Speaking for myself I do not find that either Lord Romilly or Chitty, J., say one word inconsistent with the principle which I have sought to apply in arriving at this judgment. Lord Romilly expressly says in arriving at his conclusion that it is an inference which he draws from the particular facts of that case, and he says, "Unquestionably in coming to these conclusions I have not done so with any degree of confidence, or even of complete satisfaction to myself." (He is there speaking of questions of fact.) "The

evidence, minute and clear as it is, cannot give the same effect that a personal examination might do, but even on a personal examination I should doubt whether I could come to a more accurate conclusion. The best conclusion I can come to with regard to the articles I have enumerated is that they seem to me to belong to the freehold and to be inseparable from it." That is to say, Lord Romilly concluded from all the facts of that case that the intention to be inferred from the fact was that the tapestries were affixed as they were to the wall for the purpose of the improvement of the freehold, and not for the purpose of the enjoyment of the chattels. It seems to me that *Norton* v. *Dashwood* is capable of precisely the same explanation.

STIRLING, L.J.—I am of the same opinion. The question in substance arises between the tenant for life, Madame De Falbe, and the remainderman under her former husband's will. Madame De Falbe, being tenant for life under that will, became possessed of certain tapestries worth, it is stated, several thousands of pounds, and she proceeded to affix them to the walls of the drawing-room of a house of which she was tenant for life. She has died, and the tapestries remaining so fixed, the question has arisen between her representatives, who it is admitted stand in the same position as herself, and the person who was entitled in remainder under the husband's will. The question is whether those tapestries still form part of the estate of Madame De Falbe or whether they pass to the remainderman as annexed to the freehold. Undoubtedly the old rule of common law was that whatever became affixed to the freehold passed to the owner of the freehold, but modifications have been introduced from time to time into that rule. The first point which deserves consideration is, what is the ground on which that old simple rule has been modified? Now, I find in a case which I have before me a statement on that subject in the judgment given by Martin, B., in the Court of Exchequer, which expresses so exactly what I desire to say that I prefer to read his judgment rather than use any words of my own. I refer to the case of *Elliott* v. *Bishop*, 10 Exch. 496, at p. 522. [His lordship read the judgment from "The old rule laid down in the old book is," to "of course saleable at the will of the person who has annexed them."] It will be observed there that the learned judge says the rule has been relaxed in favour of tenants both for life and for terms of years, and that the objects to which the rule relates are those which have been affixed to the freeholds for the more convenient or luxurious occupation of them or for the purposes of trade. It is not disputed that as between landlord and tenant chattels annexed to the freehold for purposes of trade have long been included within this exception to the rule. It cannot be disputed that in recent years, whatever may have been the case in former times, objects which have been affixed by way of ornament to the freehold as between landlord and tenant fall within the same category. That point is considered in this very case of *Elliott* v. *Bishop*, and forms the subject of an elaborate judgment by Coleridge, J., in an appeal in that case reported in 11 Exch., at p. 113. There the court came to the clear conclusion, citing a judgment which has been already referred to of Dallas, L.C.J., in *Buckland* v. *Butterfield*, 2 Bro. & Bing. 54, in these terms: "In the progress of time this rule has been relaxed" —that is, the old rule *quic quid plantatur solo, solo cedit*—"and many exceptions have been grafted on it. One has been in favour of matters of ornament, as ornamental chimney-pieces, pier-glasses, hangings, wainscot fixed by screws only, and the like." So that it is clearly established that as between landlord and tenant ornamental objects are included in the exceptions. Now is there any reason why, if the ornamental objects are included in the exceptions as between landlord and tenant, they should not be included in the exceptions as between tenant for life and remainderman? If we look at the origin of the rule as stated in the passage which I have just read it seems to me there can be no reason for such a distinction. The origin of the rule is stated to be to prevent the injustice of denying the tenant the right to remove them at his pleasure and so practically forfeiting expensive property to the owner of the freehold. If that be a good ground as between landlord and tenant I fail to see why it is not a good ground as between tenant for life and remainderman. So far as authority goes we find the matter in this position: Lord Hardwicke in the year 1751 dealing with a case of trade fixtures—namely, *Dudley* v. *Warde*, said, "The case being between executors of a tenant for life and a remainderman is not quite so strong as between landlord and tenant, yet the same reason governs it." Therefore as regard trade fixtures he treats the rule as being the same in the case of landlord and tenant and as between tenant for life and remainderman. It seems to me that in a case of earlier date—namely, *Laughton* v. *Laughton*, decided in 1743, which was also a case of trade fixtures, Lord Hardwicke refers to the case of ornamental fixtures and treats them as really being governed by the same rule. He points out that in the old cases, and as long ago as Henry VII.'s time, the court construed furnaces to be part of the freehold, but he goes on, "Since that time the general ground the courts have gone upon of relaxing this strict construction of law is that it is for the benefit of the public to encourage tenants for life to do what is advantageous to the estate during their term. What would have been held to be waste in Henry VII.'s time, as removing wainscot fixed only by screws and marble chimney-pieces, is now allowed to be done." That I read as referring to ornamental objects and as showing that Lord Hardwicke's opinion was that ornamental fixtures stood in the same position as trade fixtures both as regards the position between landlord and tenant and tenant for life and remainderman. It appears to me, therefore, that both on principle and authority the exceptions from the rule extend as well to ornamental fixtures as to trade fixtures. Now what are the objects as to which the dispute arises here. Tapestries which we can see from the photographs before us are plainly of an ornamental character, and therefore it appears to me that the rule applies in this case. That goes a long way, if not the whole way, to decide the case, but I do not desire to rest it entirely on that. A case which is less favourable to the right to remove is the case between heir and executor, or between vendor and vendee, or between mortgagor and mortgagee. In those cases no question of injustice arises. There is no injustice and no forfeiture of any property when an owner in fee affixes his own chattels to the freehold. Therefore there is no necessity for introducing any relaxation into that rule at all. But even in such cases the question arises as between heir and executor as to whether or no things which are originally chattels have or have not become part of the freehold. And as is pointed out in *Holland* v. *Hodgson*, the question as to what constitutes an annexation sufficient to make the property part of the land is one which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention—namely, the degree of annexation and the object of the annexation. As regards the degree of annexation, that in some cases is material, as is

pointed out by the learned judge in that case, who gives various examples in which the degree of annexation may be material. As regards the object, the main question which has to be considered is whether the object of the annexation is to improve the freehold to which the annexation is made, or whether it is for the more complete and better enjoyment of the chattel itself. Here, as I have said, the chattels to be enjoyed are certain pieces of tapestry. They must, to be enjoyed, be made available for being seen by the eye, and in order that they may be properly seen they must be put in a large room, being large pieces of tapestry. Madame De Falbe put them into the best room in the house—namely, the drawing-room. She affixed them no doubt to the walls of the room, but she did it in such a way that the tapestries might be removed without any structural damage, by which I mean not that there may not be some injury done to the plaster and so forth, but that nothing is required to be altered in the structure of the house. Nor was anything in the structure of the house really altered when they were put up, but there were certain additions made in the shape of panels and canvas stretched upon them, painted or dyed a suitable colour for the enjoyment of the tapestries so that the accompaniments might not be an eyesore to the beholder. Looking at the evidence as to the mode in which they were affixed and the position in which they were placed, and what was done in reference to putting them up, I feel no doubt that everything that was done here was done for the better enjoyment of the chattels, and not to make an addition to the extent of many thousands of pounds to the value of this mansion-house. I come, therefore, to the same conclusion at which my learned brothers have arrived, and I think the appeal ought to be allowed.

Solicitors, *Hadden, Woodward, & McLeod; Payne, Shaw-Mackenzie, & Lake; Rowcliffes, Rawle, & Co.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } March 5, 6, 11, 18.

BELMORE, COUNTESS OF *v.* KENT COUNTY COUNCIL. (*a.*)

Highway—Land alongside road—Evidence of user—Presumption.

An uninclosed strip of land, of varying breadth, adjoined a highway for the space of 300 yards. The road authorities had made no use of it, but the owner of the adjoining land had, as far as living memory went, exercised acts of ownership over it.

Held, that there was no presumption of dedication of the strip to the public; and even if there had been any such presumption, it was rebutted by the surrounding circumstances and by the evidence.

The question in this action was whether the public had any, and if so what, rights over an uninclosed strip of land adjacent to the metalled road leading from Sevenoaks to Offord.

The road was not laid out under any Inclosure Act.

It seemed to be an ancient highway which was kept in repair under a turnpike trust from the middle of the 18th century until a few years ago, when the trust expired.

It was now a main road under the control and management of the Kent County Council.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

The defendants had begun to deposit rubbish and lay a drain along the strip, for the purpose of rendering it suitable for public use. The strip lay on the west side of the road. It was about 300 yards long, and about 50 feet wide at the broadest part, tapering off to nothing at each end. The strip was not part of the waste of the manor. The land adjoining the strip on the west was a farm, of which the plaintiff, the Countess of Belmore, was tenant for life in possession, the co-plaintiff Kipping being her tenant. The farmhouse and farm buildings stood a short distance to the west of the strip. Pawley, who occupied the farm from 1865 to 1870, constructed a cartway with a drain alongside from the high road across the strip, and a similar cartway had since been made by Kipping. The swamp had by this means been partly drained, and the tenants had cut willows and rough grass thereon. There was no evidence that any vehicle ever went along the strip, but occasionally foot-passengers walked on its margin along the high road.

Eve, K.C., and *Wace*, for the plaintiffs.

Vernon Smith, K.C., and *Church*, for defendants.

COZENS-HARDY, J., found on the evidence that as far as living memory went the plaintiffs or their predecessors in title had used and enjoyed the strip in such a manner, and to such an extent, as the nature of the strip permitted, and had exercised acts of ownership inconsistent with public rights. He would not regard the action of the highway authorities in occasionally placing a heap of stones or road scrapings on the west side of the high road instead of on the east side, where they were usually placed, as of any real importance. Even if the occupier did not protest, the proper inference would be that it was permissive. Upon the whole the evidence was insufficient for the purpose of proving dedication of the strip as a highway by user. The defendants, however, asserted that there was a presumption of dedication to the public quite up to the ancient fence, and that there was no justification for limiting the dedication to that portion of the high road which was metalled, even though highway rights had not been exercised beyond the metalled roadway.

The learned judge continued: On this point I have derived assistance from the judgments of Channell, J., and of the Court of Appeal in *Neeld v. Hendon Urban District Council*, 81 L. T. Rep. 405, 48 W. R. Dig. 67. Lord Russell of Killowen says at p. 409: "It seems to me very difficult to give assent to such a general proposition as this, that under all conditions where you find a metalled road bordered by unmetalled margins, and beyond the margins by hedges, there is an invariable presumption that all the space between the hedges is highway. The question whether such a space is all highway would depend to a great extent, I think, on many other circumstances. Such, for instance, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. These are all circumstances which should be taken into account before any presumption of law can arise as to the width of the highway. It seems to me that it is not safe to say, as a general proposition, without knowing the condition of each particular case, that in such a case as I have mentioned all the space between the hedges is part of the highway. It is often impossible to discover the exact circumstances under which a fence has been erected upon any particular spot. The fence may have been put there because there was already a sort of natural boundary, or it may be in some cases that the person who made the inclosure

wished to leave a margin of ground for the use of the public if at any time the road should become founderous. But even in the latter case I doubt whether it would be right to say that a margin left by the landowner outside a fence for that purpose is necessarily dedicated by him as a highway for all time."

Now, applying the principles laid down by the late Lord Chief Justice, I think there is no presumption of dedication up to the old fence, or that, if there is any such presumption, it is rebutted by the surrounding circumstances and by the evidence. The only difficulty I have felt is as to the margin. But upon reflection I do not see my way to hold that it is part of the highway unless every highway passing through an uninclosed country must, as a matter of law, be deemed to include a certain space on each side of the metalled road.

I am satisfied that the margin has been used only occasionally and by a few persons, and only to such an extent and in such a manner as was inevitable by reason of the absence of any fence or other obstacle. Such user is too indefinite to form the foundation of a public right, or to establish a dedication as part of the highway. I may add that even if the public have rights over the margin, but not beyond, the acts of the defendant council cannot be justified. I must therefore make a declaration and grant an injunction in terms of paragraphs 1 and 3 of the claim, and the defendants must pay the costs of the action.

Solicitors for the plaintiffs, *Paterson, Snow, Bloxam, & Kinder.*

Solicitors for the defendants, *Prior, Church, & Adams.*

Chan. Div. } Farwell, J. } Feb. 28; March 1.

STEVENS *v.* CHOWN.
STEVENS *v.* CLARK. (*a.*)

Market — Statutory remedy — Construction of Act of Parliament—Jurisdiction of the High Court—Injunction.

Where there is a liability existing at common law which is re-enacted by statute with a special form of remedy, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law.

Wolverhampton New Waterworks Co. *v.* Hawkesford, 7 *W. R.* 464, *followed.*

Where a remedy in Chancery is wider than the old common law remedy, the Court of Chancery has jurisdiction to grant an injunction, unless the statute deprives it of such jurisdiction.

The enactment of special penalties or remedies by a statute does not exclude the jurisdiction of the High Court unless it is so expressly provided.

Summons.

These were actions for an injunction to restrain the defendants from selling within the parish of Sidmouth any articles, commodities, or things usually sold in public markets, except in accordance with the provisions of the following Acts—one of 1839 entitled "An Act for maintaining and regulating the market in the parish of Sidmouth, in the county of Devon" (2 & 3 Vict. c. lxxxi.), and a subsequent Act of 1846 (9 Vict. c. xlviii.).

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

The case came before the court on a point of law to determine whether the High Court had jurisdiction.

The Act of 1839, section 6, provided: "If any person holding, using, or in any manner occupying any of such buildings, sheds . . . or stations as aforesaid, or selling, or offering, or exposing to sale any butchers' meat or any other goods . . . or things in the said market place, or within the said parish of Sidmouth, shall, upon demand thereof made by the agent . . . or other person so authorized to receive the said several tolls . . . neglect or refuse to pay, or shall evade the payment of the same . . . or any part thereof, then . . . it shall be lawful for the agent, collector, or other person authorized to receive the same . . . to levy the same by distress and sale of all or any of the goods, articles, and things so offered or exposed to sale, and the distress so taken to sell by auction or private contract immediately on such distress being made . . . or otherwise to summon the party so neglecting . . . or evading such payment before some justice of the peace for the county of Devon, who is hereby authorized and directed to hear and determine such case in a summary way, and to order and enforce such payment, with the costs of such proceedings, as he shall think fit. . . ."

Section 10: "In case any dispute shall arise concerning such distress or sale for recovery of tolls, as authorized by this Act, such dispute shall be settled and determined by any justice of the peace having jurisdiction within the limits of this Act, who shall by warrant . . . summon the parties to appear before him and hear and determine the matter of every such complaint upon oath and make such order therein and award such costs to either party as to him shall appear reasonable, and by warrant . . . cause the money to be awarded and the costs of such warrant to be levied by distress and sale of the goods of the party liable. . . ."

Section 28: "If any person shall find himself aggrieved by any rule . . . made under the provisions of this Act or by any determination or judgment made in pursuance thereof or of this Act . . . it shall be lawful for such person to appeal to any general or quarter sessions of the peace to be held in and for the county of Devon, . . . which court is hereby authorized to hear and finally determine the matter of the said appeal."

Section 31: "Nothing in this Act contained shall extend or be construed to extend to prejudice, hinder, abridge, make void, destroy, lessen, or defeat any right, interest, title, property, power . . . or authority of the lord of the manor of Sidmouth . . .; but that every lord . . . shall and may at all times hereafter enjoy all such rights and privileges (except as aforesaid) in as full . . . a manner, in all respects whatsoever, as he could have done in case this Act had not been made . . ."

The Act of 1846, s. 2, provided: "If any person shall hawk, sell . . . or carry for sale any butcher's meat . . . or other article of provision in any place whatsoever within the parish of Sidmouth, except at the said market-house, before twelve o'clock at noon, nor after that hour without having first so personally attended at the said market-house . . . and there paid the said tolls and duties, every such person shall on conviction before any justice of the peace for the said county of Devon, for every such offence forfeit and pay any sum not exceeding five pounds . . ."

Percy Wheeler (*Macmorran, K.C.*, with him), for the plaintiff, relied on the following cases in support of the jurisdiction: *Goldsmid* v. *Great Eastern Railway Co.*, 32 W. R. 341, 25 Ch. D. 511; *Attorney-General* v. *Aspinall*, 2 My. & Cr. 613; *Earl of Shaftesbury* v.

Russell, 1 B. & C. 666; *Corporation of Birmingham* v. *Foster*, 70 L. T. Rep. 371; *Reg.* v. *Buchanan*, 8 Q. B. 883; and *Cooper* v. *Whittingham*, 28 W. R. 720, 15 Ch. D. 501.

R. B. Phillpotts, for the defendant in the action, in support of his plea to the jurisdiction, cited the following cases: *Wolverhampton New Waterworks Co.* v. *Hawkesford*, 7 W. R. 464, 28 L. J. C. P. 242; *Barraclough* v. *Brown*, [1897] A. C. 615, 46 W. R. Dig. 64; *North London Railway Co.* v. *Great Northern Railway Co.*, 31 W. R. 490, 11 Q. B D. 30; *Hayward* v. *East London Waterworks Co.*, 28 Ch. D. 138, 38 W. R. Dig. 240; *Abergavenny Improvement Commissioners* v. *Straker*, 38 W. R. 158, 42 Ch. D. 83.

FARWELL, J.—A preliminary point of law has been taken, which raises a question as to the jurisdiction of the court. The plaintiff sued in respect of market rights, which were set forth in the two Acts of Parliament that have been frequently referred to in the arguments. It appears from the preamble of the Act of 1839 that an ancient market, with tolls attached to it, had existed at Sidmouth; and in my opinion what that Act really did was to provide for the substitution of a new market for the old market, and of new tolls which included, but did not extinguish, the old tolls, the *maximum* tolls allowed by the schedule to the Act covering the previous tolls, which were thus kept alive. Section 31, which was a saving clause, is also important in this connection. The Act of 1839 is therefore really an Act by way of confirmation of an old market, with specific regulations for the benefit of the owner and the convenience of the individuals using it. It has been argued that the present case fell within the third class of cases mentioned by Willes, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford*. The three classes were as follows: "There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt, or other remedy at common law, to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it." In my opinion the present case falls, not within the the third class, but within the first class of cases mentioned by Willes, J. The statute had not created a liability not existing at common law, but had simply re-enacted the old common law rights—the new tolls included the old tolls, and the remedies were extended to the whole of them. The plaintiff, therefore, could have brought an action at common law. Moreover, even if that had not been so, in my opinion the remedy in Chancery was wider than the old common law remedy, and I do not think that the Court of Chancery could be held to have no jurisdiction to grant an injunction in such a case, unless the statute expressly deprived it of such jurisdiction.

Then it was argued that, unless an action at law would lie, the court could not grant an injunction. I cannot accept that contention in face of what Turner, L.J., has said in *Emperor of Austria* v. *Day*, 9 W. R. 712, 3 De G. F. & J. 217, at p. 253. If it was held that the statute, either by a new creation or by a restatement of former rights, enacted a right of property, that at once gave rise to the jurisdiction of the court, and no special penalties or remedies provided by the statute excluded the jurisdiction of the court, unless it was expressly so stated. Had no penalties been provided in the present statute there would still have been a right of property, which could have been protected. This view of the case was entirely borne out by Sir G. Jessel's judgment in *Cooper* v. *Whittingham*. It had been contended that Chitty, J., had held in *Hayward* v. *East London Waterworks Co.*, that Sir G. Jessel had gone too far in his application of the law, but in my opinion that was not the case, and Sir G. Jessel's judgment is sound law.

The result is that the plea to the jurisdiction is unfounded, and the summons must be dismissed.

Solicitors, *Steavenson & Couldwell; Dunn, Baker, & Baker*, for *Dunn & Baker*, Exeter.

Chan. Div. } Feb. 15.
Farwell, J. }

In re GREENWOOD.
SUTCLIFFE v. GLEDHILL. (*a.*)

Will—Forfeiture—Trustee—Garnishee order.

A testatrix devised and bequeathed her real and personal estate to trustees for sale and conversion, and then upon trust to pay the annual income to her son during his life or "until he does or attempts to do or suffer any other act or thing, or until any other event happens whereby, if the same income were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," in any of which cases it was given over.

A creditor obtained an order garnishing the income accrued due and in the hands of the trustees.

Held, that a garnishee order could not be obtained unless a debt was actually due from the trustee to the beneficiary, and that the garnishee order did not create a forfeiture.

Sampson *v.* Sampson, 44 *W. R.* 557, [1896] 1 *Ch.* 630, *followed.*

Bates *v.* Bates, [1884] *W. N.* 129, *not followed.*

This was an originating summons to determine whether a forfeiture or cesser had taken place of the life interest of John Arthur Greenwood under the will of Mary Greenwood, dated the 4th of November, 1891, and under settlements dated the 30th of March, 1893, and the 20th of February, 1896.

P. F. S. Stokes, for the trustees of the will.

Upjohn, K.C., and *Edward Ford*, for one of the defendants.

W. H. Loehnis, for the defendant Jonathan Gledhill, a judgment creditor.

R. F. MacSwinney, for the tenant for life.

FARWELL, J., in giving judgment, said: In this case I have come to the conclusion that the order absolute does not operate as a forfeiture. John Arthur Greenwood is entitled under a trust in the will which—is, I am told, in terms similar to the settlements, which have also been put in evidence on this application—which is in these words: "Upon trust if my said son shall not at the time of my death be an undischarged bankrupt, or shall not have executed, done, or suffered any act, deed, or thing, or if no event shall have happened whereby the trust next hereinafter declared would if subsisting be determined, then to pay the said income to my said son John Arthur Green-

(*a.*) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

wood during his life or until he attempts to alien, charge, or anticipate the same or any part thereof, or is adjudged a bankrupt or takes proceedings for liquidation in bankruptcy or makes any arrangement or composition with his creditors having the effect of a charge upon or alienation of the said income or any part thereof, or until he does or attempts to do or suffer any other act or thing, or until any other event happens whereby if the same were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof," in any of which cases, as well as on the death of the said John Arthur Greenwood, it is given over.

Now what has happened is this: A creditor has obtained an order *nisi* first of all, and then absolute, garnishing the income accrued due and then actually in the hands of the trustees. That that is the case is plain from the decisions on the rules about garnishing. You can only garnish the debt after it has become due. For that I will take the words of Lindley, L.J., in the case of *Webb* v. *Stenton*, reported in 11 Q. B. D. 518, 31 W. R. Dig. 8: "Is a trustee a debtor to his *cestui que trust?* You cannot say he is unless he has got in his hands money which it is his duty to hand over to the *cestui que trust;* then, of course, he is a debtor, and there is no difficulty in attaching such a debt under this order. But take the case of a trustee of Consols for my life. Is he in any proper sense my debtor so long as he has no dividends which are payable to me? Clearly not; he individually may never receive those dividends; there may be a change of trustees before the next dividend day. You cannot possibly say that a trustee is a debtor to the *cestui que trust* before he has, or but for some fault of his might have had, the money which it is his duty to hand over." The garnishee order therefore proceeds on the footing that the trustee is not only a trustee, but has also been turned by the operation of the true construction of the will and the rules of law and equity into a debtor as well. It is by virtue, not of a continuing trusteeship, but by virtue of the new relation of debtor and creditor, that the garnishee order can be made at all; and that being so, it seems to me that there is this dilemma with regard to the applicant's position, that either the garnishee order is ineffectual because there is no debt at all, and therefore it is a mere nullity; or, if it is effectual, it has operated because there is a debt, and a debt arising as between the trustee and the tenant for life, which shows that the income has actually become payable in such a way as to make a debt In my opinion that is the true view of this will. I bear in mind, first of all, that the courts do not construe gifts of forfeiture so as to extend their limits beyond the fair meaning of the words unless they are actually driven to it. Forfeiture is not regarded with favour, and one does not apply one's mind to a case with any particular desire to extend the terms of a forfeiture clause to a gift such as the present. In my opinion, on the true view of these words, which are the only words which are really material to the present case—"or until any other event happens whereby if the same income were payable to him absolutely for his life he would be deprived of the right to receive the same or any part thereof"—they mean if he were deprived of the right to receive the same or any part thereof on the day it becomes due. That seems to me not only a fair and reasonable construction of the words of this particular will, but, also, to be in accordance with what, I think, are really the necessary requirements of the law to make it a valid gift. I think the late Sir John Rolt's argument in the case of *Re Stulz*, 1 W. R. 499, 4 De G. M. & G. 404, was well founded, and that you cannot give a man the income during his life payable on the quarter days on which it becomes due, or the half-yearly days on which it becomes due, and then take it away from him by reason of any event that happens after the day when it has actually become due. So to do would be repugnant to the absolute gift. Mr. Upjohn tried to avoid that by saying there is no absolute gift here. I do not agree with that. The first gift is to pay the income to John during his life. Then, according to the construction I put on this clause, all the other matters are limited—I mean that the defeasance portion of the clause is limited to the period until each particular quarterly payment or half-yearly payment becomes actually payable. When once it becomes payable there is a trust to pay, and the day after the creditor's dividend has become payable a trustee is turned into a debtor as well as a trustee, and is bound to pay, under the trusts of this will, to John Arthur Greenwood. That being so it is not competent to the testator to attempt to deprive John Arthur Greenwood, after the period at which he is so entitled to give a receipt, of the income by reason of any matter subsequent to the day on which he was entitled to give a discharge for it. That seems to me to be the true view to take of the construction of this will. To some extent I am confirmed in the view I take by the case of *Sutton* v. *Goodrich*, 80 L. T. Rep. 765, 47 W. R. Dig. 208, and still more by reason of the decision of Stirling, J., in the case of *In re Sampson, Sampson* v. *Sampson*. 44 W. R. 557, [1896] 1 Ch. 630, where the learned judge puts the proposition which I have been trying to adapt to this will in a way that seems to me to be applicable not only to the will before Stirling, J., but also to the will now before me. His lordship says: "I think that the epoch at which the destination of any instalment of income is to be determined is the moment when that instalment either accrues due or is in the hands of the trustees ready for application in accordance with the trusts of the will." Any other construction would, as it appears to me, lead to results which would be startling, assuming that it was legal. For example, the *cestui que trust* might go to his trustee the day after the income was received, receive his money, and then go round and pay his bills, but if he were ill in bed he could not send a request to the trustee to be good enough to go round and pay his bills for him, and write at the same time to his creditors, and say: "I am ill, do not trouble me, my trustee is coming round to pay you with the income which is already mine." That would be a conclusion I should be very reluctant to arrive at unless I was actually driven to it; but on the cases which have been cited I think I am not driven to it.

Now, the matter that has really caused me the most trouble has been the decision of Pearson, J., in the case of *Bates* v. *Bates*, reported in [1884] W. N. 129. I confess I cannot avoid the conclusion that I am really not following *Bates* v. *Bates*, because I think the result of the view I take is that you cannot really, by garnishing, create a forfeiture. Inasmuch as you can only garnish what is a debt actually due, I do not see how any garnishing could ever operate as a forfeiture, and Pearson, J., undoubtedly did in that case hold that a garnishee order did operate as a forfeiture. I can only say, with every possible respect to that very eminent judge, that the judgment is reported only in the *Weekly Notes*; no reasons are given for it, and I am really unable to follow it. It has already not been followed by Kennedy, J., and I do not think myself it is consistent with the case of *In re Stulz* in the Court of Appeal. I quite follow what Mr. Upjohn said in reply, that the words there were different, but I do not agree with his distinction that they were all governed by the word "anticipate." I do not think that is so. It is not a fair way of con-

struing a clause to say "anticipate, assign, or otherwise incumber" makes the word "anticipate" govern the assignment or otherwise incumbering. The three words are all different, and are meant to apply to different things. I do not think the decision turned on that, except so far as it gave rise to the argument of Sir John Rolt, which, I think, is a sound argument that really disposes of the question. There has been no forfeiture.

Solicitors, *Ridsdale & Son*, for *Sutcliffes, Hebden Bridge; W. J. & E. H. Tremellen*, for *Eastwoods & Sutcliffes*, Todmorden.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) May 3.

THE KING *v.* OVERSEERS OF THE PARISH OF CONNAH'S QUAY. (*a.*)

Local government—Burial Acts—Transfer of powers of burial board to urban district council—Burial expenses—Moneys borrowed under the Burial Acts—Poor rate—General district rate—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 53 (3), 62 (1), 67 (3).

Where an urban district council takes over the powers and duties of a burial board under section 62 *of the Local Government Act,* 1894, *the expenses incurred by the council in carrying into execution the Burial Acts and the payment of interest upon, and the repayment of moneys borrowed in pursuance of the Burial Acts, are chargeable to the poor rates of the parish or parishes for which the burial board was formed, and are not payable out of the general district rate.*

Rule *nisi* for a *mandamus* commanding the overseers of the parish of Connah's Quay to show cause why they should not honour a certificate of the Urban District Council of Connah's Quay, and pay to them the sum of £150 to defray the expenses of carrying into execution the Burial Acts.

In the year 1882 a burial board was formed for the three townships of Wefre, Golftyn, and Kelsterton.

On the 20th of November, 1882, the board borrowed £1,500 from one James Freme, and on the 22nd of November, 1883, a further sum of £300, by terminal annuity deeds, which constituted the repayment of the sums a charge upon the poor rates of the parish of St. Mark, Connah's Quay. The parish of St. Mark consists of the three above-mentioned townships. From 1882 to 1897 the expenses of the board were paid out of the poor rate upon the certificate of the board.

On the 3rd of March, 1897, the Urban District Council of Connah's Quay by resolution took over all the powers, duties, and liabilities of the burial board. In 1897, 1898, and 1899 certificates were issued by the urban district council to the overseers of the poor in respect of the accounts payable under the annuity deeds and the expenses of carrying into execution the Burial Acts, which certificates were duly honoured.

On the 4th of July a certificate was issued to the overseers directing them to pay the above sum of £150. The overseers refused to comply, on the ground that the moneys ought to be paid out of the general district rate and not out of the poor rate.

Marshall, K.C. (*Jenkin* with him), showed cause.—The Burial Act, 1852, by section 19, provides that the expenses incurred or to be incurred by the burial board of any parish in carrying the Act into execution shall be chargeable upon and paid out of the rates for the relief of the poor of such parish, and the overseers are required to pay out of the rates for the relief of the poor such sum as the board may direct upon receipt of a certificate from the board. Section 20, which has been since repealed, gave the board power to borrow money for the purpose of laying out burial grounds, and for other purposes. It is provided by the Burial Act, 1857, s. 4, that a local board of health may, by Order in Council, be constituted a burial board, and by the Burial Act, 1860, that the expenses of a local board constituted a burial board may be paid out of the general district rate or by a separate burial rate. Then came the Local Government Act, 1894, which by section 62 (1) gave an urban district council power by resolution to take over the powers, duties, property, and liabilities of any authority in its district constituted under any of the adoptive Acts. Section 28 of the same Act provides that the expenses of an urban district council shall, subject to the provisions of the Act, be paid out of the district fund and general district rate, and section 53 (3) provides as follows: "The property, debts, and liabilities of any authority under any of the adoptive Acts whose powers are transferred in pursuance of this Act, shall continue to be property, debts, and liabilities of the area of that authority, and the proceeds of the property shall be credited, and the debts and liabilities, and the expenses incurred in respect of the said powers, duties, and liabilities shall be charged to the account of the rates or contributions levied in that area, and where that area is situate in more than one parish the sums credited to and paid by each parish shall be apportioned in such manner as to give effect to this enactment." The effect of those provisions was to enact that the expenses incurred by a district council under the Burial Acts should be paid out of the general district rate. It is true that section 67 provides that "Where any powers and duties are transferred by the Act from one authority to another authority . . . (3) all debts and liabilities of the first authority incurred by virtue of such powers and duties shall become debts and liabilities of the latter authority, and be defrayed out of the like property and funds out of which they would have been defrayed if this Act had not passed." But that provision only applies in cases where powers and duties are transferred directly by the Act, and not, as here, by resolution of the authority which takes them over.

Macmorran, K.C., and *R. V. Bankes*, for the urban district council, in support of the rule, were not called on.

Lord ALVERSTONE, L.C.J.—In this case the Urban District Council of Connah's Quay has become the burial authority in the parish of Connah's Quay by virtue of the operation of the powers of the Local Government Act, 1894, and they have as a burial board made a demand upon the poor law authorities to pay the money which would have been payable under the Burial Acts.

As I gathered from Mr. Marshall's very clear statement, the facts are that there was a burial board from 1882 to 1897. In March, 1897, there was a resolution to transfer the powers and duties of the burial board to the urban district council under the powers of subsection 1 of section 62. It is not denied that the Burial Acts are adoptive Acts, and it is not denied that the powers under them are now to be exercised by this urban district council.

As I understand sections 62 and 67 of the Local Government Act, 1894, taken together and with some other provisions of the Act which I need not mention,

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

but which Mr. Marshall referred to, they mean this, that after the transfer of the powers under the adoptive Act by resolution, or by whatever machinery transfers those powers, the new authority is to exercise the powers of the old body. If it had been intended to charge a different class of ratepayers special words would have been used. The Acts referred to are adoptive Acts—that is to say, Acts which the local authority may adopt. Mr. Marshall argued that because a resolution was required to pass the powers and duties from the burial board to the urban district council—that, therefore, the transfer was not a transfer of powers and duties from one authority to another by the Act within the initial words of section 67. But I think that if it had been intended to exclude from the protective clause of section 67 transfers which took place under section 62, we should have found a specific enumeration, and I think that it was intended that when powers and duties were transferred by virtue of the operation of the Act that the protective clause in section 67 should apply.

I agree that we have not to consider the rights of the persons who lent the money in this case, but I think it is fair to point out that the ordinary scheme of legislation would be that where duties are transferred under the powers of an Act to a new authority, the rights, powers, and obligations continue to have the same incidence and effect in the hands of such new authority. I think that the rule for a *mandamus* must be made absolute.

LAWRANCE, J.—I entirely agree.

Rule made absolute.

Solicitors for the overseers, *Maples, Teesdale, & Co.*

Solicitors for the urban district council, *Bower, Cotton, & Co*, for *Hughes & Hughes*, Flint.

K. B. Div.
(Channell and Bucknill, JJ.) March 15.

REX *v.* GOVERNOR OF HOLLOWAY PRISON.
Ex parte BLUHM. (*a.*)

Extradition — Extradition treaty with Germany — "Apprehension"—"Sufficient evidence for the extradition" within two months from apprehension—Subsequent investigation of other charges—Jurisdiction to review decision of magistrate—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 8.

B. was arrested in this country under the extradition treaty with Germany, charged with obtaining money by false pretences from one Wallesch, and evidence was given upon that charge, and B. was remanded from time to time. After the expiration of two months from his arrest, B. was committed for extradition on this charge. He was, however, detained pending the investigation of thirty other charges against him, and he was also committed on those charges.

Held, that there was, in fact, upon the depositions before the expiration of the two months from the date of B's arrest, sufficient evidence for his committal on the first charge under the treaty.

Semble, *the committal of B. on the subsequent charges was regular.*

In this case a rule *nisi* for a *habeas corpus* had been obtained calling upon the Governor of Holloway Prison to show cause why he should not bring up Joseph Bluhm, a prisoner in his custody, in order that he might be released.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

It appeared from the evidence before the magistrate that Bluhm had been charged with obtaining money by false pretences from a German subject resident in Germany, the allegation being that he promised one Wallesch an advance of a considerable sum of money upon receipt of an instalment of interest, and having received the instalment never sent the principal. Bluhm was brought before Mr. Marsham, one of the metropolitan police magistrates, remanded from time to time, and, after the two months had expired, he was committed for extradition on the Wallesch charge, but was detained pending the investigation of some thirty or forty other charges of similar frauds said to have been perpetrated by him in Germany, and he had now been committed for extradition also on those charges. The Extradition Treaty with Germany (see articles 9 and 12) and the Extradition Act of 1870 provide that unless sufficient evidence to justify committal be brought against a prisoner within two months of his apprehension he should be discharged from custody.

The rule *nisi* was applied for and obtained on the 8th of March, the prisoner having been arrested on the 27th of December, 1900, and was granted on the following grounds: (1) That no sufficient evidence for extradition had been produced within two months from the applicant's apprehension, (2) that the magistrate was not entitled after the expiration of two months to receive any evidence in support of charges other than those on which the prisoner was apprehended, and (3) that there was no evidence of the identity of Joseph Bluhm with the person referred to in the depositions taken in Germany.

Sir R. Finlay, A.G. (*H. Sutton* and *H. C. Biron*, with him), showed cause.—The rule was moved for and granted under a belief that there was no evidence within the two months of the charge on which extradition was applied for. But that in fact was not the case. The treaty—and articles 9 and 12 of the Extradition Treaty with Germany* which for the purposes of this case may be taken as incorporated into the Extradition Acts, although upon that questions might arise in other cases—only impose the condition that there should be within two months sufficient evidence on which the magistrate could act. The depositions amply fulfilled that condition. If an order had been made for extradition on the first charge there would be nothing to prevent the German government from making an application on the subsequent charges also. If no evidence had been offered on the Wallesch charge within two months then the magistrate ought to have discharged him, but he could immediately have been re-arrested on the other charges.

J. R. Randolph, in support of the rule.—On the 14th of February, 1901, at which date the two months expired, there was not sufficient evidence to justify the committal of Bluhm. The court was not bound by the adverse opinion expressed by the magistrate on

*Article 9 of the Extradition Treaty with Germany is as follows: "If the requisition for extradition be in accordance with the foregoing stipulations the competent authorities of the state applied to shall proceed to the arrest of the fugitive. The prisoner is then to be brought before a competent magistrate, who is to examine him and to conduct the preliminary investigation of the case, just as if the apprehension had taken place for a crime committed in the same country."

Article 12: "If sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty."

this point, as was clear from a *dictum* of Lord Brampton given in *In re Castioni*, [1891] 1 Q. B. 149, at p. 164. [The case is also reported in 39 W. R. 202.] Moreover, the prisoner has been committed on some thirty charges other than the one preferred by Wallesch, the evidence in support of which is insufficient to justify extradition. If these are to form the ground of extradition, the prisoner is entitled to be discharged under the order issued in regard to the charge made by Wallesch and he should be reapprehended. A man in custody may be apprehended by reading over the warrant to him: *Reg.* v. *Weil*, 31 W. R. 60, 9 Q. B. D. 701.

CHANNELL, J.—In my opinion this rule should be discharged on the first ground, as in my opinion there was in fact, upon the depositions, before the expiry of two months from the apprehension sufficient evidence for a committal of the prisoner on the charge made by Wallesch. That being our opinion it is unnecessary to say anything on the question whether the magistrate's opinion that there was sufficient evidence would have been binding upon us or not, but there seems some authority for saying that the court should not go behind the opinion of the magistrate on that point. The result, therefore, is that within two months from the apprehension sufficient evidence was produced on the first charge, and therefore the prisoner is not entitled to the benefit of article 12 and ought not to be set at liberty. With regard to the other questions argued by Mr. Randolph, and upon which we granted the rule in order that they might be considered, I am not sure whether it is necessary for us to express any opinion. However, we think that the proceedings which we now know have taken place—namely, the committal on thirty odd charges—were regular, and even if they were irregular I do not see how we can grant this application for a *habeas corpus*, since the prisoner is not entitled to be set at liberty, in our judgment, on the first charge, and we could not say he could be detained on one ground and not on another. Article 12 is intended to prevent a prisoner against whom a charge has not been made out from being detained longer than two months under suspicion, and he has a right to be set at liberty if within two months a case is not made out justifying his detention. If that does not apply, the procedure is to be the same as in this country. Article 9 provides for this. If he is charged with one offence, and the evidence is sufficient to justify his being committed, the magistrate can commit him then and there, but not necessarily if there are other charges pending against him. The only difference in procedure is that which is made by article 12, and if that does not apply there is no difference at all. These proceedings appear to me regular and businesslike. It may be that when the prisoner is tried in Germany he may be entitled under the German law, made in accordance with article 7, to plead he has been properly extradited only on the one charge. If he has not been properly extradited as to the thirty charges he can raise that point in the German courts but not here. It is, moreover, clear that we could have granted an application to quash these proceedings if the matter had come before us in some such form, and not on a rule for a *habeas corpus*. For these reasons the rule must be discharged.

BUCKNILL, J.—I agree, and for the same reasons. I would only add that by our decision no injustice has been done the man as he is not precluded raising the same point in the German courts as his counsel desired to raise here.

Solicitors, *The Treasury Solicitor; Crawshaw & Caldicott.*

Court of Appeal.

From Q. B. Div. (A. L. Smith, M.R., and Collins and Romer, L JJ.) — March 6, 14, 15, 29.

LUDBROOK v. LUDBROOK. (a.)

Limitations, Statute of—Mortgage—Person claiming under a mortgage—Possession adverse to mortgagor—Real Property Limitation Acts, 1833, *ss.* 2, 20; 1837; 1874, *s.* 9.

The plaintiff, the sister of the defendant, sought to recover possession of a house which was held by their father under a lease expiring in 1922.

In 1876 *the father demised and assigned this and other premises to a mortgagee for the whole term except the last day; and in* 1882 *he assigned all the premises to a second mortgagee for the whole term, subject to the first mortgage.*

The father died on the 1st *of January*, 1885, *having by his will bequeathed the lease to trustees in trust to secure an annuity to his widow for her life, and after her death an annuity to his daughter (the plaintiff) for her life, and subject thereto in trust for the defendant.*

After the father's death the widow was allowed to reside in the house until her death in July, 1899, *under circumstances which the plaintiff alleged gave her a title by possession, under the Real Property Limitation Acts*, 1833 *and* 1874, *for the remainder of the term. By her will the mother bequeathed all her property to the plaintiff, who continued to reside in the house until December*, 1899, *when the defendant took possession and excluded her.*

In 1888 *the defendant paid off the second mortgage, and in* 1893 *the first mortgage, and obtained a transfer of the property. In* 1894 *he purchased the reversion subject to the lease on the whole of the premises. It was admitted that, up to the transfer in* 1893, *interest upon the mortgage debts had been duly paid by the mortgagor or his assigns, and therefore within twelve years of the son taking possession*

Held (reversing the decision of Grantham, J.), *that, as the mortgage was not extinguished, the defendant was entitled to rely upon the Real Property Limitation Act*, 1837, *and to take possession as mortgagee, the mortgage having been created before the possession of the mother commenced; and, further, that section* 20 *of the Act of* 1833 *did not apply.*

This was an application by the defendant for judgment or new trial in an action tried before Grantham, J., and a special jury.

The action was brought to recover possession of certain premises situated in the East End of London, and mesne profits from the 27th of December, 1899, and damages for trespass.

The plaintiff was the sister of the defendant, and it was not disputed that the defendant was legally entitled to the possession of the premises unless the plaintiff could show a possessory title by reason of the Statutes of Limitation.

This title the plaintiff said she had acquired in the following way.

She alleged that under the Real Property Limitation Acts, 1833 and 1874, her mother had acquired a title by possession for more than twelve years for the remainder of the term on which the premises were held, and that she, under her mother's will, was entitled to the houses.

The jury found that since the death of the plaintiff's father, his widow was in possession of the house, and

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

after her death the plaintiff remained on in possession, but without the consent of the defendant.

Grantham, J., on further consideration on the above findings of the jury, gave judgment for the plaintiff, and the defendant appealed.

R. A. M'Call, K.C. (*Younger, K.C.*, and *H. H. Lawless* with him), appeared for the defendant.

J. A. Foote, K.C., H. Terrell, K.C., and *A. B. Shaw*, for the plaintiff.

Cur. adv. vult.

March 29.—The following judgment was read by

ROMER, L.J.—The only question that arises for our determination on this appeal is whether the plaintiff is entitled to recover from the defendant possession of the house and premises known as Eagle House. The plaintiff claims to have acquired as against the defendant a good title to the property under the Statute of Limitations, 3 & 4 Will. 4, c. 27, as altered by the Act 37 & 38 Vict. c. 57. Apart from the operation of these Acts it is clear that the plaintiff has no title to the premises. To the plaintiff's claim several defences have been raised, but there is one short answer on the part of the defendant which renders it unnecessary for us to consider the other points taken by him. He is a mortgagee of the premises, and he claims the benefit of the statute 7 Will. 4 and 1 Vict. c. 28, as altered by the statute 37 & 38 Vict. c. 57, s. 9. We think that this claim on his part is good, and affords a complete answer to the plaintiff's case. The circumstances of the case, so far as necessary to be stated to show how the point we are now dealing with arises, are as follows: The premises, together with others, were held by the father of the plaintiff and defendant under a lease for a long term of years which will not expire until the year 1922. In his lifetime the father mortgaged the lease to secure certain sums of money advanced to him. First, in 1876, he mortgaged it by deed by which the leasehold premises were demised and assigned to the mortgagee for the whole term except the last day, and, secondly, in 1882 he mortgaged it by deed by which the leasehold premises were assigned to the second mortgagee for the whole term subject to the first mortgage. The father died on the 1st of January, 1885, having by his last will bequeathed the lease to two trustees in trust to secure an annuity given to his widow for her life, and after her death an annuity given to his daughter, the plaintiff, for her life, and subject thereto in trust for the defendant. After the testator's death the widow was allowed to reside during her lifetime in Eagle House under circumstances which we should have had carefully to consider but for the point now being dealt with. On the 1st of December, 1888, the defendant, in consideration of his payment to the executors of the second mortgagee of the sum then owing on the second mortgage, obtained a transfer to himself of the mortgage debt and security; and on the 27th of January, 1893, in consideration of his payment to the first mortgagee of the sum then owing on the first mortgage, the defendant obtained a transfer of that mortgage debt and security. In 1894 the defendant purchased and had conveyed to him the reversion, subject to the lease, in the leasehold premises. In July, 1899, the widow died, having by will bequeathed all her property to the plaintiff. The plaintiff, who had been living with her mother, continued to reside at Eagle House until the 27th of December, 1899, when the defendant took possession, and excluded the plaintiff. The plaintiff thereupon brought this action.

In the course of the argument before us it was admitted on behalf of the plaintiff that, at any rate up to the date of the transfer in 1893 of the first mortgage to the defendant, interest on the mortgages had been duly paid by the mortgagor and his assigns within the meaning of 7 Will. 4 and 1 Vict. c. 28. That being so, twelve years had not elapsed since the last payment of interest when the defendant took possession of Eagle House. It is also clear that the mortgages are still in existence, and have not been merged or extinguished. That being so, the defendant is in a position to avail himself of the benefit of the statutes to which we have referred. It is said on behalf of the plaintiff that the defendant did not take possession of the premises in his character of mortgagee; but, even if the defendant did not originally intend to take possession as mortgagee, it is quite open to him by his defence to justify the taking of possession in his capacity of mortgagee as against the plaintiff, who seeks to treat him as a trespasser. The next point taken on behalf of the plaintiff is that, inasmuch as she had acquired under the Statute of Limitations a good title against the defendant in his capacity other than that of mortgagee, he was barred as mortgagee by virtue of section 20 of the Act 3 & 4 Will. 4, c. 27. But even if section 20 applies to any concurrent right other than one in respect of a future estate or interest, yet in the present case the section cannot apply. The defendant was not in the position of the mortgagor. The trusts upon which the lease, subject to the mortgages on it, was held by the trustees of the father's will were still existing. The defendant had no estate in possession other than his estate as mortgagee, and he had no right, apart from his right as mortgagee, to make an entry or distress, or bring an action to recover the land within the words of the section. In short, he never came within the operation of the section at all. Lastly, it was said on behalf of the plaintiff that the statute 7 Will. 4 and 1 Vict. c. 28 only applies to proceedings between mortgagor and mortgagee. But the statute is not in terms limited to such proceedings. And it has been held in several cases not to be so limited. If the mortgage be an existing one and was created before the commencement of the possession of the person claiming to have acquired a title by such possession under the Statute of Limitations, then the statute 7 Will. 4 and 1 Vict. c. 28 undoubtedly applies in favour of the mortgagee, although the person in possession may have acquired a good title as against the mortgagor and those claiming under the mortgagor: see *Thornton* v. *France*, 46 W. R. 56, [1897] 2 Q. B. 143, a decision of the Court of Appeal, where the earlier authorities are considered. In the present case the mortgages were executed before the commencement of the possession of the widow, and are valid and subsisting mortgages, and there are no circumstances existing which prevent the defendant from claiming the benefit of the statute as against the plaintiff. This point being decided in favour of the defendant the plaintiff's case fails, and we need not consider the other defences raised by the defendant. But we think it right to say that, if the defendant had not been a mortgagee, we should under the circumstances of the case have considered it necessary that a new trial should take place. The jury were not sufficiently or properly directed as to the circumstances and nature of the mother's occupation of the premises. Nor were they directed upon or told to consider the questions, first, whether the entries made and acts done by the defendant from time to time by the permission of the trustees on the premises did not amount to a continuation of the possession of the father, and secondly, whether the interest of the widow in the premises immediately after the father's death was not that of tenant at will, and was not reconstituted from time to time by the entries and acts of the defendant.

Appeal allowed.

Solicitor for the defendant, *H. M. Sandom.*

Solicitors for the plaintiff, *Parson, Lee, & Co.*

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 26.

DE LASALLE *v.* GUILFORD. (*a.*)

Landlord and tenant — Lease of house — Collateral warranty as to condition of drainage—Right of action for breach of warranty.

An action lies for breach of a collateral warranty, on the granting of a lease of a house, that the drainage is in good condition.

Application for a new trial or for judgment in an action tried before Bruce, J., and a special jury.

The action was brought to recover damages for breach of a warranty as to the sanitary condition of the drainage of a house which the plaintiff took on lease from the defendant.

There was an alternative cause of action for misrepresentation; and there was a further alternative cause of action for breach of covenant to repair the outside of the house after notice.

In February, 1899, the plaintiff entered into negotiations with the defendant for taking on lease a house belonging the defendant.

The plaintiff's case was that he caused particular inquiries to be made as to the sanitary condition of the house, and the defendant assured him that the drainage was in perfect order. Relying on the defendant's representations the plaintiff executed a tenancy agreement, and entered into possession of the house on the 25th of March, 1899. He found that the sanitary arrangements were in a very bad state, and he, his wife, and his daughter suffered considerably in health in consequence, and had to go to the seaside for change of air.

In April, 1900, a sanitary inspector was called in, and he discovered numerous defects in the sanitary arrangements, and alterations had to be made which involved the plaintiff in considerable loss.

At the trial the jury, in answer to questions left to them by the learned judge, found—(1) that there was a distinct representation by the defendant that the drains were in good order; (2) that the defendant did not give his word as to the perfect condition of the drains; (3) that there was no fraudulent misrepresentation on the part of the defendant; (4) that there was no breach of covenant to repair, because the plaintiff had not given notice in accordance with the covenant. The jury assessed the damages at £75.

On further consideration, Bruce, J., gave judgment for the defendant, being of opinion that the jury had not found that there was a warranty, and that, even if there was a warranty, it was not collateral so as to entitle the plaintiff to maintain an action.

The plaintiff applied for a new trial or for judgment.

Robert Wallace, K.C., and *Israel Davis*, for the plaintiff.

Bankes, K.C., and *Montague Shearman*, for the defendant.

Cur. adv. vult.

March 26.—A. L. SMITH, M.R, read the following judgment: This is an action for damages by a tenant against his landlord for breach of a warranty that the drains at the time of the letting of the defendant's house to the plaintiff were in good condition, whereas they were not, whereby illness intervened and the plaintiff suffered damages, as the jury have found, to the extent of £75. There were alternative causes of action—one founded upon a false and fraudulent representation and the other upon a breach of covenant to repair the outside of the house after notice. But these two last causes failed, because as to the one the plaintiff could not prove fraud, and as to the other because he failed to prove that the notice required by the covenant had been given to the defendant. The jury found, however, the disputed facts relating to the alleged warranty in favour of the plaintiff, and the questions which now arise are—first, does what the jury have found to have been stated by the defendant, in the circumstances in which the statements were made, amount to a warranty in law, or only to a mere representation, in which case no action for damages can be maintained without proof of fraud? Secondly, if the statements found to have been made by the defendant amounted to a warranty, was such warranty a warranty collateral to the lease so as to be given in evidence and given effect to notwithstanding the lease?

Before considering these points it is necessary to see what it is that the jury have found to be the truth in this case as to the statements made by the defendant to the plaintiff's wife and daughter before the counterpart of the lease was handed over by the daughter to the defendant. The defendant's case was a flat denial that he had said anything about the drains. The jury acted upon the evidence of the wife and daughter, and, as these findings stand unimpeached, all that is left to the defendant to argue is that the statements made do not amount to a warranty but only to a representation, and that if they amount to a warranty it is not collateral to the lease and cannot be given effect to. Prior to the 28th of February, 1899, the plaintiff, who was anxious about drainage, as he had suffered from bad drains in his previous house, by his wife, on his behalf, had had interviews with the house agents about the drains of the defendant's house, and on the 21st of February, 1899, the plaintiff wrote to the defendant as follows: "Mayfield, 21.2.99. Dear Sir,—I beg to acknowledge your letter of the 14th inst. with enclosure. (This was the draft agreement for tenancy for three years.) I shall be prepared to exchange the counterpart for the lease when executed, and shall be glad to hear from you accordingly in due course. Will you kindly inform me if the drains and all sanitary arrangements are in good order?" To this the defendant answered: "February 22, 1899. . . . As regards the drainage, that was tested and put into good order by me, including a new w.c. upstairs when Mr. Rawlings went out." This did not, as it will be seen, satisfy the plaintiff; for, although on the 28th of February, 1899, he sent his wife and daughter to the defendant, who took with them the counterpart executed by the plaintiff ready to be exchanged for the lease if further assurances about the drains were obtained, he gave particular instructions to them that the counterpart was not to be exchanged for the lease until they got from the defendant the necessary assurance. The wife stated: "I told the defendant that my husband before exchanging the agreement wanted a still further assurance as to the drains. I gave as my reason for this that we had before suffered from the drainage in the house in which we had been, and it made us more particular. I said my husband would like a certificate. He then said that he could give me his word for the perfect condition of the drains, that I need have no

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

fear on the subject; and he repeated, 'I will give you my word, will that satisfy you?' I said I could not but be satisfied with his word, and accepted it. My daughter then said, 'We will exchange agreements, then; I will give you the agreement,' and she handed it to him." In cross-examination the wife said: "I had in the very first instance told Nightingales, the house agents, I would not take a house in which the drains could not be guaranteed." The plaintiff's daughter in her evidence stated: "When we reached the defendant's office (he is a solicitor) my mother first of all spoke on the subject of the drains, and was very emphatic about wishing to know if they were in thorough good order, and suggested that we should have the sanitary inspector's certificate. The defendant said it was quite unnecessary, that the drains were in perfect condition, and we could take his word for it. . . . 'I give you my word upon the subject.' . . . I then handed the agreement to him." As before stated, the defendant's evidence was a flat denial that he had ever said anything at all about the drains to the wife or her daughter. Now do these proved statements by the defendant to the wife and daughter, in the circumstances in which they were made, afford evidence of a warranty, or only evidence of a representation? Bruce, J., in a clear and accurate summing up undoubtedly directed the jury upon the question of warranty, also upon false representation, and also upon the breach of covenant. The questions he then put to the jury were these—viz., Was there a breach of covenant? Then, he said, comes the question—was there a warranty? Did he warrant and pledge himself that the drains were in perfect order? If he made the representation that the drains were in perfect order, did he do that falsely and fraudulently? The jury negatived fraud, and found no breach of covenant, on the ground that due notice had not been given thereunder. It will be seen from the shorthand notes that the jury, or some of them, for some reason had a difficulty about the word "perfect," though they unanimously found that the statement of the defendant was that the drains were in good order, and that they were not. Mr. Shearman, the learned counsel for the defendant, upon the verdict being given, said, "Then, my lord, it comes to this, that there is a verbal warranty, no fraudulent misrepresentation, and no breach of covenant." Bruce, J.—"Yes." Mr. Shearman.—"That raises a question of law." Bruce, J.—"I will hear you on that." In my judgment, having read through the shorthand notes of the summing up of Bruce, J., and what took place at the end of the summing up, I think that Mr. Shearman was quite accurate in what he said was the verdict. Afterwards, upon further consideration, Bruce, J., doubted whether there was a sufficient finding that there was "something which would amount to a warranty," and he arrived at the conclusion that even if there was it would not be collateral to the lease. To get over this doubt of Bruce, J., as to no sufficient finding of a warranty, the learned counsel on each side in this court have left it to us, assuming the jury did not in fact find a warranty, though I think they did, to say whether the true inference from the proved statements made is that there was a warranty or merely a representation by the defendant.

Now, what constitutes a warranty in law, or a mere representation? To create a warranty no special form of words is necessary. It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it. It was laid down by Buller, J., as long ago as 1789 in *Pasley* v. *Freeman*, 3 T. R. 51: "It was rightly held by Holt, L.C.J., in *Crosse* v. *Gardner*, Carth. 90, 3 Mod. 261, and *Medina* v. *Stoughton*, 1 Salk. 210, 1 Lord Raymond, 593, and has been uniformly adopted ever since, that an affirmation at the time of sale is a warranty provided it appear on evidence to have been so intended." And in determining whether it was so intended a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not. See Benjamin on Sales (3rd ed.), p. 607, whose statement upon the law, in my judgment, is accurate. That the above constitutes a warranty upon the sale of a chattel cannot be doubted, and why not upon the sale of real property or upon the granting and taking of a lease if it be collateral? I know of no authority which shows nor do I see any principle upon which it should be held that, the like conditions existing, such an affirmation does not constitute a warranty upon, as in this case, the granting of a lease. Now, in the present case, did the defendant assume to assert a fact, or merely to state an opinion or judgment upon a matter of which he had no special knowledge and upon which the plaintiff's wife on behalf of her husband might be expected also to have an opinion? What is it the defendant asserts? I paraphrase the evidence: "You need have no certificate of a sanitary inspector, it is quite unnecessary; the drains are in perfect condition, I give you my word upon the subject. Will that satisfy you? If so, hand me over the counterpart." What more deliberate and emphatic assertion of a fact could well be made during the course of the dealing which led up to the counterpart lease being handed over to the defendant? That the question asked and the answer given were seriously intended, to use the words of Wills, J., in *Best* v. *Edwards*, 60 J. P. 9, to be the basis of the contractual relation between the parties I cannot doubt. There is the evidence that the plaintiff would not take the lease unless the drains were guaranteed, and surely the statements made by the defendant were not made on the assumption that they were to be of no avail to the plaintiff, except they were made fraudulently. In my judgment everything necessary to establish a warranty has in this case been proved.

The next question is—Was the warranty collateral to the lease so that it might be given in evidence and given effect to? It appears to me in this case clear that the lease did not cover the whole ground, and that it did not contain the whole of the contract between the parties. The lease is entirely silent about the drains, though there is a covenant that the lessee during the term should do inside repairs, and the lessor the outside repairs, which would, I suppose, include the drains which happened to be inside or outside the house. There is nothing in the lease as to the then condition of the drains—*i.e.*, at the time of the taking of the lease, which was the vital point in hand. Then why is not the warranty collateral to anything which is to be found in the lease? The present contract or warranty by the defendant was entirely independent of what was to happen during the tenancy. It was what induced the tenancy and in no way affected the terms of the tenancy during the three years which was all the lease dealt with. The warranty in no way contradicts the lease, and without the warranty the lease never would have been executed. Three cases were cited in which parol collateral agreements outside leases had been allowed in evidence and given effect to by the court—viz., *Morgan* v. *Griffith*, 19 W. R. 957, L. R. 6 Ex. 70;

Erskine v. *Adeane*, 21 W. R. 802, L. R. 8 Ch. App. 756, in this court, and *Angell* v. *Duke*, 23 W. R. 307, 548, L. R. 10 Q. B. 174. The first two cases related to parol agreements collateral to leases as to keeping down rabbits, and the last case to a parol collateral agreement to do repairs and to send in additional furniture. This last case was first decided in the Court of Queen's Bench upon demurrer upon the pleadings as they stood, when the parol agreement was held to be collateral and admissible in evidence, but when it came to the trial Blackburn, J., refused to admit the evidence about the additional furniture, and the learned judge gave the following reasons for so doing (reported 23 W. R. 548, 32 L. T. Rep. 320, at p. 321): "Here the lease expresses the whole of the terms; the defendant agrees to let, and the plaintiff to take, the house and furniture at a certain rent. There is said to have been an arrangement made beforehand during the negotiation that the defendant should let the plaintiff have more furniture for the same rent. How is this collateral? I cannot perceive that it is." In the present case, as above stated, the lease does not contain the whole terms of the bargain. In the rabbit cases the agreements were held collateral to the leases, and did not contradict the terms of the lease. It was argued by the learned counsel for the defendant that the collateral agreements in the rabbit cases were agreements that something should be done after the lease was taken, and that in the present case the agreement or warranty is that the drains were then in good order. This is true, but if in the rabbit cases the agreements were collateral and outside the leases, the leases not containing the whole terms and the collateral agreements not contradicting the leases, I cannot see why the warranty in this case is not collateral also. Then some cases were cited by the defendant's counsel to show that representations as to drains were never held to be warranties, but when examined I do not think they show this; for the representations in the cases cited were by no means such complete and emphatic statements of fact as were made in this case. And, indeed, upon principle why should there be any difference in the case of drains? First came the case of *Green* v. *Symons*, 13 Times L. R. 301, which, in my opinion, so far as it goes is an authority against the defendant, and not in his favour. The verbal warranty alleged was that the house was dry and that the drains were perfect. The jury found that there was a verbal warranty as to the house being dry, and that the house was not dry, but that the drains were not defective, and assessed damages at £50. Lawrance, J., who tried the case, entered judgment for the plaintiff for that amount. Upon appeal this was set aside, not upon the ground that if there had been a warranty the judgment should not have stood, but upon the ground that what was said was a mere representation without fraud, and was made without authority; and neither Lord Esher nor Lopes, L.J., nor Chitty, L.J., doubted that if there had been a warranty the action would have lain, for if it had been their opinion that it would not, it would have been a short end to the case. In *Kennard* v. *Ashman*, 10 Times L. R. 213, Wills, J., held that it was clear that there was no warranty that the house was well built, but the learned judge does not seem to me to have held that if there had been a warranty and it had been broken no action could have been maintained. On the contrary, in the case of *Best* v. *Edwards* that learned judge clearly thought that if there had been a warranty an action would have lain. His decision was upheld upon appeal, 10 Times L. R. 447, solely upon the facts of the case. In *Longman* v. *Blount*, 12 Times L. R. 520, Wright, J., held that a warranty contained in a letter that the house was in a perfect sanitary condition could not be given in evidence, and directed judgment for the defendant, and somewhat invited an appeal. This apparently was not done. I should require further argument to convince me that this direction was correct. The question about it being too late to bring this action because of the lease having been executed was settled adversely to the defendant in this court in the case of *Palmer* v. *Johnson*, 32 W. R. 293, 12 Q. B. D. 32, 13 Q. B. D. 351, 32 W. R. Dig. 221. In my opinion, even if the jury had not found a warranty, the true inference is that there was a warranty given in this case collateral to the lease, and therefore the judgment entered for the defendant must be set aside, and judgment entered for the plaintiff for the £75, the amount found by the jury, and this appeal must be allowed.

COLLINS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Atkinson & Dresser.*

Solicitors for the defendant, *Woodbridge & Son.*

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — March 13.

In re KNOTT END RAILWAY ACT, 1898. (*a.*)

Railway—Judgment creditor—Line not open to traffic—Receiver—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 27), *s.* 4.

Where the line of a railway company was incomplete and unlikely to be open to traffic for a considerable time, the court declined to appoint a receiver of the company's undertaking, on the ground that there were no duties for him to perform.

Whether the court has jurisdiction under section 4 *of the Railway Companies Act*, 1867, *to appoint a receiver of the undertaking of a railway company, before the line is open to traffic*, quære.

This was an appeal by the Knott End Railway Co. from an order of Farwell, J., appointing a receiver of the undertaking of the company.

The company was incorporated by an Act passed in 1898 to construct a light railway between Knott End and Pilling, in the county of Lancaster, and for other purposes.

This Act provided (*inter alia*) that the railway should be constructed and worked as a light railway subject to the provisions of Part V. of the Regulation of Railways Act, 1868; that the capital of the company should be £50,000 in 10,000 shares of £5 each; and that if the railway should not be completed within five years from the 12th of August, 1898, the powers granted by the Act should cease except as to so much thereof as should then be completed.

The whole of the capital authorized by the Act was offered for subscription, but only 1,171 shares were subscribed for. The total amount paid up on such shares was about £5,835.

By an agreement dated the 4th of November, 1898, and made between the company and the contractor, Mr. Robert Worthington, the contractor agreed to construct and complete the railway.

By a supplemental agreement the consideration payable to the contractor was to be paid as to £6,000

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

in cash and as to £28,000 in fully-paid shares of the company. One thousand and fourteen shares of the company had been allotted to the contractor or his nominees.

The company proceeded to purchase lands and to construct the railway, but it had not yet been completed. The permanent way was formed and fenced but no rails had been laid. The land for the station at Knott End had not been acquired, and some purchases of land for the public way were not yet completed.

On the 9th of February, 1900, a firm of solicitors obtained judgment against the company for about £1,500, and issued execution. Under the execution about 250 tons of rails on the property of the company were seized and sold, but the judgment remained in part unsatisfied.

On the 15th of August, 1900, another judgment was obtained against the company for £2,982 15s. for debt, and £7 10s. for costs in the Queen's Bench Division. This judgment was still in force and unsatisfied. These latter judgment creditors then presented a petition for the appointment of a receiver of the undertaking of the railway company under section 4 of the Railway Companies Act, 1867.

Section 4 of the Railway Companies Act, 1867, is as follows: "The engines, tenders, . . . and effects constituting the rolling stock and plant used or provided by a company for the purpose of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company, on application by petition in a summary way to the Court of Chancery . . .; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed . . . in payment of the debts of the company . . ."

In the present case it was agreed that the company had no assets remaining on which execution could be levied.

Farwell, J., appointed a receiver.

The company appealed.

Phipson Beale, K.C., and *Martelli*, for the company, referred to *In re The Waterford Dungarvan, and Lismore Railway Co.*, 5 L. R. Ir. 102, 28 W. R. Dig. 52; *In re The Southern Railway Co.*, 5 L. R. Ir. 165, 28 W. R. Dig. 190; *In re Manchester and Milford Railway Co.*, 14 Ch. D. 645, 28 W. R. Dig. 190; *In re Beddgelert Railway Co.*, 19 W. R. 427; *Midland Wagon Co.* v. *Potteries Railway Co.*, 29 W. R. 78, 6 Q. B. D. 36; *In re Mersey Railway Co.*, 36 W. R 372, 37 Ch. D. 610.

Maughan (*Eldon Bankes, K.C.*, with him), for the judgment creditors.

Phipson Beale, K.C., replied.

RIGBY, L.J.—This case raises an important question as to the construction of section 4 of the Railway Companies Act, 1867, and as to the duty of the court under it. On the present occasion, for the purpose of this application, I think it is not necessary to lay down any final or complete rule as to the jurisdiction conferred on the court by section 4 under all circumstances. It appears to me sufficient to say that, under the existing circumstances of the present case, I can see nothing to justify the appointment of a receiver. Subject to what I have said as to not laying down any final rule, it is necessary to consider the terms of section 4 and the object with which it was passed. We all know that the holders of debentures of a railway company were subject to some restrictions and limitations to which the general creditors were not subject. A general creditor who had recovered judgment against a railway company for his debt could levy execution and seize the rolling stock of the company. The first part of section 4 prohibits the taking in execution of the rolling stock and plant of a railway company "after their railway or any part thereof is open for public traffic," but it leaves the remedies of the creditors before the railway is opened entirely unaffected. Whatever power they had before the Act, to seize the company's chattels they still retain. Then the second part of the section gives a new remedy in place of that which is taken away by the first part—viz., the appointment by the court of a receiver, and, if necessary, of a manager, of the undertaking of the company, on the application of a judgment creditor. In the present case an application was made by judgment creditors of the company for the appointment of a receiver. What are the duties of a receiver appointed under this section? He has to receive the profits of the company as a going concern, and to apply them, under the direction of the court, in payment of the debts of the company. It is not suggested that there are in the present case any outstanding debts due to the company or any income which the receiver would be entitled to receive. All that he could receive would be the profits of the railway as a going concern when it is open for traffic. If there were nothing else to be considered I should have thought the meaning was clear, that a receiver ought not to be appointed until the railway is open, or is on the point of being opened, for public traffic, because under those circumstances only would the appointment of a receiver be efficacious. But it has been argued that, though the two clauses of section 4—the first, which restricts the right of a creditor to levy execution, and the second, beginning with the word "but," which confers the power to appoint a receiver—are parts of one section, they are wholly independent of each other, and should be treated as if they were two distinct sections, and the judgment of Jessel, M.R., in *In re Manchester and Milford Railway Co.* is cited as an authority in support of this view. I entirely dissent. No court can by its finding alter facts; it cannot make one section two. But, in my opinion, that judgment has no such effect as has been attributed to it. No doubt in that case Jessel, M.R., described the new right given by the latter part of section 4 as "wholly independent of the fact that the company had or had not rolling stock to be taken in execution," and as "an entirely new right given to all judgment creditors of railway companies." But what were the facts of the case? The railway had been opened for traffic, and the court was asked to appoint a manager of the undertaking. The appointment was objected to apparently on the ground that the petitioner had not been deprived of any right by the first part of section 4. The court said that the second part of the section applied, notwithstanding that the company had no rolling stock which could be taken in execution. But I think no one would have been more astonished than the learned judges who decided that case if they had been told that their language was to be wrested from its context and from the facts to which it applied, and to be interpreted as saying that the two parts

of the section must be treated as two sections which have no relation to each other. All that the learned judges meant to say, I think, was this, that it was not necessary for a creditor to show that he had been deprived of a special or particular right by the first part of the section before he could have the benefit of the new general right which is conferred by the second part. I must not be understood as saying that there is jurisdiction under section 4 to appoint a receiver, unless the railway is open, or about to be opened, for traffic. I think there is reasonable ground for contending that the words which restrict the rights of judgment creditors after the railway is open for traffic apply equally to the appointment of a receiver. But what I do say is this, that, whether there is jurisdiction or not, it would not be right, or in accordance with the practice of the court, to appoint a receiver who in all probability would not have any duties to perform for some considerable time, and perhaps none at all, if the railway is never open for traffic. This alone is a sufficient ground for saying that a receiver ought not to be appointed in the present case; I cannot see that there would be anything for him to do until the railway is opened for traffic. And, indeed, my present view is that any judgment creditor of the company who, but for the appointment of a receiver, would have been entitled to seize any chattels belonging to the company, would be able by an application *pro interesse suo* to obtain leave from the court to seize those chattels, notwithstanding the appointment of a receiver. The only reason why such a creditor must obtain the leave of the court is that he must not interfere with the officer of the court without that leave. The rights of a judgment creditor are not affected by section 4 until the railway is open for traffic. If a receiver were in fact appointed and put in possession of chattels of the company, the court would, I think, on the application of a judgment creditor, order the receiver to relinquish possession. Under these circumstances I cannot see any use in appointing a receiver in the present case, and it would be contrary to the practice of the court to do so. In my opinion the order ought to be discharged.

VAUGHAN WILLIAMS, L.J.—I assent, for I understand that, according to the practice of the courts of equity, it would not be usual under the circumstances of the present case to appoint a receiver who would have no functions which he could usefully perform. I have not sufficient knowledge of the practice to enable me to form an independent judgment, and therefore I think I am right in accepting the view of my learned brethren, who are familiar with the practice, that the order ought to be discharged. But I think it is right that I should say a few words about the construction of section 4. That section is divided into two parts. The first part is for the protection of the rolling stock and plant provided by a railway company for its traffic, and the protection is given by depriving individual judgment creditors of the right of taking the rolling stock and plant in execution, either of law or in equity. It is quite plain from the express words of the section that this protection does not arise, and that the right to levy execution is not taken away until there is public traffic on the railway. Everything in the first part of the section is governed by the words "after their railway or any part thereof is open for public traffic." The right of individual creditors to levy execution having been thus taken away, the second part of the section goes on to give a new right, not to the individual creditor, but to the creditors in general. It is not a substituted right given to individual creditors, but any judgment creditor may obtain the appointment of a receiver. I understand the language of Jessel, M.R., in *In re Manchester and Milford Railway Co.*, in exactly the same sense as does my brother Rigby, L.J.—viz., as meaning that the right which is conferred is a new right, and is independent of the exercise of the creditors' old right. From the first part of the section we see at once that the right of execution which is taken away is limited to a comparatively small subject-matter, whereas the new right conferred by the second part of the section applies to a much larger and wider subject-matter. For instance, the first part of the section does not take away any right of execution upon surplus lands of the company, whereas a receivership order would include surplus lands. Taking this view of the section, the next question is, whether there is jurisdiction to appoint a receiver in the present case. I do not think it is necessary to say more than that I must not be taken as expressing any opinion that no order for the appointment of a receiver can be made under the latter part of the section until the railway is open for traffic. But, assuming for the present purpose that there is jurisdiction before there is traffic on the railway, I will consider whether, apart from the practice of the courts of equity, the order would be a useless one, because, notwithstanding the making of the order, the rights of individual judgment creditors continue until there is traffic on the railway. In my judgment, if it is true that the new remedy is a remedy for all the creditors, it would seem to follow that the moment the new remedy is put in force the rights of individual creditors would be suspended, not because they are taken away by the express words of the first part of the section, but because they are superseded by the new remedy, which operates as an execution for the benefit of the whole class of creditors instead of individual creditors only. Could it be said for a moment that, supposing traffic on the railway had commenced, and the company had property liable to execution—for instance, surplus lands—a judgment creditor could, after the appointment of a receiver under the second part of section 4, issue an *elegit* against the surplus lands, because there is nothing in the first part of section 4 to take away his rights. In my view, if it is true that the appointment of a receiver is for the benefit of a class of traders, no member of the class ought to be allowed to exercise his individual rights. It is, however, as I understand, not according to the practice of the court to appoint a receiver unless there is an immediate prospect of there being something for him to receive, and it may be that it would not be his duty to protect the property of the company. But, speaking for myself, I am by no means satisfied that there is no jurisdiction under section 4 to appoint a receiver until the railway is open for traffic, and I am by no means satisfied that, if a receiver were appointed before traffic had begun, it would be possible for a judgment creditor to proceed with his execution notwithstanding the appointment.

STIRLING, L.J.—I am of the same opinion. I need not add anything about the construction of section 4, and I will assume that there is jurisdiction in this case to appoint a receiver. But what is it that a receiver when appointed has to do? Section 4 says that all money received by him "shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein."

That, I think, shows that the view of the Legislature was that the receiver when in possession of the railway would work it to a profit, so that the surplus earnings would go to pay the creditors. In the present case there is a railway which is far from completion; there is nothing for the receiver to distribute, or even to receive, in the shape of money. It has not been suggested that there are any outstanding debts or other moneys which he could receive. That being so, the first thing he would have to do would be to complete the railway, so that it might become a going concern. From what source are the funds for that purpose to come? The petitioning creditors are not prepared to undertake to supply them, so that it must be left to the company or to the contractor to find the money. I should in any case be very loth to appoint a receiver when there was nothing for him to do. But in this case I think the appointment of a receiver would be an obstacle to the completion of the line. The circumstances of the present case are peculiar. The contractor, who is to be paid partly in cash and partly in shares, has a strong interest in the completion of the line. A judgment creditor, in the exercise of his undoubted legal rights, has seized some rails which had been brought upon the company's land, and which, under the agreement between the company and the contractor, had become the property of the company, and since then the contractor has not unnaturally held his hand. Under these circumstances I think the appointment of a receiver would not tend to bring about the completion of the line, and I can see no use in making an appointment which would probably be an obstacle to its completion. I think, therefore, that this is not a case in which the jurisdiction, if it exists, should be exercised. And, if authority were needed in support of this view, I find it in the observations of Cotton, L.J., in *In re East and West India Dock Co.*, 36 W. R. 849, 38 Ch. D. 576, where he said: "The Act does not require the court to make an order, but only gives the court power to make an order if the company is a company coming within that definition. If, therefore, the dock company had not made the railway, although it would still be within the definition, yet the court, if asked to make an order under the Act, might say, 'The company may be within the definition, but we are not compelled to make an order, and under the circumstances of the case we shall not make an order.'"

Appeal allowed.

Solicitors, *Ashurst, Morris, & Co*; *Rowcliffe, Rawle, & Co.*, for *Houghton, Myres, & Co.*, Preston.

Appeal.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 13.

WRIGLEY *v.* BAGLEY & WRIGHT AND WHITTAKER & SONS. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Sub-contracting—Work ancillary to business of undertakers—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 4.

In an arbitration under the Workmen's Compensation Act, 1897, *it appeared that the workman's employers, who were engineers, had contracted with a firm of cotton spinners to supply and fix a driving-wheel for a steam-engine on their factory, and that the workman was accidentally killed while engaged in the operation of lifting the wheel into its place.*

Held, that the cotton spinners were not liable to pay compensation under section 4 of the Act, because the work of fixing the wheel was merely ancillary or incidental to, and was no part of or process in, their business.

Appeal from the decision of the judge of the Oldham County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a workman who had been accidentally killed in the course of his employment.

His employers were Whittaker & Sons, who were engineers. Whittaker & Sons had entered into a contract with Bagley & Wright, who were cotton spinners and manufacturers, to supply and fix a new driving-wheel for a steam engine on their factory.

The workman at the time of the accident was taking part in the operation of lifting the wheel into its place, which was performed by means of a hand-winch and pulleys.

The applicant claimed compensation alternatively from Whittaker & Sons under section 7 of the Act, and from Bagley & Wright under section 4.

The county court judge held that the applicant was not entitled to compensation under the Act. He was of opinion, firstly, that the operation of fixing the wheel was not "engineering work" within the meaning of section 7, because it was not performed by "machinery driven by steam, water, or other mechanical power," and, secondly, that the case was not within section 4, because the work which the engineers had contracted to do was merely ancillary or incidental to, and was no part of or process in the trade or business carried on by Bagley & Wright.

The applicant appealed.

Joseph Walton, K.C., and *J. Montefiore*, for the applicant.

Rowlatt, for Bagley & Wright.

Ruegg, K.C., and *F. H. Mellor*, for Whittaker & Sons.

A. L. SMITH, M.R.—In this case the applicant claimed compensation alternatively from Whittaker & Sons, the engineers in whose employment the deceased workman was, and from Bagley & Wright, with whom the engineers had contracted to do the work in question. The county court judge held that the case did not come within the Workmen's Compensation Act, and the applicant appeals. The claim against the engineers is not now seriously maintained. With regard to Bagley & Wright it is necessary for the applicant to bring them in under section 4. Down to the last clause of the section the applicant would seem to succeed in bringing them in. They were "undertakers" within the Act, and they had contracted with the engineers for the execution of the work in question. But the last clause says this: "This section shall not apply to any contract with any person for the execution by or under such contractor of any work which is merely ancillary or incidental to and is no part of or process in the trade or business carried on by such undertakers respectively." The contract here was to supply and put up a new fly-wheel for a steam-engine which was used on Bagley & Wright's premises. The trade or business carried on by Bagley & Wright was that of cotton spinners. The county court judge held that putting up a new fly-wheel was merely ancillary and incidental to and was not a part of or a process in their trade or business. I think that the county court judge was right, and that Bagley & Wright cannot be brought within the Act.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

COLLINS and ROMER, L.JJ., concurred.

Appeal dismissed.

Solicitors for the applicant, *Mills, Lockyer, & Mills*, for *D. E Griffiths*, Oldham.

Solicitors for Bagley & Wright, *Field, Roscoe, & Co.*, for *G. P. Fripp*, Oldham.

Solicitors for Whittaker & Sons, *R. B. Wheatly, Son, & Daniel*, for *Cobbett, Wheeler, & Cobbett*, Manchester.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 8.

SADGROVE v. HOLE. (a.)

Libel—Publication—Post-card—Privileged occasion.

The defendant employed an architect to draw up a specification and to take out the quantities for certain building work. The architect instructed the plaintiff, a quantities surveyor, to take out the quantities, and these were sent to certain builders in order that they might tender for the work. The defendant, having discovered mistakes in the quantities, sent post-cards to two of the builders stating that the quantities were wrong. The quantities surveyor thereupon brought an action for libel against the defendant.

Held, that there was no publication of and concerning the plaintiff until the cards reached the builders, as the plaintiff's name was not mentioned, and there was no evidence that anyone into whose hands the cards might fall prior to reaching the builders would know to whom the statements referred; further, that, as between the defendant and the builders, the occasion was privileged; and that the mere fact that the statements were made on post-cards did not avoid that privilege.

This was an appeal by the defendant in a libel action tried before Ridley, J., and a common jury.

The plaintiff, E. J. Sadgrove, was an architect and quantities surveyor, and the defendant, S. Hole, was managing director of Pike Brothers & Hole (Limited), provision merchants.

With a view to having certain alterations and additions made to one of the company's shops the defendant instructed Alfred Webb, an architect, to draw plans and drawings, and also to prepare a bill of quantities. Webb instructed the plaintiff to take out the quantities. This the plaintiff did, and on the 30th of July, 1900, sent copies to seven builders inviting them to tender for the work.

On the same day the defendant having seen one of the copies and having discovered that mistakes had been made in taking out the quantities, sent to one of the said builders a post-card on which he had written as follows: "Dear Sir,—The quantities sent you this morning by architect are entirely wrong. I have plans, &c., here, and you can give me prices on those. —Yours truly, S. Hole."

On the same date he also sent to another of the said builders a post-card on which he had written as follows: "Gentlemen,—There are great errors in the quantities posted to you this morning; if you will call here you can see plans and give me price of these. —Yours obediently, S. Hole."

The plaintiff alleged that the post-cards were libellous and reflected on him in regard to his business and calling as a quantities surveyor. The defendant pleaded that the words complained of did not bear the meaning put upon them by the plaintiff, and that they did not amount to defamatory matter, and further, that the publication of the post-cards to the two builders was privileged and made *bonâ fide* and without malice.

At the trial Ridley, J., held that the publication was not privileged, and the jury returned a verdict for the plaintiff for £5, and judgment was entered accordingly.

The defendant now applied to have that verdict and judgment set aside and judgment entered for him, or for a new trial on the following grounds: (1) That the contents of the cards were not defamatory; (2) that there was no publication of or concerning the plaintiff; (3) that the occasion was privileged; (4) that there was no evidence of malice to go to the jury; (5) that the learned judge had misdirected the jury.

Firminger, for the appellant.—The post-cards did not constitute a libel. There was no mention of the plaintiff's name thereon, and if these cards had fallen into strangers' hands no one would have known to whom they referred, therefore there was no publication of or concerning the plaintiff. At the trial the defendant said in evidence that he did not know who had taken out the quantities and that he had never even heard of the plaintiff at the time he wrote the cards. There could, therefore, be no possible evidence of malice. The publication of the words on the post-cards was only published to the builders to whom they were sent, and such publication was on a privileged occasion. There was no express malice so as to avoid this privilege.

Kemp, K.C., and *J. C. Earle*, for the respondent.—The words on the post-cards are clearly libellous, and likely to injure the plaintiff in his profession, and the jury were right therefore in awarding him damages. These words clearly amount to saying that the plaintiff is an incompetent quantities surveyor. The builders' clerks in this case would in all probability know to whom these statements referred, and therefore the privilege is avoided, just as in the case of the telegraph clerks in the case of *Williamson* v. *Freer*, 22 W. R. 878, L. R. 9 C. P. 393. In that case it was held that a communication that would otherwise be privileged loses its privilege if made through the medium of the postal telegraph, the necessary communication of the libellous matter to the receiving and forwarding officials amounting to publication to parties to whom the sender was under no such obligation to make the communication as would confer privilege. This case was approved of and followed in *Robinson* v. *Jones*, 4 L. R. Ir. 391, 27 W. R. Dig. 115. In that case it was held that the transmission by post of an uncovered post-card, containing libellous matter, is a publication of the libel; and it is no defence to say that the writer had an interest in making, and the person addressed a corresponding interest in receiving, the communication, and that it was made *bonâ fide*, believing the contents to be true, without malice, and in the *bonâ fide* belief that the mode of communication used was reasonable.

A. L. SMITH, M.R.—I think this appeal must be allowed. The libel alleged in this case is contained in statements on two post-cards written by the defendant and sent respectively to two builders who had been invited to tender for certain work and alterations which the defendant desired to have carried out. On one of these post-cards were the following words: "Quantities sent you this morning are entirely wrong," and on the other post-card were these words: "There are great errors in quantities posted to you this morning." The plaintiff in the action, it appears, was not the architect referred to on these post-cards but was a quantities surveyor who had been

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

employed by the architect to take out the quantities which were sent to the several builders who were invited to tender for the proposed work. The question we have to decide is whether these statements on the post-cards are libellous. For myself I must say that I cannot hold that they are incapable of constituting a libel, but in my opinion, whether they do so or not, they were written by the defendant on a privileged occasion. It has been argued by counsel on behalf of the plaintiff that the very fact that these statements were made on post-cards and not enclosed in envelopes destroys any privilege. Now in an action for libel it is necessary for the plaintiff, in order that he may succeed, to show that the defendant has published the libel of and concerning him the plaintiff. If a man writes a libellous statement on a post-card which clearly applies to a certain person, and sends it by post, that is a publication of that statement exactly as in the case of a telegram, and there is authority for saying this in the case of *Williamson* v. *Freer*.

But what evidence has the plaintiff in this case given of any publication of and concerning himself? None that I can see. He has given no evidence that any such publication was made before the post-cards were received by the builders to whom they were sent because there is no evidence that if these post-cards had fallen into the hands of other persons than those to whom they were sent such persons could have known to whom the statements referred.

Of course if the plaintiff's name had been mentioned on the post-cards then there would no doubt have been such a publication. The plaintiff's name, however, was not so mentioned. Therefore there was, in my opinion, no publication of a libel of and concerning the plaintiff until these post-cards were received by the builders to whom they were sent, and that occasion was, as I have already said, privileged. Then arises the question whether there is any evidence of express malice on the part of the defendant such as would avoid that privilege. As regards this point it was contended, on behalf of the plaintiff, that the mere fact that these statements were made on post-cards in itself is sufficient evidence of such malice. I do not think so. In my opinion there is no evidence in this case of any express malice, and I think, therefore, that we ought to order judgment to be entered for the defendant.

COLLINS, L.J.—I am of the same opinion. In order for the plaintiff in this case to succeed it is necessary for him to prove that the libel was published of and concerning himself. But this he has not done. I have not the least doubt that the defendant was acting within his rights in communicating with the builders as to the question of the quantities, and therefore as between himself and the builders the occasion was a privileged one; and in my opinion that privilege covers the libel unless there is what I may call a superfluous publication, to other persons than the two builders—namely, such persons as those who might obtain knowledge of the statements on the post-cards before they reached the builders to whom they were sent. In my opinion, if these post-cards had contained statements that were understood by such other persons to refer to the plaintiff, I do not think the privilege would cover such superfluous publication. But these post-cards are not written in such terms and are not *primâ facie* a publication of and concerning the plaintiff at all. They contain no reference to the plaintiff intelligible to any persons other than those to whom they are addressed. The plaintiff, therefore, has failed to prove that there is a publication of a libel of and concerning himself except to the builders, and in my opinion such publication is privileged. Then comes the question whether there is any evidence of express malice. I do not think there is. In my opinion the mere fact of the communication being made on a post-card is not *per se* evidence of express malice.

ROMER, L.J., concurred.

Appeal allowed.

Solicitor for the appellant, *J. E. S. King.*

Solicitors for the respondent, *Woodbridge & Sons.*

High Court of Justice.

Chan. Div. } Byrne, J. } Feb. 12-14.

MIDLAND RAILWAY CO. v. WRIGHT. (a.)

Railway—Land over tunnel—Superfluous land—Title by adverse possession against railway company—Separate ownership of surface stratum *and tunnel—Telegraph wires over surface.*

Land situated over a tunnel, though not superfluous land within the meaning of the Lands Clauses Act, is not necessary to the undertaking of a railway company, and a title by adverse possession can be acquired to it against the company, carrying with it all rights to the air above the surface stratum, *and, subject to the company's rights in the tunnel, to the soil below; and the company is therefore not entitled to carry telegraph wires over land above a tunnel to which such a title has been acquired.*

Trial of action.

This was an action in which an injunction was claimed to restrain the defendant from removing telegraph wires carried over a small piece of land in the township of Idle, in the West Riding of Yorkshire, situated over the "Thackley" Tunnel on the Leeds and Bradford Railway of the plaintiffs.

The piece of land in question, with others, was conveyed by a deed of statutory conveyance dated the 4th of December, 1847, to the Leeds and Bradford Railway Co. for the purposes of their undertaking.

The company shortly afterwards constructed the tunnel, which was perpendicularly under a portion of the piece of land.

In 1851 the undertaking of the Leeds and Bradford Railway Co. became vested in the plaintiffs, who have ever since used the tunnel for traffic; but neither railway company, except as hereinafter mentioned, ever occupied or claimed rights over the surface of the land.

By an indenture dated the 8th of June, 1859, the trustees of the vendor to the company conveyed the piece of land, with adjoining lands, to the defendant's predecessor in title, who took without notice of the previous conveyance to the company, and it had since been used for grazing purposes by the defendant and his predecessors.

About 1864 the Electric and International Telegraph Co. erected a line of posts and telegraph wires along the top of the tunnel, the wires being carried across the piece of land at a height of about 30ft., though no posts were erected on it; on the 15th of April, 1864, the Telegraph Co. entered into an agreement with the grantee under the conveyance of 1859 for the annual payment to him of 2s. 6d. in respect of the wires carried "over the land belonging to him situate in the vicinity of" the Thackley Tunnel.

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

About 1868 the plaintiffs became entitled to the wires, and they continued to pay the 2s. 6d. to the defendant or his predecessors till 1897. In that year they discontinued the payment, and claimed to be entitled to carry the wires over the land without payment and to fence off the land; the defendant thereupon threatened to remove the wires, and eventually the present action was commenced in November, 1899. The wires had been slightly shifted from time to time, but were now over the part of the land perpendicularly over the tunnel.

The statement of claim asked for an injunction to restrain the defendant from removing or attempting to remove the wires; he pleaded possession, the Statutes of Limitation, and the acquiescence, *laches*, and delay of the plaintiffs, and also that if they had ever been entitled to the surface they had abandoned it and that it had accordingly become superfluous land within the meaning of the Leeds and Bradford Co.'s special Act, containing provisions similar to those of the Lands Clauses Act, and not having been sold had vested in the defendant or his predecessor; and he counterclaimed for an injunction to restrain the plaintiffs from entering on or fencing off the land, or erecting or maintaining a fence there, and from permitting any telegraph lines or wires to remain over or along it, and for an order to remove them.

For the defendant, possession was proved, and for the plaintiffs their chief electrical engineer gave evidence as to the greater convenience of carrying wires over railway tunnels rather than through them.

Levett, K.C., and *Sargant*, for the plaintiffs.—The railway company took possession of the surface by making and using the tunnel, and have never abandoned possession. They could not have sold the surface, and did no act to limit their possession to the tunnel itself. There is no authority for the contention that land over a tunnel can be severed by the Statute of Limitations so as to give a title to the surface. There is no difference between artificial surfaces constructed on the "cut and cover" system and natural surfaces. Where another owner has rights under the surface, all that can be acquired is a mere grazing or similar right over the surface itself; and this is all the defendant has, if indeed he has more than a mere licence. In any case he has no right to the air many feet above the surface.

They cited *Leigh* v. *Jack*, 29 W. R. 452, 5 Ex. D. 264; *Bobbett* v. *South-Eastern Railway Co.*, 9 Q. B. D. 424, 30 W. R. Dig. 118; *Norton* v. *London and North-Western Railway Co.*, 28 W. R. 173, 13 Ch. D. 268; *Rosenberg* v. *Cook* 30 W. R. 344, 8 Q. B. D. 162; *In re Metropolitan District Railway Co. and Cosh*, 28 W. R. 685, 13 Ch. D. 607; *Mullner* v. *Midland Railway Co.*, 27 W. R. 330, 11 Ch. D. 611; *Smith* v. *Lloyd*, 2 W. R. 271, 9 Exch. 562; *Low Moor Co.* v. *Stanley Coal Co.*, 34 L. T. Rep. 186. 24 W. R. Dig. 155; *Wandsworth Local Board* v. *United Telegraph Co.*, 32 W. R. 776, 13 Q. B. D. 904; and Shelford's Real Property Statutes, p. 121.

Norton, K.C., and *Clayton*, for the defendant.—A statutory title can be acquired against a railway company. If the defendant has rights over the surface he must be entitled to the air above; separate titles cannot be acquired to separate *strata* of air. The natural surface of a tunnel may be superfluous land; it is not like the artificial surface in the cases cited. And the railway company have acknowledged our title by the annual payment of 2s. 6d.

They cited *Grand Junction Canal Co.* v. *Petty*, 36 W. R. 795, 21 Q. B. D. 273; *Ware* v. *London, Brighton, and South Coast Railway Co.*, 31 W. R. 228; *Keyse* v. *Powell*, 2 E. & B. 132; *Lewis* v. *Branthwaite*, 2 B. & Ad. 437; *Seddon* v. *Smith*, 36 L. T. Rep. 168, 25 W. R. Dig. 133; *Marshall* v. *Taylor*, [1895] 1 Ch. 641, 43 W. R. Dig. 98; *Corbett* v. *Hill*, L. R. 9 Eq. 671, 18 W. R. Ch. Dig. 143; *Walker* v. *Jeffreys*, 1 Hare 341; *Pickering* v. *Rudd*, 4 Camp. 219; *Kenyon* v. *Hart*, 13 W. R. 406, 6 B. & S. 249; *Mayor of Brighton* v. *Brighton Guardians*, 5 C. P. D. 368, 28 W. R. Dig. 133; *Laybourn* v. *Gridley*, 40 W. R. 474, [1892] 2 Ch. 53; and *Bevan* v. *London Portland Cement Co.*, 67 L. T. Rep. 615, 41 W. R. Dig. 122.

Levett in reply.—What the defendant claims is not a definite cubical part of the hereditament like a cellar or a floor of a building, and so no title can be acquired to it. If this land is superfluous the company will be obliged to sell the land above all its tunnels.

He referred to Shelford's Real Property Statutes, p. 119.

BYRNE, J., after stating the facts, continued: There can be no doubt that if both parties in this case had been private individuals the possession which has been proved on the part of the defendant would have been sufficient to establish his title to the piece of land against the plaintiffs under the Statute of Limitations; and this title would have included the air above and the soil below, apart from the question of the tunnel. But then the plaintiffs in this case are a railway company, and it has been argued for the defendant that this land is superfluous land within the meaning of the Lands Clauses Act. I am of opinion that it is not superfluous, and I think this is established by the case of *In re Metropolitan District Railway Co. and Cosh*; but I also think it is established by *Norton* v. *London and North-Western Railway Co.* and *Bobbett* v. *South-Eastern Railway Co.*, and by the judgments of Lindley, L.J., and A. L. Smith, L.J., in *Marshall* v. *Taylor*, that a title may be acquired by a stranger to land of a railway company which is not superfluous and could not have been sold by the company though it is true that the other cases have been those of lands adjacent laterally to a railway, not situated over it; and I may refer to the analogous case of charity lands where it was held in *Magdalen Hospital* v. *Knotts*, 27 W. R. 602, 4 App. Cas. 324, that such a title could be acquired to lands of which the charity could not dispose. Then it was argued for the plaintiffs that the possession and use of the tunnel amounted to a possession of the surface, but I cannot accept that argument. In my opinion the defendant and his predecessor in title have acquired the surface with all above it and all below necessary for its proper enjoyment, subject to the plaintiffs' rights in the tunnel and in such part of the soil as is necessary for its due enjoyment as a tunnel; and I do not think it is necessary to draw a definite line as to where the property of the defendant as surface owner ends and the property of the railway company begins. The case of a cellar and various other hypothetical cases have been argued, and I do not say but that a question may hereafter arise whether a stranger can acquire a title to land necessary to the undertaking of a of a railway company, but this land, though no doubt possession of it is convenient for the railway, is not necessary to its undertaking. And lastly, I think the railway company have acknowledged the title of the defendant and his predecessors by the annual payment of 2s. 6d. For these reasons I must hold that the plaintiffs' claim for an injunction fails, and the action must be dismissed with costs, and an order made in the terms of the counterclaim, but this must not to be acted on for six months.

Solicitors, *Beale & Co.*; *Jaques & Co.*

Chan. Div. } Farwell, J. } March 14, 21, 22.

In re HOLLAND.
GREGG *v.* HOLLAND. (*a.*)

Settlement—Married Woman—Husband entitled jure mariti *to wife's reversionary interest in personalty—Ante-nuptial agreement — Post-nuptial settlement—Recital—Voluntary settlement by husband—Fraud on creditors—Trustee in bankruptcy—Estoppel—Statute* 13 *Eliz. c.* 5.

A husband entitled jure mariti *to his wife's reversionary interest in personalty (subject only to the contingency of her surviving him before he had reduced it into possession, which did not happen), in* 1873 *joined with his wife, then an infant, in executing a post-nuptial deed of settlement. This settlement recited that, previously to the marriage in* 1872, *he had "agreed to make such settlement of the fortune of his said wife as is hereinafter contained," and contained a covenant by him with the trustees that, on the interest falling into possession, he and she, or the survivor, and all other necessary parties, would assign and transfer it to the trustees upon the trusts of the settlement, which were for her for life, and after her death, if the husband should not have been or become a bankrupt, for him until he should become a bankrupt, with remainder for the issue of the marriage in the usual way, the survivor of the husband and wife having a power of appointment among issue. The wife having died in* 1877, *the husband in* 1897 *appointed two-thirds of the trust funds to his sons and surrendered his life interest to them, and five months afterwards he was adjudicated a bankrupt. The reversionary interest had since fallen into possession.*

Held, (1) *that, even with such a recital as here, a parol contract before marriage cannot support a settlement made after marriage so as to satisfy the Statute of Frauds;* (2) *that the settlement here was a voluntary settlement, and, as it expressly provided that the husband's property should be withdrawn from his creditors in case he became a bankrupt, was fraudulent within* 13 *Eliz. c.* 5; (3) *that, even if the recital had been sufficiently precise to create an estoppel binding the husband, the trustee in bankruptcy, having a paramount right by statute overriding the title of the bankrupt and persons claiming under settlements made by him, was in a superior position to the bankrupt himself, and would not be bound by such an estoppel, but no such estoppel was raised;* (4) *that the fund, therefore, belonged to the trustee in bankruptcy for the benefit of the creditors.*

Semble, *no post-nuptial settlement can by itself satisfy the Statute of Frauds; it is the date of execution, and not the contents of the document, that is material.*

Dundas *v.* Dutens (*variously reported in* 1 *Ves. jun.* 196 *and* 2 *Cox Ch. Cas.* 235) *explained.*

Barkworth *v.* Young, 5 *W. R.* 156, 4 *Drew.* 1, *disapproved.*

Adjourned summons.

Under the will of Henry Holland, dated the 26th of April, 1871, Charlotte Fanny Holland was entitled in remainder expectant on the death of the testator's widow to one-eighth share of the proceeds of sale of his residuary real and personal estate.

The testator died on the 12th of December, 1871.

On the 27th of August, 1872, Charlotte Fanny Holland, being then an infant, intermarried with Isidore M. Bourke.

On the 8th of February, 1873, a post-nuptial settlement was executed by deed made between Isidore M. Bourke and Charlotte Fanny, his wife, then an infant, of the first part, the trustees of the will of Henry Holland, who were also the guardians of Mrs. Bourke, of the second part, and Henry Holland and W. M. Bourke of the third part.

This deed contained the following recital: "And whereas the said parties hereto of the first part intermarried on the 27th of August, 1872, and previously to such marriage the said Isidore M. Bourke agreed to make such settlement of the fortune of his said wife as is hereinafter contained"; and then followed a covenant by the husband with the trustees that immediately upon the share and interest of and in the residuary estate and effects of the said Henry Holland, to which the husband and wife or the husband in his right or either of them then were or was or thereafter might become entitled, becoming an interest in possession, the husband and wife or the survivor and all other necessary parties would assign and transfer the said share to the trustees of the settlement upon the trusts thereinafter declared. The trusts of the settlement were for the wife for life for her separate use without power of anticipation, and after her death, if the husband should not have been or become a bankrupt or assigned, &c., for the husband until he should become bankrupt or assign, &c., with remainder for the issue of the marriage in the usual way, the survivor of the husband and wife having a power of appointment amongst issue.

On the 14th of April, 1877, Mrs. Bourke died.

On the 25th of October, 1897, Isidore M. Bourke appointed two-thirds of the trust funds to two of his sons and surrendered his life interest to them.

On the 1st of March, 1898, a receiving order was made against Isidore M. Bourke, and on the 18th of March, 1898, he was adjudicated a bankrupt.

On the 11th of December, 1899, the testator's widow died, and the eighth share of residue given by his will to Mrs. Bourke fell into possession. The fund was claimed by the trustees and beneficiaries under the settlement of the 8th of February, 1873, and their claim was resisted by the official receiver as trustee of Isidore M. Bourke.

W. H. Cozens-Hardy, for the trustees, explained the facts.

St. John Clerke, for the trustees and beneficiaries under the settlement of the 8th of February, 1873.—There was a good equitable assignment of the husband's interest in what, at the date of the settlement, was a reversionary *chose in action* in the hands of his wife, then an infant; the recital under seal of the ante-nuptial agreement is a complete equity as against the husband and operates as an estoppel against him and the official receiver, who is in no better position. For the legal force of such a recital see the judgment of Lord Selborne in *Codrington* v. *Lindsay*, 21 W. R. 182, L. R. 8 Ch. App. 578, at p. 588; *Young* v. *Smith*, L. R. 1 Eq. 180, 14 W. R. Ch. Dig. 44; *Buckland* v. *Buckland*, 48 W. R. 637, [1900] 2 Ch. 534. I submit that by the settlement of the 25th of October, 1897, anterior to his bankruptcy, the husband forfeited his life interest completely, but I admit that the whole question turns on whether the deed of the 8th of February, 1873, was a good settlement or not.

W. H. Upjohn, K.C., and *A. Adams*, for the official receiver.—This is a fraud on the bankruptcy laws. The question is not one of the recital effecting an estoppel, but whether that recital, even if valid, is enough to show a settlement for valuable consideration, and we submit that it is not. There was no agreement *de præsenti* but only an assignment *in futuro*, and the settlement is not enforceable against the covenanting husband or his trustee: *Dundas* v. *Dutens*, 1 Ves. jun. 196, 2 Cox Ch. Cas. 235; *Spurgeon* v. *Collier*, 1 Eden 55; *Warden* v. *Jones*, 6 W. R. 180,

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

2 De G. & J. 76; *Trowell* v. *Shenton*, 26 W. R. 837, 8 Ch. D. 318; *Freeman* v. *Pope*, 18 W. R. 906, L. R. 5 Ch. App. 538; *Battersbee* v. *Farrington*, 1 Swanst. 106. On grounds of public policy, having regard to the Statute of Frauds, effect ought not to be given to this recital; on the general policy of the law of bankruptcy and on the particular policy of section 47 of the Bankruptcy Act, even if the bankrupt is bound by this covenant, his trustee in bankruptcy cannot be held to be so bound. The assignment to the sons is void because it is within two years of the bankruptcy. The position of the trustee is not affected by the fact that he has not yet taken out letters of administration to the wife's estate: *Smart* v. *Tranter*, 38 W. R. 530, 43 Ch. D. 587.

St. John Clerke, in reply.—This is not a question under the Statute of Frauds, but a question whether a husband is to be assisted to get rid of his own covenant. But, in point of fact, the settlement does satisfy the statute. As to the policy of the law of bankruptcy, it is well established that the trustee only takes the right which the bankrupt could have had, and no more: *Harris* v. *Truman*, 30 W. R. 533, 9 Q. B. D. 264.

[FARWELL, J., refers to *In re Walhampton Estate*, 32 W. R. 874, 26 Ch. D. 391.]

Cur. adv. vult.

March 21.—FARWELL, J., having drawn the attention of counsel to *In re Pearson, Ex parte Stephens*, 25 W. R. 126, 3 Ch. D. 807, as a case of a voluntary settlement held to be fraudulent within the statute 13 Eliz. c. 5.,

St. John Clerke.—I distinguish *In re Pearson* as inconsistent with the general course of law and decisions like *In re Detmold, Detmold* v. *Detmold*, 37 W. R. 442, 40 Ch. D. 585, for the court should arrive at its conclusion as an inference of fact from all the circumstances before it; it is also distinguishable because there the husband could do what he liked with the property, while here it was his wife's reversionary *chose in action*: see *Montefiore* v. *Behrens*, L. R. 1 Eq. 171, 14 W. R. Ch. Dig. 44.

Adams.—This case is a settlement by the husband, and the husband alone, and is within *In re Pearson*.

Cur. adv. vult.

FARWELL, J., after stating the facts as above, said: The fund is claimed by the trustees and beneficiaries under the settlement of the 8th of February, 1873, and their claim is resisted by the official receiver as trustee of Isidore M. Bourke. It is conceded on behalf of the former that the settlement rests in *fieri* and cannot be enforced unless it can be supported by the consideration of marriage, and he relies on the recital of an ante-nuptial contract which I have already read. The first question that I have to determine is whether the settlement of the 8th of February, 1873, containing such a recital is sufficient to satisfy the Statute of Frauds. In my opinion it is now settled that in the absence of such a recital a parol contract before marriage cannot support a settlement made after marriage. The cases are conflicting, but this is, in my opinion, the conclusion on the balance of authorities. In *Hodgson* v. *Hutchenson*, 5 Vin. Abr. 522, placit 34, which was decided in 1712, it is reported as follows: "A father encourages the courtship of his son with another's daughter, who proposes by letter to give her £500 if the father would settle £100 per annum on the son, which is refused. The son and daughter marry privately, and after this letter is written; then he that refused consented, and he that consented refused. On a bill for performance of this agreement it was objected that these promises were within the Statute of Frauds, and that the letter being after the marriage should not bind; but decreed contra on circumstances of the father's privity and consent to the match and of the marriage, by afterwards approving of it. That it was out of the statute if no letter for the agreement is admitted by the answer; but this case doth not depend on parol evidence or admissions; for the letter after marriage, considering the transactions before, is sufficient. The offer to settle £100 per annum shall be in tail, with a power to the husband to charge it with £500 for younger children, being the mother's portion, and decreed accordingly: *per* Harcourt, Lord Keeper." The first ground on which this was decided is that where the agreement is admitted by the answer the statute cannot be pleaded, and this was correct at that time, although it is no longer law: *Moore* v. *Edwards*, 4 Ves. 23; *Blagden* v. *Bradbear*, 12 Ves. 466, at p. 471. The second ground is so concisely stated in the report that it is difficult to say what it really amounts to. *Montacute* v. *Maxwell*, as reported in 1 Eq. Cas. Ab. 19 and Prec. in Chancery, 526, was a case of fraud, the reduction of the agreement into writing having been prevented by the fraud and practices of the party to be bound. In the report of the same case in 1 Strange 235, at p. 237, Parker, L.C., says: "But such a parol promise on marriage is sufficient consideration to support a settlement made agreeable to it after marriage. This has been frequently determined. So it is also sufficient consideration to establish a promise made in writing after marriage." Lord St. Leonards (on Powers 647) treats this as a mere *dictum*, and the editor of Eden's Reports, in a note at vol 1, p. 62, says there is no decision to warrant such a *dictum*. The report of this case in 1 P. Wms. 618, which was cited in *Warden* v. *Jones*, 6 W. R. 180, 2 De G. & J. 76, does not contain the second hearing of this case, in which this *dictum* is stated. In *Taylor* v. *Beech*, 1 Ves. sen. 297, the defendant pleaded the statute in bar to discovery, as well as to relief, and I read the case as confined to this—that the Lord Chancellor thought that there were circumstances which might raise an equity in the plaintiff's favour if full discovery was made, and that he would not shut out such circumstances by refusing discovery. In *Surcombe* v. *Pinniger*, 3 De G. M. & G. 571, at p. 575, there is a *dictum* of Turner, L.J.'s: "But it has been held in many cases that if there be a written agreement after marriage in pursuance of a parol agreement before marriage, this takes the case out of the statute." This *dictum* was not necessary for the decision, and the Lord Justice does not refer to any case except *Taylor* v. *Beech*, which he treats as a case of part performance by acts other than mere marriage. In *Barkworth* v. *Young*, 5 W. R. 156, 4 Drew. 1, Kindersley, V.C., decided that a statement of a parol agreement in an affidavit made after the marriage by the party to be charged was sufficient to satisfy the statute. At p. 12 he says: "The defendant objects that, supposing this was in every other respect a sufficient note or memorandum in writing, it was not made till after the marriage, and, therefore, is not good within the intent of the statute. And the opinion expressed by Sir W. Grant in *Randall* v. *Morgan*, 12 Ves. 67, is relied upon. Sir W. Grant's opinion is expressed in the form of a strong doubt, and unquestionably even the doubts of such a judge are entitled to the utmost consideration and deference. But, notwithstanding that doubt, it has been since held by Lord Langdale in *De Beil* v. *Thomson*, 3 Beav. 469, and by Lord Cottenham in the same case on appeal (see note in 12 Cl. & Fin. 64), that a written memorandum or note made after the marriage of a parol agreement made before the marriage

would be sufficient within the statute; the former referring to Lord Harcourt's opinion in *Hodgson* v. *Hutchenson*, and the latter referring not only to that case, but also to Lord Hardwicke's decision in *Taylor* v. *Beech*, and to that of Lord Macclesfield in *Montacute* v. *Maxwell*. All these opinions must, I think, outweigh Sir W. Grant's doubt." I have already referred to two of the cases on which the Vice-Chancellor relied, and with regard to *De Biel* v. *Thomson* and *Hammersley* v. *De Biel* I would point out with all respect that Lord Langdale did not decide the case on the ground that a subsequent memorandum would satisfy the statute, but said that the subsequent letter was either a sufficient note to satisfy the statute or a sufficient adoption of an ante-nuptial contract purporting to have been entered into by his sons in writing on his behalf; and, further, that Lord Cottenham in *Lassence* v. *Tierney*, 1 Mac. & G. 551, at p. 572, expressly stated that his judgment in *Hammersley* v. *De Biel* turned on part performance by acts other than the mere marriage. Except so far, therefore, as the case in Vin. Abr. is an authority, I come to the conclusion that the Vice-Chancellor's judgment was not supported by express authority. On the other hand, in addition to a *dictum* of Sir William Grant's in *Randall* v. *Morgan*, there are three cases of the highest authority which, in my opinion, show that *Barkworth* v. *Young* cannot be supported. In *Spurgeon* v. *Collier* there was a settlement made after marriage; evidence was tendered of an antecedent parol agreement; the evidence failed, but Lord Northington (1 Eden, at p. 61) says: "Secondly, if proved, it would not better the case. It is admitted that, since the statute, though such promise was made, Dr. Alston could have no remedy. Then the settlement was voluntary, for it could not be compelled. It was made to a person having no right to demand it, for where there is no remedy there is no right. But, if such a parol agreement were to be allowed to give effect to a subsequent settlement, it would be the most dangerous breach of the statute and a violent blow to credit. For any man, on the marriage of a relation, might make such promise, of which an execution never could be compelled against the promisor, and the moment his circumstances failed he would execute a settlement pursuant to his promise and defraud all his creditors." I read this as a clear expression of the Lord Keeper's opinion that such an agreement, although followed by a settlement in pursuance of it, cannot satisfy the statute. In *Warden* v. *Jones* creditors filed a bill to set aside a settlement as fraudulent within the statute of Elizabeth. The Lord Chancellor assumed the existence of an antecedent parol agreement, and decided that it was not sufficient to satisfy the statute so as to give consideration to the settlement made after marriage in pursuance of such agreement. Finally, in *Trowell* v. *Shenton*, Sir George Jessel says (8 Ch. D., at p. 324): "Some observations were made during the argument as to the effect of a subsequent acknowledgment in writing of a contract, and *Barkworth* v. *Young* was referred to in support of the contention that the settlement was for value, though there was no ratification till after the marriage. The answer to this is given by *Warden* v. *Jones*, which is subsequent in date to *Barkworth* v. *Young*, and therefore, so far as the two are inconsistent, overrules it. Lord Cranworth, there referring to a post-nuptial settlement reciting that it was made in pursuance of an ante-nuptial agreement, says at p. 85: 'Lord Thurlow decided in *Dundas* v. *Dutens*, that such a settlement is good, and on that decision I will only remark that if it be a correct view of the law the whole policy of the statute is defeated. It cannot be enough merely to say in writing that there was a previous parol agreement. It must be proved that there was such an agreement, and to let in such proof is precisely what the statute meant to forbid.' In that short passage the Lord Chancellor disposed of all the other authorities." And at p. 326 of the same report, Cotton, L.J., says: "It was urged that, though no action could be maintained for breach of the agreement, yet the settlement was not to be treated as voluntary. *Warden* v. *Jones* appears to me to decide the exact contrary of this contention. The consideration was held to be insufficient in that case, because the Statute of Frauds provided 'that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing, signed,' &c. Here the question does not turn on the Statute of Frauds, but on Lord Tenterden's Act; but if in one case it is held that a parol contract before marriage cannot support a settlement made after marriage, so here a settlement cannot be supported by an infant's contract of which there is no written confirmation." See also Sugden on Powers, 647-650.

In both of the last cases the court expressly pointed out that there was no recital of any ante-nuptial agreement, and the next question that I have to consider is whether the existence of such a recital makes any difference. In my opinion it does not. The decision of the courts that a post-nuptial settlement is not supported by an ante-nuptial parol agreement involves the proposition that no post-nuptial settlement can by itself satisfy the statute. It is the date of execution, not the contents of the document, that is material. Recitals may in some cases raise a case of estoppel, but they cannot affect the construction of a statute, nor can the same document be at one and the same time an agreement within and an agreement not within the statute, according as it is impeached by a settlor or his creditors. The question, What is an agreement sufficient to satisfy the statute? must be answered in the same way in all cases. Further, I come to the same conclusion on the construction of the statute. Section 4 enacts "that no action shall be brought whereby to charge any person upon any agreement made upon consideration of marriage unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." An agreement or memorandum or note thereof to satisfy the statute must, in my opinion, be reduced into writing and signed before the marriage. True that the statute does not render the agreement void or illegal, but it renders written evidence of it indispensable: *Maddison* v. *Alderson*, 31 W. R. 820, 8 App. Cas. 467, at p. 488. An agreement which a man cannot be compelled to perform is a voluntary agreement. He cannot be compelled to perform the ante-nuptial agreement, because it is parol, nor the post-nuptial, because it is founded on a past consideration, and fails, therefore, to possess that essential part of a contract—the consideration for value—for it is well settled that a past consideration will not support a present promise, and the contract in consideration of marriage differs from contracts for sale, within sub-sections 4 and 17 of the statute, as to which it has been held that the agreement must be signed before action (*Lucas* v. *Dixon*, 37 W. R. 370, 22 Q. B. D. 357), because the marriage is performed once for all and is irrevocable. But in contracts for sale the consideration continues, for, if the whole purchase-money has not been paid, the

balance unpaid remains a consideration at the date of the contract, and if the whole has been paid, the purchaser can recover it back if the contract is repudiated. I do not forget that the post-nuptial agreement here is under seal, but this is immaterial for the present purpose, for equity will not aid a voluntary covenant by specific performance (*Jefferys* v. *Jefferys*, Cr. & Ph. 138). and Mr. Clerke is claiming the fund *in specie*, not damages for breach of covenant.

Is there, then, any authority that prevents my holding in accordance with my own opinion? It is very doubtful whether *Dundas* v. *Dutens*, amounts to more than a *dictum*. It is certainly a mere *dictum* as reported in Vesey. "If the husband made an agreement that he would settle, and then in fraud of that agreement got married, would not he be bound by it? I thought there was a case in point for that. What the settlement might be if made upon himself after marriage is another question. But in Eq. Cas. Ab." (which I apprehend is the case of *Montacute* v. *Maxwell*, which I have referred to), "where there was an agreement before marriage, and the father drew the man in and was privy to his having married without any execution, and then refused to execute, relief was given. If in this case there was an agreement before marriage, and afterwards he drew her in to be married, and then refused to perform it, it appears to me to be that kind of fraud against which this court will relieve. If there is a parol agreement for a settlement upon marriage, after marriage a suit upon the ground of part performance would not do, because the statute is expressed in that manner; but is there any case, where in the settlement the parties recite an agreement before marriage, in which it has been considered as within the statute?" And Sir William Grant so treats it in *Randall* v. *Morgan*, and although Lord Ellenborough calls it a decision in *Shaw* v. *Jakeman*, 4 East 201, he refers to the report in Vesey, where it is not more than a *dictum*. In 2 Cox Ch. Cas. 235 it is reported as a decision; but I think Vesey's report, supported as it is by Sir William Grant, is the more trustworthy. I have considered this in detail, because, if Lord Thurlow decided the point, Lord Cranworth's *dictum* could not overrule it, and it would, of course, be binding on me. But I think that it is only *dictum*, and that it is outweighed by the *dicta* of Lord Cranworth in *Warden* v. *Jones*, 2 De G. & J., at p. 85. "This most reasonable construction of the statute is consistent with the decision of Lord Cottenham in *Lassence* v. *Tierney*, and though the precise question does not arise in the case now before me, I have thought it right to advert to these authorities, in order that it may not be thought I decide the present case merely on the ground that it is distinguishable from *Dundas* v. *Dutens*. I incline to think that, even if this settlement had contained a statement that it was made in pursuance of a previous ante-nuptial parol agreement, I should still have considered it, as I now consider it, void against creditors." This was approved by the Court of Appeal in *Trowell* v. *Shenton* and by Lord St. Leonards in his book on Powers, 650. Mr. Clerke placed great reliance on a passage in Lord Selborne's judgment in *Codrington* v. *Lindsay*, 21 W. R. 182, L. R. 8 Ch. App. 578. "What, then, are the considerations for the settlement of the Bank of Bengal shares, and the £6,213 Consols, and £4,562 reduced stock, expressed on the face of the deed of the 31st of March, 1850? First, I find in it an express recital that upon the treaty for the marriage it was agreed (which I take to mean between the plaintiff's father and her husband) that as well the two several sums of £6,213 Consols and £4,562 reduced stock (which had been then actually transferred into the names of the trustees of the deed), as also all the interest of the plaintiff or of her husband in her right under the settlement of the 17th of August, 1824 (*i.e.*, her interest in the 80,000 S.B.) should be settled upon the trusts and in the manner thereinafter mentioned. This recital cannot, as against any person not a party to it, alter the consideration or the true character of the deed, or supply the want of other evidence of a binding ante-nuptial contract: *Warden* v. *Jones*. But I apprehend it is good evidence as between the father and the husband, at all events, of the terms of and the considerations for their agreement *inter se*." In that case, as well as in *Battersbee* v. *Farrington*, there was an express recital of an ante-nuptial contract contained in the post-nuptial settlement. The true meaning of Lord Selborne's statement is illustrated by Sir Thomas Plumer's judgment in *Battersbee* v. *Farrington*, 1 Swanst, at p. 113: "On the first question (which I am not now to decide) the distinction, I apprehend, is that against all persons claiming under the settlor the recital is conclusive; but it would be difficult to maintain that a recital in a post-nuptial settlement of ante-nuptial articles, of the existence of which there is no distinct proof, would be binding on creditors. Such a doctrine would give to every trader a power of excluding his creditors by a recital in a deed to which they are not parties. In this instance there appears no motive for the recital if untrue; a recital in a deed executed before the party engaged in trade, when he was not indebted, and twenty years prior to his death." The meaning is that, although the post-nuptial settlement does not satisfy the statute, the recital of an ante-nuptial contract may bind the party making it and volunteers claiming under him by estoppel, and Mr. Clerke has accordingly argued that the trustee in bankruptcy stands in no better position than the bankrupt, and is as much bound by estoppel as the bankrupt himself would be. Now, it is no doubt true as a general proposition that the trustee in bankruptcy stands in the bankrupt's shoes, but this is subject to several exceptions. It is only necessary here to mention three—(1) under section 47 of the Bankruptcy Act; (2) under the statutes of Elizabeth; and (3) in cases of fraud. In the first two cases the trustee has a paramount right by statute which overrides the title of the bankrupt and persons claiming under settlements made by him. The third exception is not peculiar to the trustee in bankruptcy, but is of more general application. It is conceded that the first exception is excluded in the present case, both by the terms of the section itself and by the periods that have elapsed. I will deal with the second exception presently. The third exception may be stated in Baron Martin's words in *Horton* v. *Westminster Improvement Commissioners*, 7 Exch. 780, at p. 791: "The meaning of estoppel is this—that the parties agree for the purpose of a particular transaction to state certain facts as true, and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened when the statement is made for the purpose of concealing an illegal contract, for persons cannot be allowed to escape from the law by making a false statement." Again, in *Doe* v. *Lloyd*, 5 Bing. N. C. 741, the heir-at-law of a grantor was allowed on this ground to impeach the validity of his ancestor's deed. To return to the second exception; the statute 13 Eliz. avoids voluntary settlements made with a view to defeat or defraud creditors. When the husband entered into the covenant of the 8th of February, 1873, he was entitled *jure mariti* to the property in question, which was a reversionary interest in personalty, subject only to the contingency of his wife's surviving him before he had reduced it into possession. By that settlement he expressly provided that his

property should be withdrawn from his creditors in case he became a bankrupt. It is therefore fraudulent within the statute of Elizabeth, according to the case of *In re Pearson, Ex parte Stephens*, the authority of which is not affected by *In re Detmold, Detmold* v. *Detmold*, which was the case of a marriage settlement, while *In re Pearson* was a voluntary settlement, and is therefore on all fours with the present case. Mr. Clerke argued that *In re Pearson* stood alone, and was wrongly decided, but I am not aware that it has ever been doubted, and it is right that I should follow it. He also cited *Montefiore* v. *Behrens*, but the reasoning on which the Master of the Rolls proceeded in that case is inapplicable to the present; he put it on the ground that the fund was the wife's property, and that she was entitled to enforce her equity to a settlement. But here there was no such right in the wife, because the property was a contingent reversionary interest in personalty (see *Osborn* v. *Morgan*, 9 Hare 432), and she was dead long before the fund fell into possession, and the right is, of course, personal to her. I am of opinion, therefore, that the trustees in bankruptcy would not be bound by estoppel if any such arose. But I am further of opinion that the recital is not sufficiently precise to create an estoppel. It is quite consistent with the existence of a mere parol agreement; for a pleader might insert the very words of the recital in his defence, and yet plead that such agreement was not in writing, so as to satisfy the Statute of Frauds. Even if the recital had been of an agreement in writing, it would have been open to the trustee in bankruptcy to adduce evidence to show that it was untrue, and, if it were untrue, it would be fraudulent within Baron Martin's judgment cited above. It has not been argued that the deed of the 25th of October, 1897, has any independent validity or effect, and the other points made on this deed and otherwise in the case do not arise in the view that I take of the matter. I therefore declare that the official receiver is (subject to procuring letters of administration to the estate of Charlotte Fanny Bourke) entitled to her share in the testator's estate.

Solicitors, *H. Clifton Lambert; Van Sandau & Co.; Tarry, Sherlock, & King.*

Chan. Div.
Farwell, J.

Jan. 17.

In re HOWARD.
TAYLOR *v.* HOWARD. (*a.*)

Will—Annuity to wife "so long as she remains unmarried"—Sum not exhausted—Death of wife unmarried—Duration.

Where a testator desired his executor to set aside £200 and thereout pay the testator's wife the sum of £3 monthly so long as she remained unmarried or until the sum of £200 became exhausted, the payment to cease on her marrying again, and where the wife died without remarrying before the sum was exhausted,

Held, that her executrix was entitled to the balance.

Rishton *v.* Cobb, 5 *My. & Cr.* 145, *at p.* 152, *followed.*

This was an originating summons taken out by the executrix of the widow of one William Howard, who, by his will dated the 3rd of February, 1899, appointed the defendant executor and trustee thereof, and, after making sundry bequests, provided as follows: "I desire my said executor and trustee to set aside £200, and thereout pay to my said wife, the said Amelia Howard, the sum of £3 monthly so long as she remains unmarried or until the said sum of £200 becomes exhausted, the said payment of £3 monthly to cease on my said wife marrying again."

The testator died on the 8th of May, 1899, and his wife on the 31st of May, 1900, without having married again.

The sum of £200 not having been exhausted, the plaintiff took out this summons to have it determined whether she was entitled to the balance.

S. Dickinson, for the plaintiff.—The interest of the wife was not determined by her death, but would only have been determined by the act of marriage: see the *dictum* of Lord Cottenham in *Rishton* v. *Cobb*, 5 My. & Cr. 145, at p. 152, "Her interest would not have been determinable by her death, but (independently of the forfeiture upon alienation) only by her ceasing to be single and unmarried. This is different from a gift of dividends during widowhood. The state of widowhood must determine with the life of the widow; but the gift, so long as the legatee shall remain single and unmarried, must be considered as requiring the act of marriage to determine the interest."

G. E. Fryer, for the defendant.—The observations of Lord Selborne in *In re Boddington*, 32 W. R. 448, 25 Ch. D. 685, at p. 689, show that the *dictum* in *Rishton* v. *Cobb* cannot be supported.

FARWELL, J.—I understand Lord Selborne to mean that *Rishton* v. *Cobb* can be supported on the ground stated by Lord Cottenham in that case. The Court of Appeal did not, and in my opinion could not, overrule it, and it is binding on me. The plaintiff is therefore entitled to the balance of the £200.

Solicitors, *Colman & Knight; W. H. Martin & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.)

May 3.

SMITH *v.* BOON. (*a.*)

Highway—Light locomotive—Excessive speed of driving on highway—"Having regard to the traffic on the highway"—Motor tricycle—Light Locomotives on Highways Order, 1896, *art.* 4 (1).

Article 4 (1) *of the Light Locomotives on Highways Order*, 1896, *provides that a person driving or in charge of a light locomotive when used on a highway shall "not drive the light locomotive at any speed greater than is reasonable and proper, having regard to the traffic on the highway."*

Held, that, in order to constitute an offence under this section, it is not necessary to prove that any vehicle or person was interrupted, interfered with, incommoded, or affected by the speed at which the accused was driving the light locomotive.

Case stated by justices of Surrey sitting at Kingston-upon-Thames.

An information was preferred by the respondent against the appellant, charging that on the 20th of November, 1900, at 10.45 a.m., he drove a light locomotive at a speed greater than was reasonable and proper having regard to the traffic on a certain highway, to wit, High-street, Esher.

It was proved by a police-constable that at the time and on the day in question the appellant drove his motor tricycle at about eighteen miles an hour on

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

the above highway. The police-constable admitted that he "guessed" the rate of speed and stated that he saw a Carter Paterson's van and a butcher's cart on the highway. Another witness said that he could not count twenty during the time it took the appellant to drive 300 yards. He thought the appellant was driving twenty miles an hour. Both witnesses admitted that the traffic on the highway was neither interrupted, interfered with, incommoded, nor affected by reason of the speed at which the appellant drove his motor tricycle.

The appellant denied that he was driving at the before-mentioned speed, and stated that he was driving at a speed of eight miles an hour. There was no evidence before the justices that any vehicle or person using the highway was interrupted, interfered with, incommoded, or affected by reason of the speed at which the motor tricycle was driven, and it was contended by the appellant that in the absence of such evidence the offence charged was not made out.

The justices found as a fact that the appellant was driving his motor tricycle at a speed of from eighteen to twenty miles an hour, and decided that such speed was excessive having regard to the traffic on the highway, and that the appellant's contention was ill-founded in law. They fined the appellant £5.

Roger Wallace, K.C. (*Samuel Fleming* with him), for the appellant.—The justices were wrong in finding that the speed at which the appellant drove the motor tricycle was greater than was reasonable or proper having regard to the traffic on the highway because there was no evidence that anyone was interrupted, interfered with, incommoded, or affected by the speed at which the appellant was driving the motor tricycle: see *Stinson* v. *Browning*, 14 W. R. 395, 35 L. J. M. C. 152, and *Hill* v. *Somerset*, 51 J. P. 742.

The respondent did not appear.

Lord ALVERSTONE, L.C.J.—The justices were right in convicting the appellant. They found that the motor tricycle was going at a speed of eighteen to twenty miles an hour. That is a question of fact. They then decided that that speed was excessive having regard to the traffic on the highway. The appellant contends that there must be direct evidence that some person was interrupted, interfered with, incommoded, or affected by the speed at which he was driving his motor tricycle. I understand that contention to mean that there must be some direct evidence that some trap has been forced off the highway or some poor old woman crossing the road has been obliged to turn back hurriedly—in fact, that there must be something amounting to a risk of accident, if not actual accident, before there can be a conviction. The words of the regulation "having regard to the traffic on the highway" mean the traffic on the road, and not the traffic within a few yards of the locomotive. The magistrates were justified in considering that a speed of eighteen to twenty miles in High-street, Esher, was excessive having regard to the traffic on that road.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Firth & Co.*

Court of Appeal.

From Q. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Romer, L.JJ.) April 19.

BECKHUSEN & GIBBS v. HAMBLET. (*a.*)

Stock Exchange—Principal and agent—Broker lumping several orders under one contract—Liability of principal to jobber on default of broker—Custom—Stock Exchange Rules, r. 177.

A stockbroker who was instructed by a client to purchase and carry over for him 210 *Louisville shares for a particular account, executed the order by purchasing in his own name from a jobber a larger number of these shares and appropriating in his books the specified number to the client and the remainder of the shares to a third party. The stockbroker having been declared a defaulter,*

Held, by Kennedy, J. ([1900] 2 *Q. B.* 18, 5 *Com. Cas.* 217, 48 *W. R. Dig* 185), *in an action by the jobber to recover damages for non-acceptance of the* 210 *shares by the client, that the alleged Stock Exchange usage, by which a broker, instructed by two or more different clients to purchase certain shares to be carried over from time to time, lumps the orders together and purchases the shares in his own name from the jobber, does not create any privity of contract between the jobber and the broker's clients, so as to enable the former to sue the latter in the event of the broker's failure to meet his liability.*

Held, on appeal, that the judgment of Kennedy, J., must be affirmed, as the alleged custom of the Stock Exchange relied on by the jobber had not been proved at the trial to exist.

Semble (per A. L. Smith, M.R.), *if, in some other action, the existence of this custom could be proved, it seemed to him to be a reasonable custom, and might be pleaded.*

Levitt & Thornton v. Hamblet, 17 *Times L. R.* 307, *referred to.*

Appeal by the plaintiffs in an action tried before Kennedy, J., sitting without a jury.

The action was brought by the plaintiffs, a firm of jobbers on the London Stock Exchange, to recover from the defendant, an outside broker, the sum of £186 as damages for breach of contract in refusing to take delivery of 210 Louisville shares under the following circumstances:

The defendant had dealt with a firm of brokers who had been declared defaulters on the Stock Exchange before the transaction was completed.

The defendant, who was not a member of the Stock Exchange, had for some time prior to the date of the contract sued on—the 12th of December, 1899—been employing Messrs. E. Preston & Co., members of the London Stock Exchange, as his brokers.

They had opened for him on the 12th of December 210 Louisville shares and had received instructions to carry over for him to the end December account.

Messrs. E. Preston & Co. accordingly bought from the plaintiffs for the end of December account, but having other orders to purchase Louisvilles, they lumped the orders together and purchased in all 360 Louisvilles, and of these they apportioned or intended to apportion to the defendant in their books 210, to the delivery of which under their contract with the plaintiffs they would have become entitled on the 29th of December.

On the 15th of December, in consequence of the

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

failure of certain clients (other than the defendant) to fulfil their obligations, Preston & Co. failed, and were declared defaulters.

On the 16th and 18th of December, Mr. L. Gibbs, a member of the plaintiffs' firm, saw the defendant in regard to the shares. The latter told Mr. Gibbs that his account with Preston & Co. was closed when the firm failed.

On the 29th of December Mr. Gibbs tendered 210 Louisvilles to the defendant and was refused acceptance. The shares were then sold on the Stock Exchange and the plaintiffs thereupon sued the defendant for £186, the difference between the contract price and the selling price on that day.

The plaintiffs asserted a right to sue the defendant as the undisclosed principal of Preston & Co. upon the contract made by that firm with the plaintiffs in respect of 210 out of the 360 Louisville shares which formed the subject of their contract. They alleged a custom on the Stock Exchange by which a broker, who was instructed by two or more clients to purchase shares in the same undertaking to be carried over from time to time, lumped the orders together and purchased the shares in his own name from a jobber; and they contended that this custom created a contractual relationship between the jobber and the broker's clients so as to enable the former to sue the latter in the event of the broker's failure to meet his liabilities. The defendant denied this right altogether and said, further, that the effect of rule 177 of the Stock Exchange rules and regulations was that the "hammer" price fixed on the failure of Preston & Co., was binding between him and the plaintiffs, in which case, as there had then been no fall in the price of the shares since the contract, nothing would have been due from the defendant to the plaintiffs.

Kennedy, J., in giving judgment, said that with regard to rule 177 in his opinion it only affected members of the Stock Exchange, and the defendant could not, therefore, take advantage of it, and this view of the construction and effect of the rule was subsequently approved of by the Court of Appeal in the case of *Levitt & Thornton* v. *Hamblet*, 17 Times L. R. 307. But the learned judge held that there was no privity of contract between the defendant and the plaintiffs and that the alleged custom of the Stock Exchange, even if it could be shown to have any existence, could not avail the plaintiffs in this action. He therefore entered judgment for the defendant.

The plaintiffs appealed.

Rufus Isaacs, K.C., and *G. A. H. Branson*, for the plaintiffs.

Herbert Reed, K.C., and *E. Morten*, for the defendant.

[A considerable discussion took place as to whether the custom had been sufficiently proved at the trial, and ultimately Mr. Rufus Isaacs said he would prefer to admit that it had not been proved. He asked in these circumstances that the case might be remitted to the Commercial Court to be retried. Mr. Herbert Reed asked their lordships not to do this.]

A. L. SMITH, M.R.—I have not the slightest doubt in this case that the custom necessary to be proved for the plaintiffs to succeed was not proved at the trial, assuming, that is, that it exists, and I see no reason why it should not, for it seems to me a very reasonable one. I have not therefore to say that it could not be proved, but simply that it was not proved. The plaintiffs appealed against the judgment of Kennedy, J., who, so far as I can read his judgment, has not found the custom proved. In these circumstances I and my learned brothers think that this appeal should be dismissed with costs, but the court expressly desires to state that in dismissing this appeal it is not to prejudice the point being raised again in another action as to the existence or non-existence of this custom upon the Stock Exchange as regards dealing in blocks of shares similar to the blocks in the present case. We decide this case, therefore, on the ground that the alleged custom has not been proved, and desire to say nothing to prejudice the raising again of the question of existence or non-existence of the custom, though not in this action.

VAUGHAN WILLIAMS and ROMER, L.JJ., concurred.

Solicitors, *Spyer & Sons; Albert Myers.*

Appeal.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 13.

LEECH v. LIFE AND HEALTH ASSURANCE ASSOCIATION. (a.)

Master and servant—Employers' liability—Accident—Compensation—Order on insurance company—Appeal—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 5; *Sched. II.* (4).

There is no appeal to the Court of Appeal from the refusal of a county court judge to make an order on an insurance company under section 5 of the Workmen's Compensation Act, 1897.

Appeal from an order of the judge of the Dudley County Court in proceedings under the Workmen's Compensation Act, 1897.

The applicant for compensation met with an accident while in the employment of John Henry Whittaker & Co., who had insured against liability under the Workmen's Compensation Act with the Life and Health Assurance Association.

After the applicant had obtained an award under the Act, the employers became bankrupt.

The applicant thereupon took out a summons under section 5 of the Act calling upon the insurance company to show cause why they should not pay the sum due to him under the award into the Post Office Savings Bank.

The county court judge refused to make an order against the insurance company, on the ground that there had been a breach of a condition in the policy by the employers which avoided it.

The applicant appealed.

J. R. Atkin, for the insurance company, took the preliminary objection that no appeal lay.—The only jurisdiction which the Court of Appeal has over matters under the Workmen's Compensation Act is given by Schedule II., par. 4. The schedule begins thus: "The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration." And par. 4 says, "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal." This gives an appeal on questions of law raised as to

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the liability of an employer to make compensation, but it does not give an appeal on questions as to the liability of an insurance company under section 5. Rules 51, 52, and 53 of the Workmen's Compensation Rules, 1898, provide the machinery for giving effect to section 5. Rule 53 says that the procedure on a summons under the section shall be the same as if the applicant had issued a garnishee summons against the insurers. This brings into play rules 5-13 of ord. 26*a* of the County Court Rules. A garnishee proceeding cannot be said to be a "matter which under this Act is to be settled by arbitration." The schedule does not cover this case, and therefore no appeal lies.

H. Tindal Atkinson, for the applicant.

A. L. SMITH, M.R.—In this case everything in dispute between the workman and his masters has been adjudicated upon by an award made in the workman's favour, and the workman is now proceeding under section 5, which provides a sort of equitable execution. Any dispute that arises under this section is a dispute between the workman and a third party. Now Schedule II. begins by saying that the provisions contained therein "shall apply for settling any matter which under this Act is to be settled by arbitration." Paragraph 4 provides that there may be an appeal from the decision of the county court judge on questions of law. That must mean an appeal on questions of law arising in matters which under the Act are to be settled by arbitration. In my opinion matters to be settled under the Act by arbitration are disputes between workmen and masters, and this dispute between a workman and a third party is not the subject-matter of arbitration under the Act. It follows that no appeal is given in this case by the schedule, and if not given by the schedule, there is no appeal at all.

COLLINS, L.J.—Section 1, sub-section 3, of the Act says that any question as to the liability to pay compensation under the Act is to be settled by arbitration in accordance with Schedule II. Schedule II. gives, under certain circumstances, an appeal to this court on questions of law. The present application does not raise any question as to liability to pay compensation, it is rather an application ancillary to the recovery of an amount as to which the liability has been ascertained. It is not necessary to say whether an appeal may not lie to the Divisional Court. But there is no appeal to this court.

ROMER, L.J., concurred.

Preliminary objection upheld.

Solicitors for the applicant, *Robbins, Billing, & Co.*, for *William Waldron*, Brierley Hill.

Solicitors for the insurance company, *Downer & Johnson*, for *T. H. Duffell*, Birmingham.

High Court of Justice.

Chan. Div. }
Joyce, J. } April 3.

In re BILHAM.
BUCHANAN *v.* HILL. (*a.*)

Will — Construction — "Surviving" — Surviving in person or by stock.

A testatrix by her will gave one-third of the income of a money fund to her daughter A. for life, and after her death one-third of the capital to the children of A. whom she might leave her surviving, and who had attained or should attain twenty-one, with similar gifts to her two other daughters, B. and C., and their children; and, in case any or either of the said daughters, A., B., or C., died without leaving such issue, the share of the income given to the daughter so dying was to go to the surviving daughters, and the capital to their children in like manner as the original gift, with an ultimate gift over. All three daughters survived the testatrix. A. died in the lifetime of B. and C., leaving two children who attained twenty-one, but predeceased C. B. died in the lifetime of C., leaving two children, who attained twenty-one and survived C. C. died leaving no children her surviving, but having had one daughter who attained twenty-one.

Held, that, on the death of C., the one-third of which she received the income during her life passed to the children of B.

O'Brien *v.* O'Brien, [1896] 2 *I. R.* 459, not followed.

Originating summons.

By the will dated the 10th of November, 1853, of Frances Bilham, who died on the 23rd of December, 1857, the testatrix gave one-third of the income of a money fund to her daughter Mary for her life, and after her death one-third of the capital to the children of such daughter whom she might leave her surviving who had attained or who should attain twenty-one, share and share alike. The testatrix made a similar gift to her daughter Charlotte and her children, and also to her daughter Emily and her children. There followed a gift over in these terms: "And in case of the decease of any or either of my said three daughters without leaving any lawful issue them or her surviving who then had attained or hereafter live to attain the age of twenty-one years, then I give the dividends and interest of the share of the said stocks and moneys hereby given to my said daughter so dying unto my surviving daughters in like manner as the dividends and interest hereinafter given to them for their respective lives. And after their decease I give the captital, stock, and moneys aforesaid unto and amongst the children of my said surviving daughters who may then have attained or shall thereafter live to attain the age of twenty-one years, such children taking amongst them the share in such stock and moneys only in which their parent had an interest." Then there was an ultimate gift over on the death of all her daughters without any of them having lawful issue who should have attained or should live to attain twenty-one in favour of her brother's children.

Charlotte died on the 1st of January, 1888, leaving two children, both of whom attained twenty-one, but died on the 8th of August, 1895, and the 5th of August, 1900, respectively, both testate.

Mary died on the 25th of October, 1899, leaving two children, both of whom survive and have attained twenty-one.

Emily died on the 9th of December, 1900, without leaving any children her surviving, but one daughter died in her lifetime having attained twenty-one.

The question raised by the summons was, who was entitled to the one-third share whereof the dividends and interest were given by the will to Emily for life?

Borthwick, for persons interested under the residuary gift.

Crossfield, for the children of Mary.

Alfred Whitaker, for the representatives of the two children of Charlotte.

Bovill, for the representatives of the daughter of Emily.

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

JOYCE, J., after stating the facts, proceeded: Whatever the effect might have been of this will in the absence of the ultimate gift over, it is clear, having regard if necessary to the ultimate gift, that the word "surviving" with respect to daughters in the gift over cannot be read in its literal or natural sense: *Waite* v. *Littlewood*, 21 W. R. 131, L. R. 8 Ch. App. 70; *Wake* v. *Varah*, 24 W. R. 21, 621, 2 Ch. D. 348. But the shares being all settled, the actual decision of the Court of Appeal in *Lucena* v. *Lucena*, 7 Ch. D. 255, does not apply.

There was no actually surviving daughter of the testatrix at the date of the death of Emily, and the only one who survived by her children or issue was Mary. The case is precisely that put by Cotton, L.J., in *Lucena* v. *Lucena*, 26 W. R. 254, 7 Ch. D. 255, at p. 270. Under the circumstances of the present case it is, I think, immaterial whether the survivorship be by children or issue. The decision of the Irish Court in the case of *O'Brien* v. *O'Brien*, [1896] 2 I. R. 459, was very properly pressed upon me. The very voluminous judgments in that case contain many passages the reasoning of which I am unable to follow, and with other passages I cannot agree. By deciding in accordance with the opinion of Cotton, L.J., as expressed in the report of *Lucena* v. *Lucena*, 7 Ch. D., at p. 270, I am doing less violence to the words the testatrix has used than I should do if I followed *O'Brien* v. *O'Brien* and read "surviving" merely as "others," without considering whether the other daughters did or not survive in any sense of the word. The result is that in my judgment the children of Mary are alone entitled to the one-third of which Emily received the income during her life.

Solicitors, *Routh, Stacey, & Castle; C. G. Hobbs; C. W. Hird.*

Chan. Div. Joyce, J. — Feb. 12; March 14.

In re MOORE.
PRIOR *v.* MOORE. (*a.*)

Will—Longest period allowed by law — Lives of all persons living at date of testator's death—Uncertainty —Perpetuity.

A trust to endure until the period of twenty-one years from the death of the survivor of all persons living at the death of the settlor is void, on account of the uncertainty of its duration.

Adjourned summons.

Martha Mary Moore, by her will dated the 27th of September, 1897, bequeathed the sum of £500 New Consols upon trust to apply the dividends thereof in maintaining and keeping in a state of proper repair, condition, and protection the tomb of her brother in Central Africa "for the longest period allowed by law —that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death," and subject to that trust the testatrix directed that the sum should fall into and devolve as part of her residuary estate.

She died on the 3rd of January, 1898, and her will was proved by the executors and trustees thereof on the 22nd of February in the same year.

The present summons was taken out by the trustees of the will against the legatee for the determination of several questions, including the question whether the above-mentioned legacy was valid and effectual.

Hughes, K.C., and *S. Dickinson*, for the trustees.—This gift is not void as a perpetuity, nor for uncertainty, nor as against public policy. The rule against perpetuities was not settled by *Thellusson* v. *Woodford*, 11 Ves. 112, and was not really decided until *Cadell* v. *Palmer*, 1 Cl. & Fin. 372, at p. 423. It has always been considered that any number of lives may be taken. *Pownall* v. *Graham*, 33 Beav. 242, shows that the gift is not void for uncertainty.

Younger, K.C., and *H. Fellows*, for the defendant, the residuary legatee.—The gift is not only void for uncertainty, but also as offending against the rule against perpetuities: *Thellusson* v. *Woodford*. *In re Dean*, 41 Ch. D. 552, 37 W. R. Dig. 206, shows that the rule against perpetuities must be taken as a whole, and the lives referred to must be those of specified persons. [JOYCE, J., referred to *Pettingall* v. *Pettingall*, 11 L. J. Ch. 176.]

W. F. Hamilton, K.C., and *Method*, for another defendant, referred to *Pirbright* v. *Salway*, (1896) W. N. 86.

Hughes, K.C., replied.

JOYCE, J.—I need not go into the question whether or not this bequest is void for perpetuity, because I am of opinion that it is void for uncertainty, and I so hold.

Solicitors, *Tamplin, Tayler, & Joseph; Evans, Foster, & Wadham; Johnson & Master.*

K. B. Div. (Lord Alverstone, L.C.J., and Lawrance, J.) — April 20.

REX *v.* GROOM AND OTHERS (JUSTICES OF HARWICH). (*a.*)

Licensing law — General annual licensing meeting — Adjournment beyond September — Certiorari — *Aggrieved person—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 3—*Wine and Beerhouse Act*, 1870 (33 *&* 34 *Vict. c.* 29), *s.* 11.

Licensing justices, in counties other than Middlesex and Surrey, have no power to hold a meeting, or an adjourned meeting, for the purpose of hearing original applications for the grant or renewal of licences after September.

Section 11 *of the Wine and Beerhouse Act*, 1870, *which enables the justices to adjourn a meeting or an adjourned meeting beyond September where "the applicant for the grant or renewal of a certificate has, through inadvertence or misadventure, failed to comply with any of the requirements" of the Act, does not enable them to adjourn an application for an alehouse licence.*

A brewer having licensed premises in the district within which a licence has been granted, who has opposed the grant of the licence and the order confirming the same, is a person aggrieved by such order, and is entitled to a writ of certiorari ex debito justitiæ.

Rule *nisi* for a *certiorari* to bring up and quash an order of justices confirming an alehouse licence.

At the adjourned general annual licensing meeting for the borough of Harwich, held on the 25th of September, 1900, an application was made by one White for the grant of an alehouse licence in respect of an hotel which it was proposed to build.

The notice to the superintendent of police of the district, which by section 40 of the Licensing Act, 1872, is required to be served twenty-one days before the application is made, was served upon the superintendent two days late, owing, as it appeared, to the sudden illness of the person entrusted with the duty of serving it.

(*a.*) Reported by J. F. ISELIN, Esq., Barrister-at-Law.

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The justices adjourned the application until the 23rd of October, in order that a fresh notice might be served.

When the application was renewed on the 23rd of October Messrs. Cobbold & Co. and Messrs. Daniel & Sons opposed the application, and raised the objection that the justices had no jurisdiction to hear applications for licences after the 30th of September.

The objection was overruled. Whereupon the representatives of Messrs. Cobbold & Co. and Messrs. Daniel & Sons left the court.

On the 6th of November the licence was confirmed by the confirming justices, before whom the same objection was taken, which was again overruled.

Messrs. Cobbold & Co. and Messrs. Daniel & Sons then moved for and obtained the present rule.

Messrs. Cobbold & Co. and Messrs. Daniel & Sons were brewers and owned licensed premises within the district in which the house in respect of which the application was made was situated.

C. E. Jones showed cause.—The writ of *certiorari* is not one granted as of right, and it is necessary for the applicants to show that they are persons aggrieved by the decision which is sought to be quashed. The justices have power to adjourn applications for licences after September. It is true that section 3 of the Alehouse Act, 1828, provides that the general annual licensing meetings and all adjournments thereof are to be held in counties other than Middlesex and Surrey in the months of August and September, but that provision is directory only. Moreover, the justices have power to adjourn by virtue of section 11 of the Wine and Beerhouse Act, 1870, which provides that "where an applicant for the grant or renewal of a certificate has, through inadvertence or misadventure, failed to comply with any of the preliminary requirements of the principal Act or this Act, or any Act incorporated therewith, the justices may" postpone the consideration of the application to an adjourned meeting: *Reg.* v. *Justices of Denbigh*, 59 J. P. 708; *Reg.* v. *Justices of Anglesea*, 59 J. P. 743, 44 W. R. Dig. 89; *Reg.* v. *Nicholson*, 48 W. R. 52, [1899] 2 Q. B. 455; and *Webber* v. *Justices of Birkenhead*, 61 J. P. 664.

Rawlinson, K.C. (*E. Wild* with him), in support of the rule.—Having regard to section 3 of the Alehouse Act, 1828, an adjourned meeting for granting licences cannot be held after September: *Reg.* v. *Justices of West Riding*, 18 W. R. 259, L. R. 5 Q. B. 33. Section 11 of the Wine and Beerhouse Act, 1870, does not apply to alehouse licences, but only to certificates granted under the Acts of 1869 and 1870. The applicants for the rule have ample interest in the subject-matter of the decision, being not only residents in the district but proprietors of licensed premises situated close to the premises in respect of which the licence was sought.

Lord ALVERSTONE, L.C.J.—I have come with great regret to the conclusion that we are obliged to make this rule absolute. I confess that if I could have seen my way to decide against persons who are only rivals in trade and who, having taken an objection of a highly technical character, namely, that a notice which did not affect them was served two days too late, then walked out of the room, I say, if I could have decided against them I should certainly have done so. But if I were to decide that this meeting could be adjourned in order that a fresh notice might be given for an October meeting, it would be taken to be a decision of this court that an adjourned meeting for receiving an original notice can be held in the month of October. Speaking for myself, although I have always felt great difficulty in expressing an opinion on the licensing Acts in the condition in which they now are, I think that that would be going too far.

Now it is quite clear, I think, that the language of the statute of 1828 does contemplate with regard to alehouses, by section 3, that the general annual licensing meeting and every adjournment thereof shall be held in the months of August and September in counties other than Middlesex and Surrey. Therefore there is a *primâ facie* direction that the work is to be got through during that time.

Now it is contended that there is a power to adjourn an adjourned meeting, apart from what I will call the inadvertence clause, under section 11 of the Wine and Beerhouse Act, 1870. It seems to me that we have this to guide us. If it had been competent to the magistrates to sit in October, it would not have been necessary to give the very specific directions that were given in the case of *Reg.* v. *Justices of West Riding*. There it was laid down in consequence of these provisions that the magistrates must so adjust their meetings that a notice can be given of twenty-one days for the adjournment, or, in other words, it is to be a meeting at which an original notice can be given. I think that that does show that the provision as to the period for holding the meetings is more than a mere direction. It is a statutory enactment as to the holding of an adjournment. Therefore, apart from any other section, I should come to the conclusion that a meeting—we will call it an adjourned meeting, if you like—to receive a new notice could not be held in the month of October.

Then comes section 11 of the Act of 1870. That section allows an adjournment on such terms as the justices think proper in the case of an application for the grant or renewal of a certificate. If I could have seen my way to hold that that section was attracted to the Alehouse Act, 1828, I should have been glad to have come to the conclusion that that power was also given. It is quite true that by section 40 of the Licensing Act, 1872, the notices to be given under the earlier Acts are to be given in pursuance of the provisions of the Wine and Beerhouse Act, 1869. But it seems to me that that is only an alteration of the notices, and if it were intended to make section 11 apply to every case, we should not have found the words "grant or renewal of the certificate," which are the words with which the section begins.

Then, in the case of *Reg.* v. *Justices of Denbigh*, which at first sight seemed to be an authority, there is first the doubt (it is a very short report) as to whether or not the court did not think it came within section 42 of the Wine and Beerhouse Act, 1872, being a question of renewal; and, secondly, it is possible that as the proceedings were by *mandamus* the court may have thought that that made a difference. That is the view taken by Ridley, J., in the case of *Webber* v. *Justices of Birkenhead*, to which we have also been referred.

On the question of the person aggrieved, that there was no real grievance by this notice not being served I have no doubt. But that is not the way in which we must consider whether a person is aggrieved. The person aggrieved means the person who has an interest in the decision which is given, which entitles him to come and ask for a *certiorari*. Now this point was taken by the brewers at the October meeting, and was overruled. It was taken again at the confirming meeting, and was overruled. It would be too strong, after the case of *Reg.* v. *Justices of Surrey*, 18 W. R. 166, L. R. 5 Q. B. 87, 466, to say that the person in that case was not entitled to get *certiorari*.

LAWRANCE, J.—I am of the same opinion.

Solicitors showing cause, *Gibbs, White, & Strong.*

Solicitors in support, *Godden, Son, & Holme.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 19.

STIFF (*Appellant*) v. BILLINGTON (*Respondent*). (a.)

Game—"Entering or being, in the daytime, upon any land in search or pursuit of game"—Game Act, 1831 (1 *& 2 Will.* 4, *c.* 32), *s.* 30.

By section 30 *of the Game Act,* 1831, *it is unlawful for any person to trespass by entering or being, in the daytime, upon any land in search or pursuit of game.*

The appellant, having been convicted under this section, on appeal contended that the conviction was bad, because he went upon the land for the purpose of raising a question of right, and no evidence was offered that he had gone upon the land with intent to search for or kill game at the time.

Held (dismissing the appeal), that the justices were right in convicting, and that the words "search" and "pursuit" in the section could not be limited to searching and pursuing with an intent to kill at the time.

Case stated on an information preferred by the respondent against the appellant under section 30 of 1 & 2 Will. 4, c. 32, charging him with trespassing on the 30th of September, 1900, by unlawfully being in the daytime upon certain land in the occupation of Henry Gates in search of game.

The respondent was in the employ of Mr. Abraham Barford, who was the owner of sporting rights over certain lands at Sandon, Bedfordshire. The appellant was a keeper in the employment of Mr. Robert Standish Sievier, who was the tenant of and had the right of sporting over the adjoining land. The appellant was seen to come from Mr. Sievier's land on to Mr. Barford's, having with him a retriever dog. The appellant beat the hedge on Mr. Barford's land and the dog searched the whole length of the land. The appellant said he was acting under his master's orders, and he believed that his master wanted him to be caught. Mr. Barford bred pheasants for the purpose of his shooting, and though no nests had been seen on the land in question this season pheasants and game were on the land. The land comprised about sixty acres, divided into four plots. It was a detached portion of Mr. Barford's shooting and was surrounded on three sides by Mr. Sievier's shooting and on the other side by a railway, beyond which Mr. Barford had other shooting. One portion of this land, containing about four acres, was sown with mustard, but it was so sown by the farmer who was the tenant of the land and not by Mr. Barford, who had the sporting rights. The appellant gave evidence, admitting that he went upon the land in question, and stated that he acted upon instructions. He had a retriever dog with him, but denied that he beat the hedge or that his dog hunted.

It was contended on behalf of the appellant that there was no evidence that the appellant was in search of game; that it was necessary to prove that he was searching for game for the purpose of killing or taking it; and that the appellant had gone on the land for the purpose of raising the question whether the respondent's employer was entitled to plant the land with mustard for the purpose of attracting pheasants from the adjoining land. No evidence was given by the appellant in support of this last contention.

The justices found as facts: (1) That the appellant trespassed upon the land, and that there was game on the land; (2) that he trespassed in search of game; (3) that there was no evidence of a *bonâ fide* claim of right; and (4) that, if it was material, he acted under the instruction of his employer. They therefore convicted the appellant.

Section 30 of 1 & 2 Will. 4, c. 32, provides: "And whereas, after the commencement of this Act game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exists for protecting the same from trespassers; be it therefore enacted that if any person whatsoever shall commit any trespass by entering or being, in the daytime, upon any land in search or pursuit of game . . . such person shall, on conviction thereof before a justice of the peace, be liable to a fine not exceeding £2." It was also provided that any man tried for such an offence could raise any defence which he could raise in a civil action.

H. M. Sturges, for the appellent.—Before the appellant can be convicted of the offence laid against him under 1 & 2 Will. 4, c. 32, s. 30, the respondent must prove that he was searching for game for the purpose of killing it or reducing it into possession. There is no evidence that he was searching for game either for the one purpose or the other, and, moreover, these proceedings were taken solely with the object of raising a *bonâ fide* question of right—namely, whether a man has a right to sow mustard seed on his land in order to attract pheasants from his neighbour's land upon his own. I submit the justices ought not to have convicted the appellant, as the the words "search" and "pursuit" in the section are limited to searching and pursuing game on another man's land with an intent to kill at the time.

The following cases were cited: *Reg.* v. *Garnham,* 8 Cox Cr. Cas. 451; *Reg.* v. *Head,* 1 F. & F. 350; *Burrows* v. *Gillingham,* 57 J. P. 423; *Philpot* v *Bugler,* 54 J. P. 646; *Horn* v. *Raine,* 67 L. J. Q. B. 533, 46 W. R. Dig. 62.

Stimson, for the respondent, was not called on.

Lord ALVERSTONE, L.C.J.—In this case we have nothing to do with Mr. Sievier's laudable efforts to settle the question whether a man has a right to sow mustard seed in order to attract his neighbour's pheasants to come upon his land. The magistrates have found that the appellant trespassed on the land; that there was game on the land; and that the appellant trespassed in search of game. We have been asked to say that the words "search" and "pursuit" in section 30 of the Act of 1 & 2 Will. 4, c. 32, are limited to searching and pursuing game with an intent to kill at the time. I think it would be very dangerous for the court to lay down any such limiting rule as to the meaning of those words in the section. The magistrates have found that Stiff was trespassing on the land; that there was game on the land; and that Stiff was there in search of game. On these findings I am clearly of opinion that we ought not to say that the magistrates were wrong in deciding as they have done. The appeal must be dismissed.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors, *F. Hastings Dauney,* for *Neve & Beck,* Luton; *H. W. Lathom.*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 19.

HAWKINS (*Appellant*) *v.* EDWARDS (*Respondent*). (*a.*)

Local government — Hackney carriage — Standing or plying for hire—Licensed carriage sent from yard to execute booked order only—Number-plate covered over —Bye-law—Towns Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *ss.* 38, 68.

A "hackney carriage" within the meaning of section 38 *of the Towns Police Clauses Act,* 1847, *is a carriage which is in fact used by the proprietor from time to time for the purpose of standing or plying for hire in any street within prescribed boundaries.*

Held, therefore (dismissing the appeal), that the appellant had rightly been convicted for sending out a licensed hackney carriage from his yard to execute only a booked order, without showing the number-plate as required by the bye-law, as, in the opinion of the court, the words of the section, "every wheeled carriage used in standing or plying for hire," were not limited to the period of time during which such carriage was actually standing or plying for hire in the streets, as a hackney carriage remained subject to the bye-laws applicable thereto at all times, so long as the licence was in force.

Appeal by case stated from a decision of justices of Birmingham convicting the appellant under an information preferred by the respondent charging him with that he, being the owner of a hackney carriage with a plate containing the number of the licence fixed thereon, unlawfully and negligently suffered the number-plate of such duly licensed hackney carriage to be concealed from public view when such carriage was being driven for hire, contrary to a bye-law and the Towns Police Clauses Act, 1847.

It was proved before the justices that on the 26th of November, 1900, Deeley, who was in the employ of the appellant, drove a carriage which was licensed as a hackney carriage, No. 396, along the Horsefair to the New Street Railway Station, the number-plate outside the carriage being covered over by a piece of black board, which was made to slide into a groove so that the number when the board was over it was not visible. There was a passenger in the carriage. Deeley was not licensed as a driver, and he was called as a witness by the appellant and proved that he received a specific written order from the appellant's manager to take the carriage direct from the appellant's yard to a certain house in Gough-road, Edgbaston, there to call to pick up and take a gentleman who had previously ordered the carriage from there to the New Street Station, and that he (Deeley) had in pursuance of such order gone straight from the appellant's yard to the house and there picked up the gentleman without standing on or plying for hire in any street from the time of leaving the appellant's yard till he was found driving along the Horsefair with the number-plate covered up, the same having been so covered up all the time since the carriage left the yard.

It was contended on behalf of the appellant that the question was whether the appellant's carriage at the time of, and under the circumstances proved as existing at the time of the alleged offence, was there and then a hackney carriage within the meaning of the said bye-law and sections, and it was argued on the appellant's behalf that on the facts proved the said carriage was not at the time of the alleged offence being used in standing or plying for hire in any street within the prescribed distance, nor was it a carriage standing upon any street within the prescribed distance within the meaning of section 38 of the Towns Police Causes Act, 1847, and that therefore the appellant was entitled to have the case dismissed.

It was contended by the respondent that a carriage when licensed remains subject to the bye-laws during the continuance of the licence; that a proprietor cannot by covering up the number-plate withdraw the carriage from the operation of the bye-laws; and that such a construction would render the bye-laws nugatory and would interfere with the due control by the local authority.

The justices convicted the appellant.

The bye-law in question provided that "every proprietor of a hackney carriage shall cause the number of the licence granted to him in respect of such carriage to be painted or marked" on two separate plates. "He shall cause the first of such plates to be fixed on the outside and the second of such plates on the inside of such carriage in such a position and manner that the number thereon shall be at all time distinctly and plainly visible and legible. He shall not wilfully or negligently cause or suffer any such plate or the number on any such plate to be in any or by any means concealed from public view or to be inverted at any time while such carriage may stand, ply, or be driven for hire."

Section 68 of the Towns Police Clauses Act, 1847, under which this bye-law was made, provides that the borough may make bye-laws "for regulating the conduct of proprietors and drivers of hackney carriages, plying within the prescribed distance in their several employments," and for "regulating the manner in which the number of each carriage, corresponding with the number of its licence, shall be displayed."

Section 38 of the same Act provides that "every wheeled carriage, whatever may be its form or construction, used in standing or plying for hire in any street within the prescribed distance, and every carriage standing upon any street within the prescribed distance, having thereon any numbered plate required by this Act to be fixed upon a hackney carriage, or having thereon any plate resembling or intended to resemble any such plate as aforesaid, shall be deemed to be a hackney carriage within the meaning of this Act."

William Wills (with whom was *Bethune*), for the appellant.—The carriage at the time of the alleged offence was not a hackney carriage within the meaning of that term in section 38 of the Towns Police Clauses Act, 1847, because it was not at the time being used "in standing or plying for hire in a street," nor was it standing, plying, or being driven for hire within the meaning of the bye-law. "Driving for hire" must mean in the sense in which a cabman takes his horse out to drive any chance customer who may call him. It is unreasonable to put a construction on the Act or bye-law which would prevent a proprietor using a licensed cab for doing exceptional services—as, for instance, sending it to take a person to the railway station at an early hour.

He referred to *Case* v. *Storey*, 17 W. R. 802, L. R. 4 Ex. 319; *Clarke* v. *Stanford*, 19 W. R. 846, L. R. 6 Q. B. 357.

Hugo Young, K.C., and *R. T. M. Berkeley*, for the respondent.—Assuming that the appellant's carriage is a hackney carriage, it comes within the bye-law. A carriage becomes a hackney carriage within the meaning of the Towns Police Clauses Act, 1847, when it is used from time to time for the purpose of standing or plying for hire; if, therefore, a man elects to turn his carriage into a hackney carriage, it remains

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

a hackney carriage so long as the licence is in force, and the fact that it was sent out to execute a booked order only, and not to ply for a chance fare, cannot change its character. The control of the local authority is all-important. They have in the case of hackney carriages powers as to disinfection and the like, and if the appellant's contention is right, the moment a hackney carriage enters the proprietor's yard, the number having been removed, the carriage would cease to be a hackney carriage and the inspector would have no right to inspect it.

Lord ALVERSTONE, L.C.J.—The general object of the bye-law is to protect the public and give inspectors authority to inspect all hackney carriages within their district. When a man elects to have the privileges attaching to a hackney carriage and takes out a licence in respect thereof, he elects to devote that carriage to the services indicated in the bye-law. If, therefore, the carriage in question was at the time a hackney carriage the conviction must stand, for it is clear that the bye-law applies and the conviction was right. But it was said by the appellant that a licensed carriage was not a "hackney carriage" within the meaning of the Act unless it was "standing or plying for hire in the street," and as the driver of the carriage in question was doing neither one nor the other when charged, the bye-law under which he was said to have committed the alleged offence was not applicable.

Now, in my opinion, the view the justices have taken of the words in section 38 of the Act of 1847 is the right one, for I think that every wheeled carriage that is in fact used from time to time for standing and plying for hire is a hackney carriage within the meaning of that section, and that the words "used in standing or plying for hire" are not limited, as the appellant would have us hold, to the actual time during which such carriage happens to be standing or plying for hire in the street. For these reasons I think the conviction appealed from must be affirmed.

LAWRANCE, J.—I concur.

Appeal dismissed.

Solicitors, *T. A. Dennison*, for *H. G. Tanner*, Birmingham; *Capron, Hitchens, & Co.*, for *E. Hill*, Birmingham.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 17.

REX *v.* ROBERTS, ESQ. (AUDITOR).
Ex parte KYLE. (*a.*)

Weights and measures—Inspector—Resolution by local authority to forego stamping and verification fees—Surcharge by auditor of such fees to inspector—Weights and Measures Act, 1878 (41 *&* 42 *Vict. c.* 49), *s.* 47—*Weights and Measures Act,* 1889 (52 *&* 53 *Vict. c.* 21), *s.* 13.

A local authority has no power, under section 13 *of the Weights and Measures Act,* 1889—*which section repealed section* 47 *of the Weights and Measures Act,* 1878—*to order an inspector not to collect the fees specified in the first schedule "for the verification and stamping of weights, measures, and weighing instruments by inspectors of local authorities."*

In this case a rule *nisi* had been granted calling upon Mr. T. H. K. Roberts, the auditor appointed by the Local Government Board to audit the accounts of the county councils in the Eastern Counties Audit District, to show cause why a writ of *certiorari* should not issue to remove a surcharge of £1 11s. 4d. made by him upon the audit of the accounts of Thomas Kyle, an inspector of weights and measures for the county of Buckingham, for the year ending the 31st of March, 1900.

Section 13 of the Act of 1889 provides as follows: "An inspector of weights and measures may take in respect of the verification and stamping of weights, measures, and weighing instruments the fees specified in the first schedule to this Act, and no others, and no discount shall be allowed, and such inspector shall at all times, not less than once a quarter, as the local authority direct, account for and pay over to the local authority, or as they direct, all fees so taken." In the first schedule to the Act there is a list of charges headed "Fees to be taken on the verification and stamping of weights, measures, and weighing instruments by inspectors of local authorities."

The Bucks County Council, considering that it was in the public interest that the stamping and verifying of weights and measures in their district should be carried out as promptly as possible, passed a resolution to the effect that no fees should be charged by their inspector, Thomas Kyle, who accordingly ceased to collect them, and in the forthcoming balance-sheet no such fees appeared. When the balance-sheets were audited by the Local Government auditor, Mr. Roberts, he drew attention to this omission, and in order to raise the question, whether a local authority had power to forego the fees chargeable under the Weights and Measures Act, surcharged the inspector with a test item of £1 11s. 4d.

The inspector then applied for and obtained a rule *nisi* for a *certiorari* calling upon the auditor to show cause why this surcharge should not be quashed.

C. A. Russell, K.C., showed cause on behalf of the auditor.

Macmorran, K.C., and *McIntyre* supported the rule.—Inspectors are appointed by the local authority under section 43 of the Weights and Measures Act, 1878, and by section 47 the local authority has power to fix the *maximum* fees which might be taken by the inspector. That section was repealed by section 13 of the Act of 1889, and instead of the maximum fees being fixed by the local authority from time to time as previously, they were now to be a fixed sum. This, however, did not deprive the local authority of the power to remit fees altogether if they were of opinion that the charging of fees was against public policy, on the ground, for example, that it was an obstacle in the way of small tradesmen in bringing up their weights and scales to have them tested. The section was in terms permissive only, and it was clear that the local authority ought to have a discretion in the matter.

Lord ALVERSTONE, L.C.J.—We have nothing to do with the policy pursued by the county council in this case. It may be a wise and prudent matter not to insist on payment of fees for the stamping of weights and measures, but our only duty is to interpret the Act of Parliament and see whether the county council has power to remit these fees by instructing their inspector not to take them. In this case it appears that under the resolution of the county council the inspector took no fees for verifying the weights and measures. Then came the audit, and the auditor found no amounts entered as having been received on account of such fees. If the inspector had not paid over money received by him, he would certainly be surcharged, but as a matter of fact no fees having been collected, the auditor proceeded to surcharge the in-

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

spector with the amount that he ought to have collected. The important question is: Has the county council under the Weights and Measures Act, 1889, any power to order their inspector to exact no fees? Now in 1878, by the Weights and Measures Act (41 & 42 Vict. c. 49), it was provided by section 47 that an inspector under the Act might take in respect of the verification and stamping of weights and measures such fees, not exceeding those specified in the fifth schedule to the Act, as the authority appointing him from time to time might fix. This section and the schedule were repealed by section 13 of the Weights and Measures Act, 1889, by which the inspector of weights and measures may take in respect of the verification and stamping of weights and measures the fees specified in the first schedule to that Act and no others, and Mr. Macmorran contended that the only effect of that section is to make the standard of fees uniform all over the country and not to take away from the county council the power of omitting those fees altogether. I have been anxious to see whether there was any independent power in the local authority to remit the fees, but Mr. Macmorran has been bound to admit that their power rested alone on section 47 of the Act of 1878, which has now been repealed, and section 13 of the Act of 1889 has been substituted for it, and section 13 has omitted to give them any power to remit the fees, but says that the inspector may take certain fees fixed by the schedule, and no others. Then it is argued that the whole section is optional, because it says the inspector "may" take certain fees, and no others, and that the local authority had, therefore, a discretion whether fees should be taken at all, but if fees were taken, they must be such fees only as are provided in the schedule.

I think, however, that we cannot accede to that contention looking at section 47 of the earlier Act and section 13 of the later one. "May" often means "shall," and I think in the present case it would be difficult to frame any section in which "may" would not be the more appropriate word than "shall." I think, therefore, the option of remitting the fees was taken away from the local authority by section 13.

The only point which remains is that the inspector cannot be surcharged with fees which he never received, but looking at the provisions as to audit in section 247 of the Public Health Act, 1875, I do not think this is a point of substance, for the fees would come within the words "or money which ought to have been brought into account by him." For these reasons the rule must be discharged.

LAWRENCE, J.—I am of the same opinion.

Rule discharged.

Solicitors, *Pyke & Parrott; Sharpe, Parker, Pritchards, Barham, & Lawford.*

K. B. Div.
(Lord Alverstone, L.C.J.) April 1, 3.

ATTORNEY-GENERAL (ON THE RELATION OF THE BROMLEY RURAL DISTRICT COUNCIL) AND THE BROMLEY RURAL DISTRICT COUNCIL *v.* COPELAND. (*a.*)

Highway—"Drain"—Pouring water from highway on to adjoining land—Easement—Highway Act, 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 67.

A pipe whereby rain-water from the surface of a highway is poured on adjoining land is not a "drain" such as is contemplated by section 67 *of the Highway Act,* 1835.

A right of way over a highway is not a dominant tenement to which an easement to pour rain-water through a pipe from the highway on to adjoining land can be attached.

This was an action tried before Lord Alverstone, L.C.J., without a jury.

The plaintiffs' claim was for an injunction to restrain the defendant, his servants and agents, from stopping up or obstructing an ancient watercourse or flow of water passing from the public highway leading from West Wickham to Beckenham, in the county of Kent, over land of the defendant lying between such highway and West Wickham station, in the parish of West Wickham, and from causing an obstruction to the said highway.

The plaintiffs also claimed damages for the obstruction of and injury to the highway.

The Bromley Rural District Council was the highway authority for the parish of West Wickham, and the aforesaid public highway was under the highway jurisdiction of the said council.

The defendant was the owner of certain lands in the said parish adjacent to the said road and lying between such road and the railway station at West Wickham.

The defendant bought his land about two years prior to the date of this action and caused to be built thereon two houses with gardens which were occupied by his tenants.

At the time the defendant purchased the land there was a pipe or channel passing from the said highway through a hedge and bank that divided the road from the defendant's land.

From the evidence it appeared that at this point there were two old catch-pits, one on either side of the road, connected by an old pipe or culvert under the road.

There was a falling gradient from the south towards the road at this point and a rising gradient from the road towards the north-west, and consequently this point was the lowest in that part of the road.

Prior to 1868 the water from the highway and the gradients found its way into the two old catch-pits and from the western catch-pit by means of the pipe under the highway into the eastern catch-pit and thence to the aforesaid pipe in the bank.

In 1868 the old catch-pit on the west was enlarged, a new catch-pit put on the east side, and these catch-pits were connected by an iron pipe and from the eastern catch-pit stone pipes were put in through the bank.

The defendant obstructed this channel and prevented the flow of rain and storm waters from the highway over his land, contending that there was no watercourse or right of flow over his land, whereas the plaintiffs claimed that there was always an ancient watercourse and natural outlet for the rain and storm waters from the highway over the defendant's land.

The plaintiffs now brought an action claiming an injunction and damages as above stated.

Section 67 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50), provides as follows: "And be it further enacted that the said surveyor . . . shall have power to make, scour, cleanse, and keep open all ditches, gutters, drains, or watercourses, and also to make and lay such trunks, tunnels, plats, or bridges as he shall deem necessary in and through any lands or grounds adjoining or lying near to any highway, upon paying the owner or occupier of such lands or grounds, provided they are not waste or common, for the damages which he shall sustain thereby . . ."

Bray, K.C., and *Clarke Williams,* for the plaintiffs.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

—The plaintiffs are entitled to the injunction asked for. There is ample evidence of the existence of an easement through the pipe on the defendant's land. There is a legal statutory origin and a legal common law origin for this easement in favour of the plaintiffs. Under section 67 of the Highway Act, 1855, a surveyor of highways had power to make drains through adjoining grounds upon payment of compensation to the owners. The very object of the section is to give the surveyor authority to make a drain to carry off the water. This pipe was in fact a drain, and it must be assumed, considering the long uninterrupted user of it, that some arrangement was made between the adjoining owner and the relators or their predecessors. *Croft* v. *Rickmansworth Highway Board*, 57 L. J. Ch. 589, 39 Ch. D. 272, 37 W. R. Dig. 84, is no authority against the plaintiffs' contention. The plaintiffs are also entitled at common law by prescription to an injunction on the ground that the public, as the occupiers of the road, have for more than the statutory period enjoyed the privilege of pouring water out of this pipe, and a legal origin ought to be presumed. In dealing with this common law right the two halves of the road must be dealt with differently, because, presumably, the half of the road on the defendant's side belongs to the defendant, and the other half to the owner of the land on the other side. The owner of the land on the other side could claim an easement—if he proved it—to pour water through a pipe in the defendant's land under the road and so on through the bank on to the land on the other side of the bank. That right may be acquired either by his own acts or by the acts of his tenants or occupiers: *Ivimey* v. *Stocker*, 14 W. R. 743, L. R. 1 Ch. App. 396. The highway authorities are in the position of occupiers of the roadway for certain purposes. In *Rangeley* v. *Midland Railway Co.*, 16 W. R 547, L. R. 3 Ch. App. 306, Lord Cairns says, at p. 311, "A public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing." In the present case this highway was in the occupation of the highway authority, not as an ordinary tenant, but as possessing a qualified but permanent occupation which is sufficient to found an easement.

G. B. Rashleigh, for the defendant.—The injunction asked for should not be granted. The defendant was lawfully entitled to do what he did. Firstly, the Prescription Act, 1832, does not apply to rights in gross: *Shuttleworth* v. *Le Fleming and Others*, 14 W. R. 13, 19 C. B. N. S. 687. Secondly, an owner of land has a right to protect himself from flood-water not brought there by his own act, although by so doing he injures someone else: *Nield* v. *London and North-Western Railway Co.*, 23 W. R. 60, L. R. 10 Ex. 4. Thirdly, a highway authority may not make use of their rights over the road in such a way as to deprive the adjoining owner of the reasonable use of his land: *Vestry of St. Mary, Newington* v. *Jacobs*, 20 W. R. 249, L. R. 7 Q. B. 47. Fourthly, section 67 of the Highway Act, 1835, only gives the highway authority a right to carry the water from the highway by a proper drain through the adjoining land, but not to pour it on to such land. The easement claimed is not an easement which the surveyor of highways could have acquired, and therefore not an easement which became vested in the plaintiffs.

Counsel referred to section 11 of the Highway Act, 1862 (25 & 26 Vict. c. 61); section 4 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77); and section 25 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

Clarke Williams replied.

Cur. adv. vult.

April 3.—Lord ALVERSTONE, L.C.J., read the following judgment: In this case the Attorney-General, acting on the relation of the Bromley Rural District Council, and the Bromley Rural District Council have brought an action against the defendant in respect of the interference of the flow of water through a certain pipe which had been put through the bank of the defendant's land. It was not denied that the defendant had obstructed the flow, and the only question for my determination is whether the Attorney-General, on the relation of the plaintiff board, or the plaintiffs' board themselves are entitled to an injunction to restrain the defendant from interfering with the flow of water through the pipe in question.

The point of law raised is somewhat novel. It will be convenient in the first instance that I should state the facts which gave rise to it.

There is in the district of the Bromley Rural District Council a road which passes from the Swan Inn at West Wickham north-west in the direction of Beckenham. It is not disputed the road was an ancient highway. The road near the point as to which the question arises passes to the south-west of West Wickham station and runs approximately parallel to the railway, which is in a cutting some little distance to the east. I find upon the evidence before me that prior to the year 1868 there were at the point E on the ordnance plan which was produced in evidence in this case two old catch-pits, one on either side of the road connected by an old pipe or culvert under the road. There is a falling gradient from the south for a distance of upwards of a quarter of a mile to the point E, about one in twenty-five, and a rising gradient from the point E towards the north-west, having a fall of about 1 in 400. The point E is in consequence the lowest point in the road at that part having gradients rising from it in each direction. In addition the natural lie of some part of the land on the west is towards the road.

Prior to the year 1868 the water collecting on the road and running down each gradient in both directions and collecting at the point E would find its way into the two old catch-pits and from the western catch-pit by means of the pipe under the road to the eastern, and then to an old cut in the bank.

In the year 1868 the old catch-pit on the west was enlarged, a new catch-pit put on the east side, and the catch-pits were connected by an iron pipe and from the eastern catch-pit stone pipes of 12in. diameter were put in through the bank. Under these circumstances I come to the conclusion that there was sufficient evidence before me to show the existence of an easement for the pouring of water through the pipe on the land of the defendant, assuming the plaintiffs are entitled to claim such an easement.

I have now to consider whether the Bromley Rural District Council or the Attorney-General on their relation can enforce, as against the defendant, the right to continue the flow of water through the pipe in question. It is urged by the plaintiffs that, inasmuch as under the 67th section of the Highway Act, 1835, a surveyor of highways could make drains through adjoining grounds upon payment of compensation to the owners, that this pipe through the bank was in fact a drain, and that I must assume, after the uninterrupted user of so many years, that there had been some arrangement between the adjoining owner and the relators or their predecessors under that section.

This section formed the subject of discussion in the Court of Appeal in the case of *Croft* v. *Rickmansworth Highway Board*. That case is not decisive of the point raised before me inasmuch as no question of prescription there arose, but I think that the judgments in the Court of Appeal do show that the only rights which could be lawfully acquired by a surveyor of highways are rights which come within the words of the section. I am of opinion that this pipe through the hedge is not a drain within the meaning of that section. It is true it may be said to drain the water off from the road, but on the other hand it is only a means whereby water is poured from the road on to the surface of the adjoining land, and, in my opinion, it is not a drain such as is contemplated by that section—namely, a drain or watercourse for the conveyance of water to some proper outlet. In addition to claiming by virtue of this section the plaintiffs also base their claim upon common law prescription, on the ground that the public, as the occupiers of the road, had for more than the statutory period enjoyed the privilege of pouring out the water from the pipes, and a passage from the judgment of Lord Cairns in the case of *Rangeley* v. *Midland Railway Co.* was cited as supporting the view that a right of way is not an easement and therefore the surface of the road was in occupation of the persons using the road. In my opinion this contention of the plaintiffs cannot be supported. In order to found a claim to an easement of this character there must be a dominant tenement to which the easement can be attached. I can find no authority for the suggestion that a right of way can be considered to be such a dominant tenement for the purpose of having such a right attached to it and there seems to me to be great difficulty in coming to such a conclusion. I think that the relators have not on either ground acquired a legal right to have this particular pipe maintained and, thereby, to discharge the water upon the defendants' land, and for these reasons I am of opinion that the action fails.

Judgment for the defendant.

Solicitors for the relators, *May, Sykes, & Co.*

Solicitor for the defendant, *Arthur Pearce.*

K. B. Div.
(Wills and Channell, JJ.) Feb. 9.

FITZPATRICK *v.* EVANS & CO. (LIMITED). (*a.*)

Master and servant—Mine—Person employed by contractor in coal mine—Conditions of employment—Liability of mine owner—"Workman"—Coal Mines Regulation Act, 1887 (50 *&* 51 *Vict. c.* 58)—*Employers and Workmen Act,* 1875 (38 *&* 39 *Vict. c.* 90) *s.* 10—*Employers' Liability Act,* 1880 (43 *&* 44 *Vict. c.* 42), *s.* 8.

By section 8 *of the Employers' Liability Act,* 1880, *the expression "workman" means any person to whom the Employers and Workmen Act,* 1875, *applies; and by section* 10 *of that Act of* 1875, *a "workman" means "any person who, being a labourer, . . . miner, or otherwise engaged in manual labour . . . has entered into or works under a contract with an employer," whether the contract be express or implied.*

By the special rules of a colliery, framed under the Coal Mines Regulation Act, 1875, *conditions of employment were made, No.* 5 *of which was for "drawers and persons working under contractors only," and was as follows: "Every drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman, or other person shall, in consideration of being employed at the works, be bound, both as between himself and the miner or contractor, and between himself and the owner, by the terms of these conditions."*

M. entered into a contract with the owners of the colliery to sink a shaft in their coal mine and to provide the labour for doing so. F., a workman, was engaged by M., and, while engaged upon the said work, was killed by an accident, and the father of the deceased then brought an action against the colliery owners under the Employers' Liability Act, 1880, *to recover damages for his death.*

Held, that, although the above condition created a privity of contract between the mine owners and the deceased workman of the contractor, it was only collateral and in addition to the contract he entered into with M., and that it did not make him a servant or workman of the mine owners within the meaning of section 10 *of the Employers and Workmen Act,* 1875; *and that, therefore, the Employers' Liability Act,* 1880, *did not apply.*

This was an appeal by the defendants from the judgment of his Honour Deputy Judge W. H. Butler, sitting at the county court of St. Helens and Widnes, Lancashire.

The action was brought by one Terence Fitzpatrick under the Employers' Liability Act, 1880, and Lord Campbell's Act, to recover damages from the defendants, colliery proprietors at Haydock, near St. Helens, Lancashire, for the death of his son, John Fitzpatrick, who was killed during sinking operations at one of the defendants' pits.

The defendant company had entered into a contract with one Morris, "a sinker," who entered into a verbal contract to sink and wall the shaft of the said pit at so much a yard, and to provide all the labour and engine winders. The deceased was employed by Morris as a workman, and was paid by him.

The following conditions of employment—so far as material to this case—were issued in the defendants' colliery:—

"Record book of persons employed on the conditions undermentioned:

"Conditions of employment at the collieries and works of Richard Evans & Co. (Limited) . . . for all persons employed at the collieries or works, directly or indirectly.

"The owners of the said colliery and works are hereinafter called the 'employer.' . . .

3. "All other usual and customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed at the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workmen or other persons employed.

"For miners and contractors only:

4. "Every miner and contractor employed at the colliery shall, upon engaging any drawer, workman, or other person to work under him, and before employing such drawer, workman, or other person, require such drawer, workman, or other person to obtain a copy of these conditions from the officer whose duty it is to provide such copies, and inform such drawer, workman, or other person that they are the conditions under which persons are employed at the colliery, and such miner, drawer, workman, and other person respectively shall be bound by such conditions.

"For drawers and persons working under contractors only:

5. "Every drawer employed by any miner, and

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman, or other person shall, in consideration of being employed at the works, be bound both as between himself and the miner or contractor, and between himself and the owner, by the terms of these conditions."

At the trial in the county court it was objected on behalf of the defendants that the deceased was not in their employ. Morris, the sinker, in giving evidence said that by his contract with the defendants he had to provide all the labour, and that the deceased was employed and paid by him, and was under his direction and control; and further, that one Cook, the certificated manager of the mine, had no control over the deceased except under the Coal Mines Regulation Act. He also said that if Cook had given him, the contractor, an order relating to the work he would have obeyed the order and would expect his men to do the same. The jury found that the deceased was a workman in the employment of the defendants, and that the defendants were guilty of negligence, and they awarded the plaintiff damages, and judgment was entered accordingly.

The defendants now appealed on the ground that the deceased was not a workman in their employment within the meaning of the Employers' Liability Act, 1880, and that there was no evidence of such employment or of negligence.

Ruegg, K.C., and *S. H. Leonard*, for the appellants.—This action was ill-founded. The deceased was employed and paid by the contractor, and was his servant, and not the servant of the defendants. This case comes within the decision in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co. (Limited)*, [1898] 2 Q. B. 588, 47 W. R. Dig. 125. Under the Coal Mines Regulation Act, 1887, it is necessary that great control must be exercised by the inspector over the work in a mine, but that does not create the relationship of master and servant between the proprietor and the workmen employed by the contractor.

Lush, for the respondent.—*Marrow* v. *Flimby and Broughton Moor Coal, &c., Co.* is distinguishable from the present case because by virtue of the control exercised by the defendants, under the conditions of employment, over the deceased the relationship of master and servant arose. The true test of that relationship is control, not payment of wages.

WILLS, J.—This case is not by any means an easy one, and it is one that is, perhaps, on the border line. I think that no substantial distinction can be drawn between this case and that of *Marrow* v. *Flimby and Broughton Moor Coal, &c., Co.*, except the one upon which Mr. Lush has argued with so much ability, and the question is, as he truly says, whether there is any evidence to go to the jury that the relationship of master and servant existed between the mine owner and the deceased. I should like to dispose at once of the only piece of parol evidence which was relied on—namely, the answer that was given by Morris, the contractor, that if Cook, the manager of the mine, had given him an order relating to the work he would have obeyed such order, and would expect the men under him to obey it. I really think that that comes to nothing if it is properly looked at. No instance was given in which any order had been given which either he or his workmen had obeyed or disobeyed. Probably the same answer would be given by any subcontractor under any ordinary building contract as to the orders of the building owner or the architect.

It is a constant practice in contracts of this kind to reserve power to the persons who are ultimately interested in the work which is being done to interfere, more or less, and to control, to a great extent, both what shall be done and also the manner in which it is to be done, and it cannot be supposed in such cases that the relationship of master and servant exists. There is no evidence that the deceased was the servant of the mine owner. The conditions contained in the "Record book of persons employed on the conditions undermentioned" are no evidence at all which will affect the deceased in the character of workman or servant other than of the contractor. The real relation between the parties in this action depends upon the printed conditions, and the interpretation of these conditions is a question for us, and we must look at them as a whole. I do not think that the words under "conditions of employment"—namely, "the owners of the said colliery and works are hereinafter called the employer," are material. The only part which is useful for the present case is the 5th clause, which relates to persons working under the contractor only. Now, under that clause the deceased, and all other persons in his position, must be presumed to have knowledge of the conditions, because, by clause 4, the contractor is bound to require every person working under him to obtain a copy of such conditions and to inform him that they are the conditions under which persons are employed at the colliery and that he is bound by such conditions. Therefore when persons enter into the employment of the contractor—not of the mine owner—they must be presumed to have knowledge of these conditions and to know that, in consideration of being employed at the work, they are bound by the terms of such conditions. Well that, undoubtedly, establishes a privity of contract between the mine owners and the workmen of the contractor. We have no doubt there was a contract between the deceased and the mine owners—the only question is, what was its nature? The deceased bound himself, in consideration of being employed by Morris, to abide by the rules which are laid down for the safety of the mine and for the guidance of the persons employed there, whether they be workmen or other persons employed in the mine. That is a consideration which is ample, because the mine owner could have prevented his being employed by the contractor if the deceased had not bound himself by those conditions.

Condition 3 shows what the workmen are to be bound by—namely, "All other usual and customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed at the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workmen or other persons employed." The question is, does that condition make the deceased a servant of the mine owner? I do not think it does so. That condition applies whether the workman is or is not a servant of the mine owner and therefore it does not seem to throw any additional light upon whether the deceased was a servant of the mine owner or the contractor. *Primâ facie* a man is not a servant of two masters. There is no evidence in this case to put aside that conclusion or to show that the deceased, although he was bound to observe all the conditions which are laid down for the guidance of persons employed at the mine, was a servant of anybody except the contractor. I have, therefore, come to the conclusion that the judgment was wrong.

CHANNELL, J.—I am of the same opinion. The whole point really turns upon the special clauses in

the book of conditions under which the deceased was employed. The fifth clause shows that, in addition to the contract the deceased entered into with the contractor, he, also, entered into a collateral contract with the mine owner. The only question that we have to consider is whether that collateral contract is a contract of service or a contract personally to execute any work or labour within section 10 of the Employers and Workmen Act, 1875. It is a matter of some little difficulty, but it seems to me that although there was a contract between the deceased and the defendants it was not a contract of service within the meaning of that Act. There is an expression of opinion in the judgment of Rigby, L.J., in the case of *Marrow* v. *Flimby and Broughton Moor Coal, &c., Co.* which is important as showing that if there is the element of privity of contract between plaintiff and defendant it would generally negative some other contract with some other party. He uses that expression with reference to the "butty colliery case" where it appeared that the intermediate contractor was not a sub-contractor but a "butty-man," and that this was known to be a mere mode of doing piece-work. What I understand the learned judge to mean is that when you have privity of contract it is an extremely important element because in all probability it negatives any contract with anyone else. It seems to me that the case is analogous to the case where a man employs another to decorate his house and says, "I will not have any workman in the house unless he engages to behave himself properly and not to go over my carpets with his dirty boots on." That would be a perfectly good arrangement, but it would not constitute the workman the servant of the owner of the house. Therefore, though there was a contract between the deceased and the defendants it was not a contract of service.

Appeal allowed. Leave to appeal given.

Solicitors for the appellants, *W. Norton Ellen*, for *Edwin Peace*, Liverpool.

Solicitors for the respondent, *Charles Russell & Co.*

K. B. Div.
(Wills and Phillimore, JJ.) } Feb. 1.

PEARL ASSURANCE CO. v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY. (a.)

Friendly societies — Industrial insurance companies— Transfer of members — Notice to society whence a member is sought to be transferred—Collecting Societies and Industrial Insurance Companies Act, 1896 (59 & 60 *Vict. c.* 26), *s.* 4 (2).

It is provided by section 4 (2) *of the Collecting Societies and Industrial Insurance Companies Act*, 1896, *that, where a member of, or person insured with, a collecting society or industrial assurance company is sought to be transferred to any other such society or company, the society to which the member or person is sought to be transferred shall, within seven days of his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred, and, by section* 14 (1) (c), *failure to give such notice is made an offence under the Act.*

A person insured with an industrial assurance company applied, through an agent, for admission to a collecting society. At the time of the application he was still insured in the company.

Held, that he was a person who was sought to be transferred to the society, and that the society, having failed to give the notices required by section 4 (2) *of the abovementioned Act, was guilty of an offence under section* 14 (1) (c).

Case stated by an alderman of the City of London.

An information was preferred by the appellant company against the respondent society for that they did not within seven days from the application of one William Perkins, a person insured with the appellant company, for admission to the respondent society, give notice in writing of the application to the appellant company from which William Perkins was sought to be transferred, and that the default had continued up to the date of the information.

There was a second information which alleged against the respondent society a similar offence in respect of Rebecca Perkins, the wife of William Perkins.

The appellant company was an industrial assurance company, within the meaning of the above Act, and the respondent society was a collecting society and was duly registered under the Friendly Societies Acts.

Perkins, who was called as a witness at the hearing of the information, stated that he and his wife had been insured in the office of the appellant company about two years, and that a collector named Jones, whom he had known as a collector for the appellant company had in or about the month of June, 1900, asked him to transfer to the respondent society. He assented to this and signed a proposal form in the respondent society and gave up to the collector Jones his books and policies in the appellant company, receiving in lieu thereof policies in the respondent society. The policies issued by the respondent society were in different form to those issued by the appellant company.

At the time this transaction took place Jones had left the appellant company and was a collector of the respondent society.

It was stated by a witness that when he was conversing with Perkins at his house the assistant superintendent of the respondent society, accompanied by Jones, came in and stated to the witness that Perkins' insurance had been transferred to the respondent society.

No notice was given by the respondent society to the appellant company within the meaning of section 4 (2).

The two policies on the lives of Mr. and Mrs. Perkins in the appellant company continued in existence up to the day when the informations were heard, and the appellant company admitted that it was not their wish or intention to cancel the policies.

The alderman held that as the policies in the appellant company and those in the respondent company were co-existent there could be no transfer or seeking to transfer within the meaning of section 4 (2), and dismissed the information.

Avory, K.C. (*H. W. Rowsell* with him), for the appellants.—The alderman ought to have convicted. The object of the provisions under which the proceedings were taken was to protect assurance companies and societies of the class referred to in the Act from the tricks of their agents and collectors who for sake of the commission they would earn sought to transfer to the company or society for which they acted the members or persons insured in other companies or societies. The present was just the sort of case which the Act was intended to provide for. The collector Jones, having been dismissed from the appellant company, obtains employment with the respondent society, and seeks to transfer to that

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman, or other person shall, in consideration of being employed at the works, be bound both as between himself and the miner or contractor, and between himself and the owner, by the terms of these conditions."

At the trial in the county court it was objected on behalf of the defendants that the deceased was not in their employ. Morris, the sinker, in giving evidence said that by his contract with the defendants he had to provide all the labour, and that the deceased was employed and paid by him, and was under his direction and control; and further, that one Cook, the certificated manager of the mine, had no control over the deceased except under the Coal Mines Regulation Act. He also said that if Cook had given him, the contractor, an order relating to the work he would have obeyed the order and would expect his men to do the same. The jury found that the deceased was a workman in the employment of the defendants, and that the defendants were guilty of negligence, and they awarded the plaintiff damages, and judgment was entered accordingly.

The defendants now appealed on the ground that the deceased was not a workman in their employment within the meaning of the Employers' Liability Act, 1880, and that there was no evidence of such employment or of negligence.

Ruegg, K.C., and *S. H. Leonard*, for the appellants.—This action was ill-founded. The deceased was employed and paid by the contractor, and was his servant, and not the servant of the defendants. This case comes within the decision in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co. (Limited)*, [1898] 2 Q. B. 588, 47 W. R. Dig. 125. Under the Coal Mines Regulation Act, 1887, it is necessary that great control must be exercised by the inspector over the work in a mine, but that does not create the relationship of master and servant between the proprietor and the workmen employed by the contractor.

Lush, for the respondent.—*Marrow* v. *Flimby and Broughton Moor Coal, &c., Co.* is distinguishable from the present case because by virtue of the control exercised by the defendants, under the conditions of employment, over the deceased the relationship of master and servant arose. The true test of that relationship is control, not payment of wages.

WILLS, J.—This case is not by any means an easy one, and it is one that is, perhaps, on the border line. I think that no substantial distinction can be drawn between this case and that of *Marrow* v. *Flimby and Broughton Moor Coal, &c., Co.*, except the one upon which Mr. Lush has argued with so much ability, and the question is, as he truly says, whether there is any evidence to go to the jury that the relationship of master and servant existed between the mine owner and the deceased. I should like to dispose at once of the only piece of parol evidence which was relied on—namely, the answer that was given by Morris, the contractor, that if Cook, the manager of the mine, had given him an order relating to the work he would have obeyed such order, and would expect the men under him to obey it. I really think that that comes to nothing if it is properly looked at. No instance was given in which any order had been given which either he or his workmen had obeyed or disobeyed. Probably the same answer would be given by any subcontractor under any ordinary building contract as to the orders of the building owner or the architect.

It is a constant practice in contracts of this kind to reserve power to the persons who are ultimately interested in the work which is being done to interfere, more or less, and to control, to a great extent, both what shall be done and also the manner in which it is to be done, and it cannot be supposed in such cases that the relationship of master and servant exists. There is no evidence that the deceased was the servant of the mine owner. The conditions contained in the "Record book of persons employed on the conditions undermentioned" are no evidence at all which will affect the deceased in the character of workman or servant other than of the contractor. The real relation between the parties in this action depends upon the printed conditions, and the interpretation of these conditions is a question for us, and we must look at them as a whole. I do not think that the words under "conditions of employment"—namely, "the owners of the said colliery and works are hereinafter called the employer," are material. The only part which is useful for the present case is the 5th clause, which relates to persons working under the contractor only. Now, under that clause the deceased, and all other persons in his position, must be presumed to have knowledge of the conditions, because, by clause 4, the contractor is bound to require every person working under him to obtain a copy of such conditions and to inform him that they are the conditions under which persons are employed at the colliery and that he is bound by such conditions. Therefore when persons enter into the employment of the contractor—not of the mine owner—they must be presumed to have knowledge of these conditions and to know that, in consideration of being employed at the work, they are bound by the terms of such conditions. Well that, undoubtedly, establishes a privity of contract between the mine owners and the workmen of the contractor. We have no doubt there was a contract between the deceased and the mine owners—the only question is, what was its nature? The deceased bound himself, in consideration of being employed by Morris, to abide by the rules which are laid down for the safety of the mine and for the guidance of the persons employed there, whether they be workmen or other persons employed in the mine. That is a consideration which is ample, because the mine owner could have prevented his being employed by the contractor if the deceased had not bound himself by those conditions.

Condition 3 shows what the workmen are to be bound by—namely, "All other usual and customary terms and regulations which obtain or exist with respect to the employment of workmen and all other persons employed at the colliery, whether expressed in writing or not, shall be and remain in full force and effect as part of the contract between the employer and the workmen or other persons employed." The question is, does that condition make the deceased a servant of the mine owner? I do not think it does so. That condition applies whether the workman is or is not a servant of the mine owner and therefore it does not seem to throw any additional light upon whether the deceased was a servant of the mine owner or the contractor. *Primâ facie* a man is not a servant of two masters. There is no evidence in this case to put aside that conclusion or to show that the deceased, although he was bound to observe all the conditions which are laid down for the guidance of persons employed at the mine, was a servant of anybody except the contractor. I have, therefore, come to the conclusion that the judgment was wrong.

CHANNELL, J.—I am of the same opinion. The whole point really turns upon the special clauses in

the book of conditions under which the deceased was employed. The fifth clause shows that, in addition to the contract the deceased entered into with the contractor, he, also, entered into a collateral contract with the mine owner. The only question that we have to consider is whether that collateral contract is a contract of service or a contract personally to execute any work or labour within section 10 of the Employers and Workmen Act, 1875. It is a matter of some little difficulty, but it seems to me that although there was a contract between the deceased and the defendants it was not a contract of service within the meaning of that Act. There is an expression of opinion in the judgment of Rigby, L.J., in the case of *Marrow* v. *Flimby and Broughton Moor Coal, &c., Co.* which is important as showing that if there is the element of privity of contract between plaintiff and defendant it would generally negative some other contract with some other party. He uses that expression with reference to the "butty colliery case" where it appeared that the intermediate contractor was not a sub-contractor but a "butty-man," and that this was known to be a mere mode of doing piece-work. What I understand the learned judge to mean is that when you have privity of contract it is an extremely important element because in all probability it negatives any contract with anyone else. It seems to me that the case is analogous to the case where a man employs another to decorate his house and says, "I will not have any workman in the house unless he engages to behave himself properly and not to go over my carpets with his dirty boots on." That would be a perfectly good arrangement, but it would not constitute the workman the servant of the owner of the house. Therefore, though there was a contract between the deceased and the defendants it was not a contract of service.

Appeal allowed. Leave to appeal given.

Solicitors for the appellants, *W. Norton Ellen*, for *Edwin Peace*, Liverpool.

Solicitors for the respondent, *Charles Russell & Co.*

K. B. Div.
(Wills and Phillimore, JJ.) Feb. 1.

PEARL ASSURANCE CO. v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY. (*a.*)

Friendly societies — Industrial insurance companies — Transfer of members — Notice to society whence a member is sought to be transferred — Collecting Societies and Industrial Insurance Companies Act, 1896 (59 & 60 *Vict.* c. 26), *s.* 4 (2).

It is provided by section 4 (2) *of the Collecting Societies and Industrial Insurance Companies Act*, 1896, *that, where a member of, or person insured with, a collecting society or industrial assurance company is sought to be transferred to any other such society or company, the society to which the member or person is sought to be transferred shall, within seven days of his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred, and, by section* 14 (1) (c), *failure to give such notice is made an offence under the Act.*

A person insured with an industrial assurance company applied, through an agent, for admission to a collecting society. At the time of the application he was still insured in the company.

Held, that he was a person who was sought to be transferred to the society, and that the society, having failed to give the notices required by section 4 (2) *of the above-mentioned Act, was guilty of an offence under section* 14 (1) (c).

Case stated by an alderman of the City of London.

An information was preferred by the appellant company against the respondent society for that they did not within seven days from the application of one William Perkins, a person insured with the appellant company, for admission to the respondent society, give notice in writing of the application to the appellant company from which William Perkins was sought to be transferred, and that the default had continued up to the date of the information.

There was a second information which alleged against the respondent society a similar offence in respect of Rebecca Perkins, the wife of William Perkins.

The appellant company was an industrial assurance company, within the meaning of the above Act, and the respondent society was a collecting society and was duly registered under the Friendly Societies Acts.

Perkins, who was called as a witness at the hearing of the information, stated that he and his wife had been insured in the office of the appellant company about two years, and that a collector named Jones, whom he had known as a collector for the appellant company had in or about the month of June, 1900, asked him to transfer to the respondent society. He assented to this and signed a proposal form in the respondent society and gave up to the collector Jones his books and policies in the appellant company, receiving in lieu thereof policies in the respondent society. The policies issued by the respondent society were in different form to those issued by the appellant company.

At the time this transaction took place Jones had left the appellant company and was a collector of the respondent society.

It was stated by a witness that when he was conversing with Perkins at his house the assistant superintendent of the respondent society, accompanied by Jones, came in and stated to the witness that Perkins' insurance had been transferred to the respondent society.

No notice was given by the respondent society to the appellant company within the meaning of section 4 (2).

The two policies on the lives of Mr. and Mrs. Perkins in the appellant company continued in existence up to the day when the informations were heard, and the appellant company admitted that it was not their wish or intention to cancel the policies.

The alderman held that as the policies in the appellant company and those in the respondent company were co-existent there could be no transfer or seeking to transfer within the meaning of section 4 (2), and dismissed the information.

Avory, K.C. (*H. W. Rowsell* with him), for the appellants.—The alderman ought to have convicted. The object of the provisions under which the proceedings were taken was to protect assurance companies and societies of the class referred to in the Act from the tricks of their agents and collectors who for sake of the commission they would earn sought to transfer to the company or society for which they acted the members or persons insured in other companies or societies. The present was just the sort of case which the Act was intended to provide for. The collector Jones, having been dismissed from the appellant company, obtains employment with the respondent society, and seeks to transfer to that

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

which the county court judge has held that there must be shown an affirmative title on the part of the claimant in the interpleader, nevertheless, if the goods are trust goods, there is no sort of title to them in the execution creditor. He had no right, when trading with Mather, to seek by execution to get satisfaction out of trust property of a debt incurred by Mather with him. The whole basis of the decisions, of which *Dowse* v. *Gorton* is the last and most final, is that assets, as they are acquired, whether by an executor, administrator, or a trustee, who, in conformity with his trust, is carrying on a business, are not the property of the administrator, executor, or trustee, but form part of the trust property, to which those to whom the executor, administrator, or trustee in trading incurs debts have no right to look in the sense of being able to seize them under an execution, because they are the goods —not of the trader—but of the trust. I will refer to two passages in the judgment of a case which seems to illustrate that point very well—namely, *In re Morgan, Pillgrem* v. *Pillgrem*, 29 W. R. 733, 18 Ch. D. 93. In that case the business of a testator had been carried on by his executor in conformity with the testator's directions, and a creditor whose debt was incurred by the executor in the course of that trading sought to enforce rights against property which had originally been the property of the testator, but which had passed to the executor in the course of carrying on the business. Fry, J., before whom the case was first heard, said (18 Ch. D., at p. 101): "The argument in support of the summons has almost gone the length of suggesting that trust property in the hands of a trustee may be seized by his execution creditor. In my judgment nothing is plainer than this—that the property which can be taken under an execution is only that property to which the execution debtor is beneficially entitled, and that no property of which he is only a trustee can be taken." The case went to the Court of Appeal, and in giving judgment there Jessel, M.R., said (18 Ch. D., at p. 104): "At a subsequent period he (the creditor) issued execution against the chattels of his debtor, and among other chattels were the leasehold premises, and, in order to enable the sheriff to seize, the lease was handed to him. I asked the counsel if the sheriff could seize trust property for the debt of the trustee, and it was admitted that he could not. The result was that the execution gave the creditor no better title than he had before; therefore he got no title to the lease under the execution, and therefore he has no legal title to the property, and as to his equitable interest he must be postponed to the *cestuis que trust*." That the creditor's only right in a case of this kind is to sue personally the executor, administrator, or trustee is, I think, decided by the case of *Dowse* v. *Gorton*. The point is made clearer if one turns to the judgment delivered in the Court of Appeal. Lindley, L.J., says, *In re Gorton* (40 Ch. D., at p. 542): "Now, let us look at the rights of those who have dealt with the executors after his death. The right of those is to sue the executors. I believe there are some very exceptional cases in which subsequent creditors can get the assets, and I think there is authority for saying that funeral expenses can be got out of the assets; but with those exceptions the right of subsequent creditors is to sue the executors. They have nothing to do with the assets of the testator at all." The House of Lords, when the case came before them, though they varied the order of the Court of Appeal, in no way dissented from that decision. Furthermore, there is a case of *Evans* v. *Evans*, 35 W. R. 586, 34 Ch. D. 597, which was cited to the learned county court judge, in which an attempt was made in a court of equity, by a creditor who, like the present execution creditor, had a claim against the administratrix of an estate, who was carrying on the business of the estate, to get a sort of charge upon goods which were in the possession of the administratrix in the course of the trading, and which that same creditor had supplied and had not been paid for. In the course of his judgment in that case Cotton, L.J., says: "The creditor cannot have any direct claim against the intestate's estate. He cannot have anything higher than a right to be substituted to the right of the administratrix to indemnity. Where a business is carried on by a trustee with proper authority, and he buys for the business goods for the price of which he is personally liable, the *cestuis que trust* cannot say to the trustee: 'These goods belong to us, and we will take them without regard to your right to indemnity.' But have the creditors any claim against the goods on that ground? The goods now in question were acquired for the purposes of the business, and went into the business. The infant child of the intestate claims them as belonging to the estate, and, in my opinion, he has a right so to claim them, subject to the right of the widow to be indemnified out of them against all claims in respect of them so far as she has not lost such right by being a debtor to the estate, and whether she has lost that right is a question depending on the result of the general account."

It appears to me to be clear that, on the facts of the present case—which are really undisputed—the goods which were seized come within these decisions; and, so far as common law is concerned they became as they came in assets of the trust estate; for it is clear both from *Abbott* v. *Parfitt*, 19 W. R. 718, L. R. 6 Q. B. 346, referred to by Lord Herschell in *Dowse* v. *Gorton*, and from *Moseley* v. *Rendell*, 19 W. R. 619, L. R. 6 Q. B. 338, that where an executor or administrator is rightly carrying on his testator's business the assets acquired in the course of trading as they come in become assets of the testator. If that is so, something also follows in equity which it appears to me the county court judge has overlooked. While there can be no right of a creditor created in the course of the trading to treat as goods of the trustee goods which form part of the trust estate, still it seems to be equally clear that the trustee has a right and an interest in the goods, because he has a right to an indemnity in the nature of a lien upon them. It necessarily follows, as it seems to me, that the trustee has a right to prevent anybody from carrying away the goods, and to say to everybody, including the *cestuis que trust*, "I am entitled to an indemnity out of these goods and have, therefore, a pecuniary interest in them." If when the accounts are taken it turns out that he has received from the trust estate more than the amount of the liabilities which he has properly incurred in trading, he then will have to give way to the *cestui que trust*, for there is nothing in respect of which he need be indemnified, but until those accounts are taken he is entitled to a lien over the assets. A lien—putting aside the question of bankruptcy—has always been held to be a sufficient title in a person who holds property not his own to hold it as against the world until the lien is satisfied or discharged, or proved not be exist. We are bound to give effect to the equitable rights of a trustee who, properly and in conformity with the obligation of his trust, is carrying on a business for the benefit of the trust estate. I will again refer to *Dowse* v. *Gorton*, which, when properly read, seems to me to cover most of the points in the present case. Lord Herschell says ([1891] A. C., at p. 199): "I think it is clear that where a business has been carried on

under such an authority as was conferred upon the executors by the will of this testator, they (the executors) would be entitled to a general indemnity out of the estate as against all persons claiming under the will." So also Lord Macnaghten (at p. 203) says: "Creditors of a deceased trader whose business has been continued by his executors, when they come for an administration decree, must treat the continuance of the business either as proper or improper. If the business has been properly continued as between the executors and the creditors (*i.e.*, the creditors of the old estate of the testator), or if the creditors choose to treat it so, which comes to the same thing, the executors are entitled to be indemnified against all liabilities properly incurred in carrying it on."

But perhaps the fullest and clearest exposition of the rights of Mather in this case, in whose shoes, subject to the bankruptcy point to which I am presently coming, the trustee stands, is given by Jessel, M.R., in *In re Johnson, Shearman* v. *Robinson*, decided in 1880. He says (15 Ch. D., at p. 552): "I understand the doctrine to be this, that where a trustee is authorized by a testator, or by a settlor—for it makes no difference—to carry on a business with certain funds which he gives to the trustee for that purpose, the creditor who trusts the executor has a right to say, 'I had the personal liability of the man I trusted and I have also a right to be put in his place against the assets; that is, I have a right to the benefit of indemnity or lien which he has against the assets devoted to the purposes of the trade.' The first right is his general right by contract; because he trusted the trustee or executor he has a personal right to sue him and to get judgment and make him a bankrupt. The second right is a mere corollary to those numerous cases in equity in which persons are allowed to follow trust assets. The trust assets having been devoted to carrying on the trade, it would not be right that the *cestui que trust* should get the benefit of the trade without paying the liabilities; therefore the court says to him, 'You shall not set up a trustee who may be a man of straw and make him a bankrupt to avoid the responsibility of the assets for carrying on the trade'; the court puts the creditor, so to speak, as I understand it, in the place of the trustee."

Therefore the case stands thus: The trustee Mather has a right at any moment, and with regard to any of the assets of the trust estate, to say, "These shall not be taken away from me. I have a right to an indemnity personal to myself, and to that extent also I have a right of indemnity, indirectly, on behalf of the creditors of the estate, who can only get at the assets through me." He, therefore, clearly has much more than the interest of a bare trustee in these assets. He has by the well-established rules of equity a direct personal interest in maintaining his lien over them.

The only question left appears to me to be this: Will this equitable right be sufficient to enable Mather to succeed as against the execution creditor in an interpleader issue? It must be conceded that the execution creditor himself had no right, but it is also clear that in interpleader proceedings the claimant must show that he has a definite title in himself to the goods. Supposing, then, that we are dealing with Mather, had he such a definite title or interest? I think he had. It has been held in more than one case that in interpleader cases, now at any rate, the law is bound to recognize equitable rights. The first case I know of, though there may be others, is *Rusden* v. *Pope*, 16 W. R. 1122, L. R. 3 Ex. 269. Then there is the case of *Duncan* v. *Cashin*, 23 W. R. 561, L. R. 10 C. P. 554, in which the late Lord Esher emphatically lays down, at p. 558, the duty to look at the equities in interpleader issues. The most recent authority is a decision of Mathew and Wills, JJ., in *Usher* v. *Martin*, 24 Q. B. D. 272, 38 W. R. Dig. 20, in which they distinguished the case of *Richards* v. *Jenkins*, 35 W. R. 355, 18 Q. B. D. 451, in the Court of Appeal, which at first sight seems to be to the contrary effect.

In the county court judge's judgment in the present case something is said about the form of the judgment being against Mather as trustee. I cannot quite understand that, though there may be something which explains it. I think I ought to assume in favour of the execution creditor that he has a perfectly good judgment, and I do so assume. Now there comes the question, Assuming that Mather had this right of title, as Jessel, M.R., calls it, what is the position of the trustee in bankruptcy—the claimant? Section 44 of the Bankruptcy Act, 1883, is plain and explicit that Mather's trust property did not pass to the trustee in bankruptcy. It is not property which is divisible among his creditors, that is clear. But, on the other hand, it is equally clear to me that here, if I rightly construe the decisions of equity, there is—to use the expression of a great master of equity, Sir George Jessel, M.R.—an actual interest in the nature of a lien or right of indemnity over this property, and if judgment should pass for the execution creditor away go the goods and the property, and the trustee's right of lien is defeated. I think it has always been held, and has always been treated, as part of the law of bankruptcy that if a person is found in possession of goods of which he may be described as the trustee in one sense, but over which he has a lien—for instance, as a factor—although the goods were never held to pass under section 44 or the corresponding section of earlier Bankruptcy Acts, the trustee in bankruptcy was not bound to part with those goods until it had been shown that the lien had been satisfied. In such cases the trustee has a right to see that the lien is maintained in the interest of the creditors of the estate. In this connection I will quote from Williams on Bankruptcy (7th ed.), p. 177, where he says: "Thirdly, there is the class of trusts where the bankrupt trustee has not the absolute or general property, but only a special property—for example, where the property is vested in the bankrupt as an agent, such as a factor intrusted with goods to sell for his principal, or a banker intrusted with bills for collection. Such property, if distinguishable from the mass of the bankrupt's property, does not pass to the trustee in bankruptcy, but the trustee has a right to enforce any lien or other right on the goods or other property in his possession which the bankrupt factor would have had against his principal had he remained solvent."

It appears to me that in equity the carrying on of a business of this kind gives an equitable lien, and I do not see why the trustee in bankruptcy ought not to have the benefit of that lien. Though no doubt the property cannot be said to be property divisible among the creditors, being trust property, yet it ought to be said that it is property in which the trustee has an interest in the nature of a lien, and every trade creditor who has a right to prove against Mather's estate in respect of debts incurred by Mather in the course of carrying on the business has also, through Mather, a right to the satisfaction of his debt by means of the lien which Mather had over what is no doubt in one sense trust property. It seems to me, therefore, that that lien has passed to the trustee in bankruptcy, and I think that judgment should be given in his favour. It follows from what I have said that the trustee cannot deal with these assets, because the *cestuis que trust* will have a right to have them brought into account. All we decide is that the

trustee in bankruptcy of Mather has established such a right against the defendant—the execution creditor—as entitles him to succeed in the interpleader issue.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitors for the claimant, *Wrensted & Hind*, for *Scott & Holmes*, Bradford.

Solicitor for the defendant, *G. J. R. Stubbs*, for *Gaunt, Hines, & Bottomley*, Bradford.

Court of Appeal.

From Chan. Div. (Rigby, Collins, and Stirling, L.JJ.) April 16.

In re BELHAM.
RICHARDES *v.* YATES. (*a.*)

Administration — Creditor administrator — Right of retainer—Form of administration bond—"Not unduly prefer."

An administrator may retain his own debt as against debts of equal degree, notwithstanding that the administration bond provides for a due course of administration "rateably and proportionably and according to the priority required by law, and not unduly preferring his own debt."

Nunn *v.* Barlow, 1 *Sim. & St.* 588, *and* Davies *v.* Parry, 47 *W. R.* 429, [1899] 1 *Ch.* 602, *considered and followed.*

This was an appeal from a decision of Joyce, J.

The intestate Belham, who died on the 26th of October, 1898, was at the time of his death indebted to the plaintiff and the defendant in respect of certain contracts which he had entered into with them respectively.

The defendant took out letters of administration to the estate, and entered into the usual administration bond as settled in *In the Goods of Brackenbury*, 25 W. R. 698, 2 P. D. 272. The bond provided (*inter alia*) that the administrator should well and truly administer the estate and effects of the deceased "according to law—that is to say, do pay all and singular the debts which he did owe at his decease in a due course of administration rateably and proportionably and according to the priority required by law, and not unduly preferring his own debt or the debts of any other of the creditors of the deceased by reason of his being an administrator as aforesaid."

The plaintiff took out an originating summons for the administration of Belham's estate, and an administration order was made by Kekewich, J., directing accounts and inquiries. The master certified the total debts at £3,350, of which £957 was due to the defendant, and the personal estate outstanding he certified at £966 14s. 6d.

The defendant claimed to exercise his right of retainer upon the authority of the decision of Romer, J., in the case of *Davies* v. *Parry*, 47 W. R. 429, [1899] 1 Ch. 602, that a bond in the form of that in the present case gave a creditor administrator the power of preferring so long as he did not do it unduly, the bond leaving it open to the administrator to retain his own debt so long as he did not do so unduly.

On the 11th of March, 1901, the plaintiff moved in the Probate Division before Barnes, J., asking that the bond might be varied by striking out the word "unduly," or otherwise to alter it so as to carry out the intention of the court, or that in the alternative the grant of administration to the defendant might be revoked and administration re-issued to some other person. Barnes, J., refused the motion, holding that he could not alter the bond, as the court could not make a new contract with the administrator. His lordship considered himself bound by *Davies* v. *Parry*, though he expressed some doubt as to the correctness of the decision, and that as the creditor administrator had not acted improperly the court would not revoke the grant.

The matter was then brought before Joyce, J., upon the further consideration of the administration action, and the learned judge declared that the defendant as administrator of a deceased intestate was entitled to retain out of the assets of the deceased the amount of the debt owing to him. His lordship considered himself bound by *Davies* v. *Parry*, with which he agreed. From this decision the plaintiff now appealed.

Griffith-Jones and *Morgan Griffith-Jones*, for the appellant.

Ingpen, K.C., and *Whinney*, for the respondent.

RIGBY, L.J., said he was of opinion that the decision of the learned judge below was right. No doubt there were cases in which one could wish the law were simpler, but as the law stood a person who obtained the right to administer had a right to retain a debt due to him. If the assets were sufficient for payment of debts no question could arise, but where this was not the case the rule often resulted in no debts being paid except that of the administrator. His lordship agreed that Joyce, J., was right in holding that the right of the administrator must prevail.

COLLINS, L.J., was of the same opinion, and said that the question was in substance decided by *Nunn* v. *Barlow*, 1 Sim. & St. 588, and followed by other decisions. The ordinary administration decree directs the debts to be paid rateably and according to law, and the usual administration bond does but write at large what the ordinary administration decree directs. To pay debts "rateably" is a duty imposed by the decree, and the case of *Nunn* v. *Barlow* decides that the right of retainer is not incompatible with an administration decree. That seems to dispose of the remarks of Barnes, J., on the case of *Davies* v. *Parry*. The words in the usual administration bond add nothing to the law. Unless the bond can be construed as a waiver by the administrator of his retainer the right to retain remains. In the present case the administrator had not renounced his rights and consequently he still had the right to retain.

STIRLING, L.J., was of the same opinion and said: Romer, J., in *Davies* v. *Parry* refers to the terms of the administration bond which impose on the administrator the duty to pay debts rateably and according to law not unduly preferring his own debt. On that he remarks that the administrator is not prohibited from preferring his own debt so long as he does not do it unduly. What does that mean? Clearly that he is not to pay his own debt in priority to debts of a higher degree. The right of retainer is given to an administrator by reason of his being both creditor and administrator and therefore unable to sue himself. In the present case there had been no undue preference, and the decision below must be affirmed.

Appeal dismissed.

Solicitors, *Woosnam & Smith*, for *Smith & Davies*, Aberystwith; *H. B. Worrell & Son.*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 27.

In re AN ARBITRATION BETWEEN MASTERS AND THE GREAT WESTERN RAILWAY CO. (*a.*)

Lands Clauses Acts—Compensation—Interest in land—Taken or injuriously affected—Right of lessee of minerals to sink pits—Reasonable approval of lessor—Lands Clauses Consolidation Act, 1845 (8 *&* 9 *Vict. c.* 18), *s.* 68.

The owner of land on which there was a colliery demised by lease for a term of years the colliery, with its buildings, pits, and shafts, and also the minerals in and under the adjoining land. The lease contained a proviso that the lessee might at any time during the term, on giving notice, sink a pit or pits on any part of the land the surface of which was not demised, but so that the position of such pit or pits should be subject to the reasonable approval of the lessor, his heirs or assigns. The lessor afterwards agreed to sell a portion of the surface to a railway company, and the company gave notice to the lessee to treat in respect of any interest which he might have in such portion. On the same day the lessee gave the lessor notice of his intention to sink a pit in that portion of the land.

Held, that the lessee, under the proviso in the lease, had an interest in the land taken by the company, for the loss of which he was entitled to compensation under section 68 *of the Lands Clauses Consolidation Act,* 1845.

Appeal from the judgment of a Divisional Court (Darling and Bucknill, JJ.) on a special case stated in an arbitration under the Lands Clauses Consolidation Act, 1845 (*ante*, p. 29, [1900] 2 Q. B. 677).

By a lease dated the 24th of June, 1891, Colonel Vaughan Lee, who was the freeholder of certain land in the county of Glamorgan, demised to Thomas James Masters for a term of sixty years the portion of that land which was coloured yellow on the plan annexed to the lease and the colliery buildings thereon and the pits and shafts then open thereon, and also the minerals lying in and under the whole of the land. And it was provided that the lessee should have the right at any time during the term, on giving notice, to sink a pit or pits on any part of the land other than that coloured yellow, but so that the position of such pit or pits should be subject to the reasonable approval of the lessor, his heirs or assigns, or his or their agent for the time being.

On the 25th of May, 1898, the Great Western Railway Co., having previously agreed to purchase from Colonel Vaughan Lee the surface of five and a-half acres of the land other than that coloured yellow, gave notice to Masters to treat in respect of any interest which he might have in the land which they had so agreed to purchase.

On the same day Masters gave notice under the lease to the agent of Colonel Vaughan Lee of his intention to sink a new pit upon part of the land specified in the notice to treat.

The lessor never gave the required leave to sink a pit, and the railway company entered upon the land.

Masters claimed compensation in respect of his interest in the land taken by the company, and the matter was referred to arbitration under section 68 of the Land Clauses Consolidation Act.

The arbitrator awarded the claimant £8,900 as compensation for the loss of his right to sink a pit or pits on the land taken by the company.

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

The facts and the arguments are fully set out *ante*, p. 29.

The question was whether the qualified right conferred on the claimant by the lease, to sink a pit in land the surface of which was not demised to him, gave him an interest in that land which was the subject of compensation under section 68 of the Lands Clauses Consolidation Act.

The Divisional Court gave judgment in favour of the claimant.

The railway company appealed.

Lawson Walton, K.C., Page, K.C., and *Howard Wright,* for the railway company.

Cripps, K.C., James Fox, and *MacSwinney,* for the claimant.

A. L. SMITH, M.R.—The question in this appeal is whether the award which the arbitrator has made in favour of Masters against the railway company for £8,900 ought to be set aside, on the ground that he had no jurisdiction to award anything at all.

The short facts of the case are these: In 1891, Colonel Vaughan Lee, who was the owner of a considerable piece of property in Wales, leased the minerals to Masters. Masters spent a large sum of money on the colliery, and no doubt he acquired a very valuable right, and he had sixty years in which to work the minerals. He had then only one shaft from which to work the minerals, but by the lease he was entitled to make other shafts in order that he might more advantageously work the minerals under different parts of the land. In 1898 the Great Western Railway Co. entered into an agreement with Colonel Vaughan Lee to purchase 5½ acres of the surface of this land, and, having constructive notice of the lease to Masters and of the provision in that lease whereby Masters had the right of sinking other shafts, they gave him notice to treat—that is to say, to sell to them whatever interest he might have in the 5½ acres which they were taking or had taken. There can be no doubt that he had this interest in the 5½ acres—viz., the right to sink shafts therein for the purpose of winning the minerals, and, on the matter going to arbitration, the arbitrator awarded him £8,900 as compensation for that right having been taken away from him by the railway company.

The point is now taken that the arbitrator had no jurisdiction to award Masters anything at all, and that is sought to be made out in this way. It is said that he had not an unfettered right to make a shaft in this 5½ acres. The clause in the lease which gives him the power to sink a pit or pits on any part of the land, other than that of which the surface was demised to him, ends with this proviso, "but so that the position of such pit or pits be subject to the reasonable approval of the said lessor, his heirs or assigns, or his or their agent for the time being." It is said therefore that his right was fettered with this, that the lessor might disapprove on reasonable, or the lessor's assignees might disapprove on reasonable grounds. No evidence was given to show that the lessor had any reasonable grounds for disapproving. Then had the Great Western Railway Co? I will assume in their favour that they are "assigns" within the meaning of the clause, but can it be reasonable on their part that, because they are a railway company taking the surface of land with notice of a man's right to dig and sink shafts in that land, they should lay their line on the surface and then say to him that for that reason he shall not sink any shafts; and, further, that they will put him to the cost of £8,900 to go elsewhere? I cannot imagine anything more unreasonable. Under the circumstances I think that the arbitrator was justified in saying that the right was unfettered, because neither the lessor nor the

railway company could on any reasonable grounds refuse Masters leave to sink a shaft, and that he had jurisdiction to award the amount of compensation which he thought Masters was entitled to. The appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. It is admitted that the railway company took subject to the burden of the conditions in the lease, and I will assume in their favour that they are entitled to the benefit of the limitation upon the burden, that they are to be the persons subject to whose reasonable approval a pit is to be sunk in any particular position. That narrows the point down to this, whether the purchasers of a piece of the lessor's land, by setting up that the purposes for which they intend to use it are such as to make it exceedingly undesirable, not to say impossible, that a pit should be sunk in it, are thereby *ipso facto* entitled to take the land free from the obligation of paying anything whatever to compensate the lessee for the loss of the right he might otherwise have to sink a pit in their land. It is obvious that such a principle of immunity would have the effect of wiping out the whole obligation of the lessor's covenant. The lessor might the next day sell every acre of the land in respect of which he had undertaken this obligation for building or other purposes, which would render it exceedingly undesirable that a pit should be sunk there. The case cannot be decided by any such consideration as that. The railway company are purchasing land which, as it stands, has no railway upon it, and steps are being taken whereby all rights injuriously affected, by their taking the land compulsorily, are to be assessed. The lessee at this moment has the right reserved by the covenant, and the arbitrator has to assess the value of this right whether any steps have been taken to enforce it or not. He has to consider whether the land taken by the company is in such a position as to make it necessary or desirable for the lessee to sink a pit there. He has also to consider the question whether the owner of the land, when he knows where the lessee desires to make the pit, could reasonably refuse to give his assent. Having taken these matters into consideration he is to assess the value of the lessee's right. That is precisely what the arbitrator has done here, and it is fair to suppose that he has given due weight to the views of the company. It seems to me that the decision of the court below is perfectly right, and I desire to express my entire concurrence with the reasoning of the judgment of Darling, J.

ROMER, L.J., concurred.

Appeal dismissed.

Solicitors for the claimant, *Bell, Brodrick, & Gray*, for *Linton & C. & W. Kenshole*, Cardiff.

Solicitor for the railway company, *R. R Nelson.*

From Chan. Div. (Rigby, Vaughan Williams, and Stirling, L.JJ.) — March 20, 21.

BURROWS *v.* MATABELE GOLD REEFS AND ESTATES CO. (LIMITED). (*a.*)

Company — Shares — Underwriting — Application of shares in payment of commission—Companies Act, 1900 (63 & 64 *Vict. c.* 48), *s.* 8.

A company agreed to grant the underwriters of an issue of shares proposed to be made to existing shareholders of the company an option to an agreed date to take 15,000 £1 *shares, part of the proposed issue, at the price of* £2 10*s. per share. The shares in fact stood at a much higher price than* £2 10*s. per share.*

Held, that the proposed arrangement was an application of shares in payment of commission in consideration of underwriting, and was prohibited by section 8 (2) *of the Companies Act,* 1900.

Decision of Farwell, J. (ante, *p.* 428), *confirmed.*

This was an appeal from a decision of Farwell, J. (reported *ante*, p. 428).

The facts are fully set out in the report of the case in the court below.

Shortly stated, a motion was brought by the plaintiff on behalf of himself and all other shareholders of the defendant company to restrain the defendant company from carrying into effect an agreement or agreements made, or about to be made, by the defendant company, whereby, in consideration of the guarantee of the issue of 60,000 shares of the company (part of an issue of 80,000 shares of £1 each offered by the company to its shareholders), the company agreed to give to the persons or person giving such guarantee an option to the 30th of June, 1901, on 15,000 unissued shares of £1 each of the company at the price of £2 10s. per share; or, in the alternative, an injunction to restrain the defendant company from applying or agreeing to apply any of its shares or capital money directly or indirectly in the payment of a commission or allowance to any person in consideration of his subscribing, or agreeing to subscribe, for all or any part of an issue of 80,000 shares of £1 each of the defendant company offered to its shareholders in accordance with the terms of a notice signed by the secretary of the defendant company, and dated the 1st of February, 1901.

The shares in question stood in fact at a much higher price than £2 10s. each.

Farwell, J., held that such an allotment would be an application of shares in payment of commission, discount, or allowance in consideration of underwriting, and was prohibited by section 8 (2) of the Companies Act, 1900.

The defendant company appealed.

Swinfen Eady, K.C., Bramwell Davis, K.C., and *Kirby*, for the company.—The section of the Act is directed against payments for underwriting out of the capital of a company. Premiums on shares, however, are part of the profits of a company, not of its capital. The proposed transaction, therefore, is not within the mischief aimed at by the Act.

They referred to *Metropolitan Coal Consumers Association* v. *Scrimgeour*, 44 W. R. 35, [1895] 2 Q. B. 604; *Verner* v. *General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Lubbock* v. *British Bank of South America*, [1892] 2 Ch. 198, 40 W. R. Dig. 38.

Upjohn, K.C., and *Eustace Smith, contra.*—This is an application of shares in consideration of an agreement to underwrite, and is prohibited by the Act.

They referred to *In re Faure Electric Accumulator Co.*, 37 W. R. 116, 40 Ch. D. 141; *Shaw* v. *Holland*, 48 W. R. 680, [1900] 2 Ch. 305.

Bramwell Davis, K.C., in reply, cited *Hirsch* v. *Burns*, 74 L. T. Rep. 769, 77 L. T. Rep. 377, 46 W. R. Dig. 29.

RIGBY, L.J.—In this case an action has been brought to restrain a limited company from carrying out a scheme which is plainly shown to us in all its bearings on the documents that have been put in evidence. It appears that the company has been

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

down to the present time a prosperous company, so that there is no doubt whatever that at present, as things exist, the shares are worth a good deal more than the normal amount, which is £1 per share. Now the plan proposed by the company was out of the unissued capital of about £112,000 to issue £80,000 for the purpose of assisting certain affiliated companies in a way a little unusual, perhaps, but not denied, so far as that goes, to be within the powers of the company. Those 80,000 shares were to be offered in the first place to the existing shareholders in the company, but the company was not minded to enter upon a transaction of this magnitude without having security against the possibility of the existing shareholders not taking up all the shares; and accordingly they entered into what is called an underwriting transaction, getting certain persons, who may or may not have been shareholders in the company, to enter into an underwriting agreement which comes in effect to this, that they would take up certain of the shares at the price at which they were offered to the shareholders, and were to have in addition the option of taking at the same price 15,000 other shares, a most valuable option if the shares went on increasing in value, so that £2 10s. a share, the price which would have to be paid, would really mean less than the market value. That option involves, on the other hand, a great limitation on the rights of the company, and in proportion as it was valuable to the underwriters it would be onerous as regards the company. Under the underwriting agreement the company were, if called upon in accordance with the conditions imposed, bound to allot to the underwriters the whole 15,000, and the question now is whether on the construction of section 8 of the Companies Act, 1900, that is or is not permissible under the circumstances. Now we are relieved from many minor points by the frank admission that whatever else takes place the company cannot claim the benefit of sub-section 1 of section 8. Whether this was an offer of shares to the public for subscription or whether it was not the company could not claim the benefit of sub-section 1 without pointing to an article of association which entitled them to pay commission and the amount or rate per cent. That must be set forth in the articles of association—that is to say, the power of the directors to pay commission is limited to an amount or rate not greater than that prescribed by the articles. There is no such article here fixing the amount or rate, and whether or not this was an offer to the public for subscription, that clause alone would prevent the company claiming the advantage—for it is an advantage—of sub-section 1. It is also admitted, and must necessarily have been admitted, that sub-section 3 can have no application here, and really the only question left for us is to consider the effect and meaning of the prohibitive sub-section 2. It has been urged that the construction of that sub-section is very difficult. I cannot myself see the difficulty. It appears to me that the section is about as plain as a section can well be made. "Save as aforesaid"—that means leaving untouched any effect that can be properly given to sub-section 1—and it is admitted that no effect can be given to it in this case—"no company shall apply any of its shares or capital money"—I pause there to consider the words "shall apply any of its shares." How can it be said that there is any doubt whatever as to the meaning of those words? "Apply" means what it says and nothing else. "No company shall apply any of its shares"—we have not got to consider the case of capital money here because the case is one of shares—"either directly or indirectly"—which are words frequently inserted for the purpose of obviating any doubt—"in payment of any commission, discount, or allowance to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally for any shares of the company." I stop there because those are the important words. No doubt the company agreed to allot shares in consideration of the underwriters applying conditionally or unconditionally for other shares in the company. They agreed to allot 15,000 shares in consideration of the underwriters subscribing for other shares. A great deal of ingenuity has been spent in saying that that is a difficult section. No doubt it is difficult if we are to wrest it out of its plain meaning. It is very difficult to say that is what it must mean, but I avoid that difficulty by applying the plain *primâ facie* meaning to it and nothing else. They say the Legislature must have meant "shall apply the shares up to the nominal value." I find nothing about the nominal value of the shares. Companies find very often to their loss that their shares are not in any way valued by the nominal amount, and what has been issued in pounds as the nominal amount may only be worth pence. It less frequently happens that what has been issued at £1 becomes worth a great deal more, but in any case the share is worth to the company what it will bring. That is the value of the thing. If it will bring more than £1, the nominal amount, then that is the value to the company, and if they apply a share which nominally only amounts to £1 but is really worth we will say several pounds, they apply several pounds' worth of their property, and that they are prohibited from doing if the result will be that a commission or profit accrues to the underwriters for subscribing for other shares in the company. That appears to me to be the plain, straightforward, and undoubted meaning of the sub-section, that they are not to get rid of their shares or apply them in allowing such a claim as the present to be put forward by the underwriters, they saying "In consideration of our paying £2 10s. you will allot to us shares which we, before we exercise the option, shall have satisfied ourselves will be worth more than the £2 10s.," which really means "You will enable us to make out of this transaction a profit or commission" — commission need not be expressed either in percentages or in definite amounts; if it is plain that a profit will be realizable then I think it amounts to "commission, discount, or allowance"; it amounts to money worth which it is contemplated that the underwriter will get, and the mode in which it is to be got is by applying the shares. How the company can apply the shares in any way more clearly than by allotting them I do not know, and when it allots them it applies, not the nominal value, but the shares themselves, and that is what the sub-section prohibits. I do not think it necessary to enter any further into the details of this matter at all, it being conceded that sub-section 2 is the only one that needs to be interpreted, and the interpretation of that being simply in obedience to the plain language and meaning of the words; that is all that I at any rate think it necessary to say in support of our view here. That is the view that has been taken by the learned judge in the court below, and the result will be that the appeal will be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. I think that if the underwriters in the exercise of their option ask for these shares, and an allotment is made to them by the company, that that will be an allotment in consideration of the underwriters subscribing or agreeing to subscribe for shares of the company, and I do not think it is the less so because the allotment may be at a premium. I think that such an allotment is

plainly and manifestly an application of the shares within the meaning of the word "apply" in sub-section 2. It was not really argued but that if you take the literal meaning of the words it is obvious there was an application of the shares within the meaning of this sub-section 2, but it was said that you ought not to read "apply" in its natural sense, and that you ought to read it as if the words had run "Save as aforesaid no company shall apply the proceeds of the issue of its shares so far as the same are capital or any capital moneys," and so on. I do not see any reason for modifying the meaning of the word "apply." The reason that is suggested for so doing is that it is said that the sub-section of the Act of Parliament is really directed against the misappropriation of capital. I do not at all know that that is so. On the contrary, when I find this distinction drawn between shares and capital money, I am rather led to the contrary conclusion. I think that it is quite possible that the very object of the Legislature in so wording the sub-section was to prevent the payment of these commissions for placing shares by giving options of this description, but whether that is so or not I have not to decide. I merely have to decide on what seems to me to be the perfectly plain meaning of the words of the sub-section.

STIRLING, L.J.—I am of the same opinion. The matter really lies within a very narrow compass. It was admitted that neither sub-section 1 nor sub-section 3 of section 8 applies to the case. [His lordship read sub-section 2 and continued:] Now, that being so, let me put this question: Can a company having £1 shares issue or allot any of those shares partly in consideration of £2 10s. and partly in consideration of an agreement to subscribe for other shares in the company? I think not. That is an application of the shares partly in consideration of an agreement to subscribe for other shares of the company which is struck at, as it appears to me, by this section of the Act. It is quite true that the whole consideration is not the agreement to subscribe, but none the less it appears to me to be within the section, and if there was any doubt upon it it would seem to me to be removed by the specified instances one of which is, "whether the shares be so applied by being added to the purchase-money of any property acquired by the company or otherwise." If I am right in that conclusion, then it seems to me that this agreement is beyond the powers of the company, and is prohibited by this section. It begins with an agreement on the part of the underwriter to subscribe for certain shares, and then it proceeds "in consideration of my undertaking as above-mentioned"—viz., the agreement to subscribe—"I am to have the right at any time to to take up and have allotted to me shares at the issue price of £2 10s." That seems to me an agreement on the part of the company to do the very thing to which I have just referred. I think the judgment of Farwell, J., was perfectly correct, and ought to be affirmed.

Appeal dismissed.

Solicitors, *Ashurst, Morris, Crisp, & Co.; Morse, Hewitt, & Farman.*

High Court of Justice.

Chan. Div. } Jan. 14-16; April 23.
Byrne, J. }

DEBENHAM v. SAWBRIDGE. (a.)

Vendor and purchaser—Conditions of sale—Defect of title—Conveyance—Compensation—Rescission.

Certain freehold hereditaments were sold by the court in a partition action, subject to a condition that, if any error or misstatement should appear to have been made in the particulars or conditions of sale, such error or misstatement was not to annul the sale or to entitle the purchaser to be discharged from his purchase, and that a compensation should be made to the purchaser, and the amount of such compensation was to be settled by the judge in chambers More than a year after the conveyance to the purchaser it was discovered that a certain part of the hereditaments belonged to a third party, whose interest the purchaser bought out.

Held, that the purchaser was not entitled either to compensation under the condition or to the rescission of his contract.

Trial of action.

This was an action in which the plaintiff F. B. Debenham claimed a declaration that C. W. Sawbridge or the other defendants to the action were liable to make compensation to him for certain errors and misstatements in certain particulars of sale relating to No. 21, Mason's-yard, Duke-street, St. James's, or in the alternative to have an indenture of sale dated the 21st of October, 1897, set aside by reason of common mistake.

The facts of the case were as follow:

In the year 1895 a partition action was commenced by an infant, E. H. Norton, against certain defendants for the sale of certain lands comprised in a settlement dated the 2nd of February, 1843.

The judgment in the said action, dated the 25th of January, 1896, directed the usual inquiry as to the parties interested in the said hereditaments, and in case it should be certified that all the parties interested were parties and that the defendants were interested to the extent of one moiety or upward, it was ordered that the said hereditaments be sold with the approbation of the judge and that the money to arise from such sale be paid into court to the credit of the action.

By his certificate made in the action, and bearing date the 23rd of March, 1897, the master, *inter alia*, certified that the defendant C. W. Sawbridge was the sole surviving trustee of the hereditaments the subject-matter of the action, and that the legal estate in the said hereditaments was vested in him, and that the following persons were absolutely and beneficially interested in the said hereditaments, and for the estates and interests and in the shares and proportions following—namely, the defendant, Frances Jane Norton to one sixth share, the said Edward Henry Norton to three sixth shares, but as to one of such sixths subject to the tenancy by the curtesy of the defendant James Hysom; the defendant Jane Ellen Norton, to one-sixth share, and the defendant Rosalie Norton to one sixth share; and that they were so interested as tenants in common.

On the 9th of July, 1897, the premises were put up for sale. They were described in the particulars as "freehold stabling, situate and being Nos. 21 and 22 on the south side of the Mason's Yard, Duke-street, St. James's-square," and as comprising, *inter alia*,

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

"dwelling over No. 21 containing on the first floor a sitting-room fitted with range and cupboards in recesses and a back landing with iron door in party wall communicating with No. 22, and a coal cupboard under stairs. On the second floor a front room and a back room or kitchen with range and cupboard sink and pan. . . . Let to Mr. William Rice, trading as Messrs. Smith & Co., Job Masters, by lease dated the 3rd of May, 1897 for a term of 15¼ years from the 25th of March, 1897, determinable by lessee at the end of the first eight years on giving six months' notice."

At the foot of the particulars it was stated: "An abstract or copy of the lease will be produced at the sale and may be previously inspected at the office of the vendor's solicitors." The plan on the said particulars contained an express reference to 21, Mason's-yard on the first and second floors.

The conditions of sale, *inter alia*, provided as follows:

"(4) The purchaser is at the time of sale to pay a deposit of 10 per cent. on the amount of his purchase-money.

"(5) The master will after the said sale proceed to certify the result. The certificate will in due course be signed and filed and become binding without further notice or expense to the purchaser. . . .

"(7) The title shall absolutely commence with the settlement the subject of the action.

"(8) The purchaser is . . . to pay the balance of his purchase-money . . . into court to the credit of the action . . . to an account to be entitled 'Proceeds of sale of property comprised in the settlement dated the 23rd of February, 1843,' on or before the 29th day of September, 1897. . . . Upon payment of the purchase-money . . . the purchaser is to be entitled to the rents and profits as from the said 29th day of September, 1897.

"(9) If any error or misstatement shall appear to have been made in the particulars of sale or these conditions such error or misstatement is not to annul the sale or entitle the purchaser to be discharged from his purchase, and a compensation is to be made to or by the purchaser as the case may be, and the amount of compensation is to be settled by the judge at chambers.

"(10) The property for sale is described in the existing lease, and no question shall be permitted as to the identity or quantity of the premises described therein and in the particulars of sale with the premises described in the previous documents abstracted, although the descriptions are not exactly the same. The property is sold subject to such tenancy, tenant's rights, and rights of way, wall, fence, light, and water, and other easements, if any, and public outgoings, as may affect the same, and the purchaser shall be taken to have had notice thereof and of the state of the premises, though not expressly mentioned, and any previous tenancy appearing on the title shall be considered at an end.

"(11) The sale being under an order of the court, no person beneficially or equitably interested shall be required in that character to join the sale and assurance, neither shall the vendor be bound to produce evidence relating to the dealings of any such party not in the possession or power of the vendor, and the assuring party, or parties, will be bound to convey only as trustee, or trustees, and all facts or matters admitted, proved, stated, or proceeded on in the above-mentioned action, or certified by the master, shall be deemed thereby conclusively evidenced."

During the preparation of these particulars the conveyancing counsel to the court had raised a doubt as to whether the premises No. 21 belonged to the property comprised in the settlement. The views of the conveyancing counsel of the court on the point and the steps taken in the proceedings before the masters will be found set out at length in the judgment. Finally Rice was induced to accept a new lease of all the property proposed to be included in the sale. The conditions and particulars were then resettled in the form given above. At the sale the plaintiff purchased the premises for the sum of £3,810, and paid the deposit mentioned to the credit of the action. The purchaser made a requisition as to the object of granting the new lease concurrent with the old one, and the answer was "The lease was granted with the sanction of the court in the action."

On the 29th of September, 1897, the plaintiff paid the balance of the purchase-money to the credit of the action and by an indenture dated the 21st of October, 1897, and made between Sawbridge of the one part and the plaintiff of the other, after reciting, *inter alia*, that the "hereditaments hereinafter described and intended to be hereby conveyed being the said hereditaments comprised in and conveyed by the said indenture of settlement were on the 9th day of July, 1897, put up for sale by public auction with the approbation of the judge to whose court the said action is attached," the hereditaments were conveyed to the plaintiff by Sawbridge, who was therein expressed to convey as trustee. Prior to the execution of the conveyance the plaintiff examined the title and the documents of title, and the fullest information was given to him and his legal advisers.

On the 1st of November, 1897, the plaintiff signed a consent in writing, whereby he admitted that he had received a conveyance of the hereditaments mentioned in the particulars of sale, and consented to the application of the purchase money in any manner that the court might authorize. In pursuance of such consent, the costs of the action of *Norton* v. *Norton* were paid out of the said purchase-money, and the residue of the said purchase-money was, after providing for duty, distributed as to three equal sixth parts thereof to the defendants Frances Jane Norton, Jane Ellen Norton, and Rosalie Norton, and as to two other equal sixth parts by carrying over the same to the separate account of E. H. Norton, who shortly afterwards died, and then by paying the same to his personal representative, E. Norton, and as to the remaining one sixth by carrying over the same to the credit of Constance E. Hysom, deceased, to which the plaintiff in the partition action was entitled, subject to an estate by the curtesy of J. Hysom. The court at the time of the present action had no power to deal with this share except for the purpose of dealing with it in accordance with the rights of the parties as shown by the title of the account. Shortly after the 14th of November, 1843, the plaintiff ascertained that an action had been commenced by Earl Beauchamp against the said William Rice to recover possession of the building over No. 21, Mason's-yard, and obtained leave to defend the said action. In the course of the action he ascertained that legal estate in the dwelling in question over 21, Mason's-yard was never comprised in the settlement of the 23rd of February, 1843, but that at the date thereof was vested in a predecessor in title of Lord Beauchamp, and at the date of the sale by auction the property therein was vested in Lord Beauchamp; and, further, that there was a cellar under No. 21, Mason's-yard, and that the same was never comprised in the said settlement, and that at the date of the said sale the property therein was vested in third parties. The plaintiff compromised the action on the terms of (1) paying the said earl £300 by way of purchase-money for the said dwelling over No. 21, Mason's-yard; (2) paying £35 for the said earl's costs; (3) paying £15

for the costs of the said W. Rice; (4) paying his own costs amounting to £25.

The plaintiff then commenced the present action against the said C. W. Sawbridge, F. J. Norton, J. E. Norton, R. Norton, and J. Hysom.

Separate defences were delivered on behalf of Sawbridge, Jane E. Norton, and J. Hysom. The last two defendants denied that there had been any common mistake between the parties.

At the hearing of the action the various steps taken in chambers in connection with the sale were carefully considered, as well as the instructions laid before the conveyancing counsel of the court and his opinions thereon. The effect of this examination appears in the judgment. It was admitted that everyone concerned in the sale had acted in perfect good faith throughout.

Levett, K.C., and *MacSwinney*, for the plaintiff.—The plaintiff's rights as to compensation rest on condition 9. That condition is not affected by condition 10, and still applies: *Manson* v. *Thacker*, 26 W. R. 604, 7 Ch. D. 620; *In re Turner* v. *Skelton*, 28 W. R. 312, 13 Ch. D. 130; *Palmer* v. *Johnson*, 13 Q. B. D. 351, 32 W. R. Dig. 221; *Clayton* v. *Leech*, 37 W. R. 663, 41 Ch. D. 103. If this has been a common mistake between the parties the fact is not altered by condition 10. Besides, on a sale by the court such a condition as condition 10 ought not to be enforced: *Else* v. *Else*, 20 W. R. 286, L. R. 13 Eq. 196; *In re Bannister, Broad* v. *Munton*, 27 W. R. 547, 826, 12 Ch. D. 131.

Norton, K.C., and *Austen-Cartmell*, for defendant Sawbridge.—Condition 9 does not apply to a want of title on the part of the vendor: *May* v. *Platt*, 48 W. R. 617, [1900] 1 Ch. 616; *Cann* v. *Cann*, 3 Sim. 447; *Clare* v. *Lamb*, 23 W. R. 389, L. R. 10 C. P. 334; *Thomas* v. *Powell*, 2 Cox Ch. Cas. 394; *Soper* v. *Arnold*, 36 W. R. 207, 37 Ch. D. 96; *In re Clifford, Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779; *Bingham* v. *Bingham*, 1 Ves. Sen. 126. If the plaintiff is entitled to compensation at all he ought to ask for it in the partition action. Sawbridge is not a necessary party to these proceedings at all. The plaintiff is too late for rectification; he is not entitled to compensation, as the purchase-money has been distributed. The conditions under which the property was sold were perfectly fair.

Rowden, K.C., W. M. Cann, and *H. Newson*, for the beneficiaries, defendants.—The plaintiff is not entitled to compensation: *Clayton* v. *Leech*. Condition 9 has no application to a defect of title: *Ex parte Riches*, 27 SOLICITORS' JOURNAL, 313. If the plaintiff had discovered the defect of title prior to completion specific performance with compensation would not have been enforced: *Clare* v. *Lamb*. Everything was perfectly fair on the defendants' part, and it will be a hard case on them if they are called upon to pay back the money. [BYRNE, J., referred to *In re Beyfus and Master's Contract*, 37 W. R. 261, 39 Ch. D. 110; *Nunn* v. *Hancock*, 19 W. R. 1041, 6 Ch. D. 850.]

Levett, K.C., in reply.—The vendors did not exhibit in regard to the negotiations the openness which the court requires as between vendor and purchaser. It was not right to use the name of the court for the purpose of making an evasive answer. Such cases as *Clare* v. *Lamb*, *Thomas* v. *Powell*, and *Cann* v. *Cann* were common law actions founded on the doctrine of failure of consideration and had no connection with the question of mistake. In *Soper* v. *Arnold* there was no mistake of fact, it was a mistake of opinion. [He referred to *May* v. *Platt*; *Brownlie* v. *Campbell*, 5 App. Cas. 925, 29 W. R. Dig. 232; *Bingham* v. *Bingham*, and to the remarks of Lindley, L.J., therein on *Huddersfield Bank* v. *Lister*, 43 W. R. 567, [1895] 2 Ch. 273, at p. 281.] The mistake here is not one of title, but of fact.

Cur. adv. vult.

BYRNE, J. (after stating the facts relative to the sale of the premises to the plaintiff): On the 14th of November, 1898, an action was commenced by Earl Beauchamp against Rice, the tenant, to recover possession of the rooms over No. 21, and proceedings were ultimately put an end to by Rice paying six years' arrears of rent to the earl, and by the plaintiff, the purchaser, buying the rooms in question for £300, he also paying £75 for costs. It is not now in dispute that the rooms in question did not, at the time of the sale, form part of the property the subject of the partition action, but belonged to Earl Beauchamp. It has also, since conveyance, been discovered that there is a cellar underneath No. 21, forming part of a range of cellarage, entered only from a trap-door situate in the mews some distance away from No. 21, and not divided from the rest of the cellarage under the other houses, and, although it is not exactly known to whom the cellarage belongs, it is pretty clear that it does not form part of the property the subject of the action of *Norton* v. *Norton*. The existence of the cellar was unknown to any of the parties to the action and to the purchaser until some time after the conveyance had been executed; and there was no suspicion of its existence in the minds of the master, the conveyancing counsel to the court, the solicitors acting in the matter, or to any one concerned at any time prior to the completion of the sale. The only entrance to the rooms over No. 21, except through the iron door in the party wall between Nos. 21 and 22, is from a passage, the access to which is obtained by means of a staircase behind No. 17 in the mews, the passage running past the level of the rooms over several sets of stabling from which such rooms are entered. There is no communication between the coach-houses on the ground floor of No. 21 and the rooms above. The action is brought to obtain compensation under the ninth condition of sale from the defendant Sawbridge, the trustee, for alleged errors and misstatements in the particulars and conditions in respect of the dwelling rooms over and the cellar under No. 21; or, alternatively, from the other defendants as beneficiaries. Alternatively, it it is sought to set aside the conveyance on the ground of common mistake. It is absolutely clear that there has been no fraud or intentional deception on the part of any one, and that every one concerned in the conduct of the sale and in the preparation of the particulars and conditions has acted with perfect good faith throughout. Every step taken before the Master, and all the instructions put before the conveyancing counsel to the court, with his opinions, have been carefully examined before me, as also have the abstract, requisitions on title, and answers. It appears to me that all concerned in the sale believed, and had reasonable ground for believing, that a good title could be made to the dwelling-rooms in question subject to a doubt which might be fairly provided against by condition. The draft particulars of sale, with abstract of title and instructions, were duly laid before the conveyancing counsel. I think these instructions are most clear and reflect credit upon the gentleman who prepared them. There was a considerable difficulty in identifying the property the subject-matter of the action, so far as regards No. 21, and particularly in reference to the dwelling-rooms over the coach-houses. It would take too long, and would serve no useful purpose, to go through every detail, but I must mention two matters. Mr.

William Rice, the tenant, was in occupation, by his manager, of the whole of lots 21 and 22, including all the rooms over. He held also several other tenements in Mason's-yard. He had taken from the trustees of one Smith, in 1890, assignments of several leasehold properties in Mason's-yard, including that comprised in a lease dated the 31st of August, 1870, made between the predecessors in title of the parties to the action of *Norton* v. *Norton and William Seymour* whereby certain property was demised to Seymour for 21 years from the 24th of June, 1870, at the rent of £200 a year.

The parcels in this lease expressly include the rooms over No. 22, and make no mention of rooms over No. 21, but they do appear to include part, if not all, of the ground floor of that tenement. There is a small plan on this lease, not, however, incorporated in the description, which appears to include part, but not the whole, of the site of No. 21. The term granted by this lease having come to an end in June, 1891, a fresh lease was granted to Rice, dated the 26th of June, 1891, of premises by the same description as in the former lease, for twenty-one years from the 24th of June, 1891, at a rent of £200 a year. There was no plan upon this lease. Rice never paid rent to any person for the rooms over No. 21 (unless the rent of £200 a year included rent for them) and he had so informed the vendor's solicitors. There were other matters, all of which are fully detailed in the instructions before mentioned, for rendering it a matter of serious doubt whether any portion of No. 21, but especially whether the rooms over, were the vendor's property; and, in advising the conveyancing, counsel says: "Upon the whole, on the above carefully-prepared statement, I am of opinion that the coach-house and harness-room in question" (that is, No. 21) "are most probably part of the trust estate, but not the rooms over the same, with any certainty, and that an adverse claim might at any time arise to them for some years to come; the conditions and particulars of sale must be accordingly." In the particulars as then settled a note appears: "Note. The dwelling rooms over the eastern coach-houses, harness-room, and way thereto, and the five-stall stable, do not certainly form part of this property for sale. . . ." I need not read it, but amongst the conditions as originally settled was one (No. 7) mentioning the fact that there was some doubt as to the exact extent of the property comprised in the title as mentioned in the particulars of sale, and providing that, as to such part of the property as to which there was any such doubt, the purchaser should accept a conveyance from the vendor so far only as he could make the same. Condition 10, as originally settled, provided for a declaration by the tenant that the premises for sale had been held, in conformity with the title, as deduced, for twenty years, and precluding any question as to identity or quantity. The matter subsequently came before the master, when he directed that an endeavour should be made to arrange with Mr. Rice to take a new lease at the old rent of all the property proposed to be included in the sale, and, after this course had been approved in conference with the conveyancing counsel, negotiations were entered into, resulting in an acceptance by the tenant of a new lease, dated the 3rd of May, 1897, by a description clearly including the whole of the property. The master then considered that the grant of the new lease would probably enable counsel to modify condition 7, and the statement in the particulars as to its being uncertain whether parts of the property were included, and he expressed a view that it was desirable they should be modified, if possible. The solicitors to the parties having the conduct of the sale did not see their way to getting the declarations mentioned in condition 10, or in the observation in the margin of the former instructions. The rate-books had been examined by the solicitor to see if Earl Beauchamp was entered as owner of the rooms, but it was discovered that in 1885, a time when the lease of 1870 was running, Earl Beauchamp was entered as owner of No. 18, described as a coach-house, but not as owner of any other premises in the yard. These fresh facts were clearly stated in further instructions laid before the conveyancing counsel, who then resettled particulars and conditions of sale in their present form, and added to his former opinion: "On my further instructions I am able to withdraw this observation" (an observation that he thought the attention of the chief clerk should be drawn to his very special instructions and his notes thereon, and in accordance with which the particulars and conditions had been settled) "and have resettled the particulars and conditions in accordance therewith, and as suggested by the master, in which suggestion I cordially agree, and the sale may proceed upon this." This opinion is dated the 14th of May, 1897, and the sale then took place in due course. An abstract was furnished and examined, requisitions were made and answered, and the title was accepted, after which the sale was duly completed. The only requisition calling for notice is part of the seventh, which is: "What was the object of granting this lease (referring to the lease of 1897) for a concurrent term with the then subsisting lease of 1870?" (meaning 1891). To which the reply was: "The lease was granted with the sanction of the court in the action." The purchaser was apparently satisfied with the answer. It also appears that a letter was written to Mr. Rice, the tenant, making some inquiry as to his tenancy, but this was never received, or replied to, and a clerk was also sent to inquire of him, but the clerk only saw some person on the property who could give no information, and then this matter also was dropped. It was not until more than a year after the conveyance that proceedings were commenced by Earl Beauchamp, and it was not until some months after that that the existence of the cellar was discovered.

In my opinion the purchaser is not entitled to claim compensation under the ninth condition, inasmuch as it does not, and is not intended to, apply to the case of a defect of title, but only to error or misstatement in the description of the subject-matter of the sale, such, for example, as an error in quantity or nature or tenure or amount of the vendor's interest. In the present case there is no error or misstatement in the description of the property; the real complaint is that no title can be shown to a part of the property so described. In 27 SOLICITORS' JOURNAL, at p. 313, there is a note of a case *Ex parte Riches*, which does not appear in any of the regular reports, but the note itself appears to be full and careful, and I see no reason to doubt its accuracy. In that case a question arose as to the effect of a condition for compensation contained in a contract for sale of real estate. Property described as freehold was put up for sale under the order of the court in an action in the Chancery Division, and the conditions of sale provided that "if any error, misstatement, or omission shall appear to have been made in or from the above particulars or these conditions, such error, misstatement, or omission is not to annul the sale or entitle the purchaser to be discharged from his purchase, but compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the judge at chambers." Before the purchase was completed the vendor, a mortgagor, had filed a liquidation petition, and the purchase

was completed by his trustee, who executed a conveyance to the purchaser, entering into the ordinary trustee's covenants. About two years after the conveyance the vendor died, and it was then discovered that as to part of the property sold he, instead of being owner in fee, had only a life estate. The purchaser claimed compensation under the above condition of sale, and applied, in the first instance, to the Bankruptcy Court, which refused his application, and in the Court of Appeal affirming this decision, Jessel, M.R., said that it was a very hard case, but he could not see his way to assist the applicant. In his opinion the condition as to compensation did not apply to the case of a defect of title. The representation in the particulars of sale was that the estate was a freehold estate, and so it was if it was only a life estate, though he agreed that both parties understood it to mean an estate in fee simple. But taking it that the representation was that it was an estate in fee simple, still the condition as to compensation did not apply. With this judgment Baggallay and Lindley, L.JJ., concurred. This appears to be a clear decision as to the non-applicability of such a condition to a defect in title. See also *In re Beyfus and Master's Contract*, where, however, the condition provided for errors "in the description of the property." Apart from condition, compensation cannot be recovered after conveyance in respect of defect of title: see *Clayton* v. *Leech*, a decision of the Court of Appeal approving *Besley* v. *Besley*. There remains the question whether or not the purchaser is entitled to the alternative relief he asks, of rescission on the ground of mutual mistake. This is relief which may undoubtedly be granted in a proper case even after conveyance, although there has been nothing in the nature of fraud. In *Bingham* v. *Bingham* the bargain and conveyance were nugatory, the defendant had nothing to sell or convey. This case has been repeatedly approved and acted upon: see *per* Lord Cranworth in *Cooper* v. *Phibbs*, 15 W. R. 1049, L. R 2 H. L. 149, at p. 164, and *per* Vice-Chancellor Hall in *Jones* v. *Clifford*, 24 W. R. 979, 3 Ch. D. 779, at pp. 791-2. Lord Selborne, in *Brownlie* v. *Campbell*, 5 App. Cas., at pp. 936, 937, points out that where there are errors in the particulars unconnected with fraud when the conveyance takes place it is not the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived; and after citing Bell's Principles as to the Law of Scotland, to the effect that where there is no warrandice the purchaser has remedy against the deficiency only on one of two grounds—either he must make out a case of misrepresentation and fraud, or he must prove an error *in substantialibus* sufficient to annul the whole contract—Lord Selborne continues: "It appears to me that the cases which have been decided in this country and in Ireland are to the same effect." He also refers to what was said by Lord Cottenham in *Wilde* v. *Gibson*, 1 H. L. Cas. 605, at p. 620, and to *Legge* v. *Croker*, 1 Ball & B. 506.

Assuming that there has been a common mistake on the part of vendor and purchaser in the present case, and assuming that there need not be a total failure of consideration to justify rescission after conveyance, still I do not consider that the error has been of such a nature as to justify it in the present case. I am not quite sure that the vendor and purchaser both shared in the same mistake. The vendor thought he was entitled, subject to a possible risk, and the purchaser, if he thought in like manner, took the risk. If, however, he absolutely thought the vendor entitled, without any risk, the mistake was not the same on both sides. I do not think the plaintiff can succeed on the ground of mutual mistake, and there are other and serious difficulties in his way. I do not see how he could, under any circumstances, obtain repayment of his purchase-money from the defendant trustee, who has not had it. The purchase-money has been dealt with by the order of the court, and I think the trustee vendor must, under those circumstances, be exonerated from liability. Upon the whole case I think the plaintiff fails and the action must be dismissed, and with costs, unless the defendants see their way to forgo them.

Action dismissed.

Solicitors, *T. G. Bullen; Church, Rendell, Todd, & Co.; Charles Sawbridge & Son; Alfred E. Copp.*

Chan. Div. } Feb. 18, 20.
Byrne, J. }

LEVER v. KOFFLER. (*a*.)

Specific performance—Alternative offers—Verbal acceptance—Agreement for yearly tenancy—Statute of Frauds.

Specific performance will be decreed of a verbal and written acceptance of one of two alternatives contained in a duly signed offer, if the offer accepted can be identified, and of an agreement to let on a yearly tenancy.

Trial of action.

The defendant was the owner of a house and land at Colwyn Bay, known as Min-y-don.

There had been some negotiations with a view to a tenancy of this property by the plaintiff, and on the 12th of April, 1900, Mr. J. A. Porter, the authorized agent of the defendant, wrote to the plaintiff the following letter:

"Estate Office, Colwyn Bay,
April 12th, 1900.

"*Re* Min-y-don.

"Dear Sir.—I interviewed the owner this morning and after a lengthy discussion got him to agree to the following proposal, which is firm and will be open for your consideration up to Thursday next at 12 noon.

He will let you the place upon an annual tenancy only at the rent of one hundred and fifty pounds (£150) and will allow you twenty pounds towards decorating, &c. Should the owner require possession and serve you with notice to quit at the end of the second year he will allow you the sum of fifty pounds (£50) as compensation for disturbance.

Do., do., Third Year, do. the sum of Thirty Pounds (£30).

Do., do., Fourth Year, do. the sum of Twenty-five Pounds (£25).

Do., do., Fifth Year, do. the sum of Twenty Pounds (£20).

Immediate possession would be given. Tenancy to commence at Midsummer, 1900."

The letter also contained at the foot the following offer to sell the plaintiff part of the property:

"He will sell you the residence, outbuildings, gardens, and grounds, the whole covering an area of four acres only with entrance to Beach-road and right of way over New-road from Abergele-road, reserving to himself the right to define boundaries of the land included in the four acres, at the price of five thousand pounds (£5,000).

"Mortgage of £4,000 at 4½ per cent. can be left on; this proposal also is open for your consideration up to Thursday next at 12 noon. The owner will not grant

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(*a*.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

any option of purchase in the tenancy agreement.—Yours faithfully,

"(Signed) J. A. PORTER."

At 11.30 a.m. on the 19th the plaintiff called at Mr. Porter's office and verbally accepted the terms, and then and there wrote the following memorandum:

"Colwyn Bay, April 19th, 1900.

"J. A. Porter, Esq.

"Referring to your offer of Min-y-don of the 12th of April, I hereby accept same on the conditions named therein.—Yours faithfully,

"(Signed) ELLIS LEVER."

The defendant subsequently repudiated the offer to let, and contended that the plaintiff had accepted the offer to purchase, and eventually the plaintiff issued his writ claiming specific performance of the agreement to let and damages.

Hewitt, for the plaintiff.—The verbal and written acceptance sufficiently indicated an acceptance of the offer to let. The agreement is for a tenancy for two years certain, and thenceforward from year to year, and the court will decree specific performance.

He cited *De Brassac* v. *Martyn*, 11 W. R. 1020.

Rowden, K.C., and *Gatey*, for the defendant.—The offer contained alternatives, and the acceptance did not specify which alternative was accepted, nor did it contain the terms. There is, therefore, no memorandum in writing sufficient to satisfy the Statute of Frauds. But in any case the agreement is for a yearly tenancy only, and the court will not grant specific performance of this: *Clayton* v. *Illingworth*, 10 Hare 451.

BYRNE, J., held on the evidence that it was clear that the plaintiff's verbal acceptance related to the offer of the tenancy. He continued: But I think the written acceptance further indicates with sufficient clearness that that was the offer which the plaintiff accepted, for it begins with the words "Referring to your offer of Min-y-don." This shows that he accepted Min-y-don—that is, the whole property; and the only offer of the whole property was the offer to let, for the offer to sell related to part of it only. Then it continues, "I hereby accept same on the conditions named therein." Thus we have a reference to the property and a reference to the terms, and the parties are identified; and I hold, following the *dictum* of Lord Cairns in *Hussey* v. *Horne Payne*, 27 W. R. 585, 4 App. Cas. 311, at p. 317, that this is sufficient to create a binding contract. It was argued that if you make an offer to sell two houses and the offer of one of them is accepted, no binding contract is created, but I cannot agree to this, and I think all that is necessary is identification of the property, the parties, and the terms. But then it is further contended that the agreement was one for a yearly tenancy only, and *Clayton* v. *Illingworth* is cited as an authority for the proposition that the court will not decree specific performance of such an agreement. With regard to this point, I think in the first place that the offer was one of a tenancy for two years certain and thenceforward from year to year. This appears from the agreement for compensation upon notice to quit "at the end of the second year." But apart from this I do not think that *Clayton* v. *Illingworth* really supports this contention. I do not think the case really means more than this, that in it the court was of opinion that there was already a binding agreement at law, and that to require the execution of a further instrument would only have put the tenant to needless expense, and that the action was therefore an idle one. On the other hand, the case of *De Brassac* v. *Martyn* is an authority for the view that the court will decree specific performance of an agreement even for a yearly tenancy if a proper case is made out. I hold, therefore, that the action succeeds, and I decree specific performance with costs and an inquiry as to damages.

Solicitors, *Belfrage & Co.*, for *Chamberlain & Johnson*, Llandudno; *Hamlin, Grammer, & Hamlin*, for *Gamlin & Williams*, Rhyl.

Chan. Div.
Cozens-Hardy, J. } May 10, 18.

UNDERWOOD v. LONDON MUSIC HALL (LIMITED) AND OTHERS. (a.)

Company—Memorandum—Right to issue pre-preference shares—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 12.

Clause 5 of the memorandum of a limited company was as follows: "The capital of the company is £60,000, divided into 6,000 preference shares of £5 each and 6,000 ordinary shares of £5 each. Such preference shares shall confer a right to a fixed cumulative preferential dividend at the rate of £7 per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed or have any special privilege or advantage, or may be deferred and may be issued on such special conditions as to priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally on such terms as the company may from time to time determine."

Held, that the company had power to increase its capital by issuing preference shares having priority over the original preference shares.

Motion, treated by consent as the trial of the action.

The action was brought by H. T. Underwood (who was one of the directors of the company) on behalf of himself and the other holders of preference shares against the company and the other directors for (1) a declaration that it was *ultra vires* for the company to increase their authorized capital by creating preference shares ranking in priority to or *pari passu* with the 6,000 preference shares mentioned in clause 5 of the memorandum of association; and (2) an injunction to restrain the defendants, other than the company, and each of them from convening or holding any meeting of the members of the company for the purpose of authorizing the creation of and also from creating preference shares of the company ranking in priority to or *pari passu* with the existing 6,000 preference shares.

The motion was for an injunction in the terms of the second part of the claim.

The question turned upon clause 5 of the memorandum of association set out above.

E. W. Martelli, for the plaintiff, contended that the company had no power to take away or lessen any rights of the preference shareholders fixed by the memorandum of association.

He referred to *Ashbury* v. *Watson*, 33 W. R. 882, 30 Ch. D. 376, and to Buckley on Companies (7th ed.), p. 18, as to the word "conditions" contained in clause 12 of the Companies Act, 1862.

A. R. Kirby, for the company and the directors other than the plaintiff, argued that clause 5 of the memorandum gave the requisite power, and the clause was supported by the articles; there was nothing in the clause to take away from the company the power to alter the rights of shareholders, as established in

(a.) Reported by W. MORRIS CARTER, Esq., Barrister-at-Law.

Andrews v. *Gas Meter Co.*, 45 W. R. 321, [1897] 1 Ch. 361.

E. W. Martelli, in reply, said that the rights of the preference shareholders were here fixed by the memorandum and were therefore unalterable.

COZENS-HARDY, J.—The company desire to increase their capital by the issue of shares having a preference over the original £7 per cent. preference shares. I think it is competent for the company to do this. The memorandum of association cannot be altered by the company, but the memorandum itself, after defining the position of the original shareholders, states that any increased capital may be issued on such special conditions as to priority as the company may determine. The result is that the £7 per cent. preference shareholders, while having an absolute right as against the original shareholders, are subjected, by the memorandum itself, to the risk of having increased capital placed in front of them. The clause is ill-drawn, because it is difficult to see how it can apply to the present or original capital, but I do not think it is so obscure that I ought to decline to give effect to it. I must therefore dismiss the action.

Motion refused.

Solicitors, *Morton, Cutler, & Co.; Nicholson, Graham, & Graham.*

Chan. Div. Buckley, J. — April 19, 20, 22, 23.

METROPOLITAN ELECTRIC SUPPLY CO. (LIMITED) v. GINDER. (a.)

Injunction — Contract — Implied negative stipulation — Undue preference — Electric Lighting Act, 1882 (45 & 46 *Vict. c.* 59), *ss.* 19, 20.

Where a contract, although affirmative in form, is negative in substance, the court will, notwithstanding the absence of a negative stipulation, imply one, and grant an injunction accordingly, upon the principle of Lumley v. Wagner, 1 *De G. M. & G.* 604.

A customer of an electric lighting company agreed "to take the whole of the electric energy required for the premises" for five years. He did not bind himself to take any quantity at all. There was no express negative stipulation.

Held, that the court would imply a negative stipulation, and grant an injunction against his taking electric energy from anyone else.

An electric lighting company were empowered under their provisional orders (duly confirmed) to supply a district with electric energy. They agreed to supply a customer for five years at 4½d. a unit upon his taking the whole of his supply from them. They were supplying another customer for two years at 4d., but he was a large consumer, and took his supply in the daytime, which was an advantage to the company.

Held, that the supply to this customer was not an undue preference, and that, consequently, the contract with the first-named consumer was not wanting in consideration.

Held, also, that the contract was authorized by sections 19 *and* 20 *of the Electric Lighting Act*, 1882, *and the provisional orders of the company.*

This was an action by an electric lighting company for an injunction to restrain the defendant from taking his electrical energy elsewhere, upon an agreement to take the whole from them.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

The plaintiff company were empowered by the Metropolitan Electric Supply Co. (Mid-London) Provisional Order, confirmed by the Electrical Lighting Orders Confirmation (No. 5) Act, 1889, to supply electrical energy to a large district in London, consisting of the parishes of Holborn and St. Giles and the Strand.

By section 46 of their order the undertakers, upon being required by the owner or occupier of premises within a certain distance of their mains, "were to give and continue to give a supply of energy for such premises in accordance with the provisions of this order."

Section 47, after providing for the service by the consumer of a notice of the supply he required, provided that he should "enter into a written contract with the undertakers (if required by them so to do) to receive and pay for a supply of energy for a period of at least two years" of an amount to be specified.

By section 52 the undertakers were empowered to make any agreement with the consumer subject to the provisions of their order and the Electric Lighting Acts as to price. The limit of their charge was 8d. a unit.

The defendant, who was the keeper of a public-house in Holborn, the "Red Lion," signed in November, 1898, a request, or, as it was called in the proceedings, a "contract," addressed to the plaintiff company, requesting them to supply his premises with electric energy, and agreeing to take all such electric energy, subject to the Electric Lighting Acts and the company's provisional orders, and subject to the terms and conditions therein contained, of which the first two were:

"(1) The consumer agrees to take the whole of the electric energy required for the premises mentioned below from the company for a period of not less than five years.

"(2) The charge for electric energy to be 4½d. per Board of Trade unit."

The premises mentioned below were the "Red Lion." There was no negative stipulation as to taking the supply. The plaintiff company thereupon supplied the defendant company as requested.

In February, 1901, the defendant decided to leave the plaintiff company, and he wrote to them that he was dissatisfied with their light, and requested them to take their meter away, and let him have their account; and he proceeded to take his supply from the County of London and Brush Provincial Electric Lighting Co. (Limited), which had also statutory powers of supplying the district.

In March, 1901, the plaintiff company issued the writ in the action, asking for an injunction to restrain the defendant until the 16th of November, 1903, from taking the whole or any part of the electric energy required for the said premises from any person or company other than themselves, in breach of the agreement of the 16th of November, 1898.

The action was heard without pleadings. The defendant alleged that the plaintiff company had failed to give him a proper supply of energy, but the learned judge found against this allegation. It was, however, proved that the plaintiff company had supplied other persons for various terms at 4½d. a unit, and also had supplied one customer under a contract for two years at 4d. a unit.

Astbury, K.C., and *Sargant*, for the plaintiff company.—The contract is in effect a negative one. The defendant does not agree to take any energy at all, but only not to take it from anyone else. The principle, therefore, of *Lumley* v. *Wagner*, 1 D. M. & G. 604, applies, and the court can enforce it by injunction: *Catt* v. *Tourle*, 17 W. R. 939, L. R.

4 Ch. App. 654. It is not necessary that there should be an express negative stipulation, it may be implied: see observations of Lord Selborne in *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, L. R. 16 Eq. 433, at p. 440, 22 W. R. Dig. 118; and of Fry, J., in *Donnell* v. *Bennett*, 31 W. R. 316; 22 Ch. D. 835. *Whitwood Chemical Co.* v. *Hardman*, 39 W. R. 433, [1891] 2 Ch. 416, which may be cited against us, was a case of personal service, and is distinguishable.

Swinfen Eady, K.C., and *Stewart Smith*, for the defendant.—*Catt* v. *Tourle* turned upon the doctrine of *Tulk* v. *Moxhay*, 2 Ph. 774. The contract in *Whitwood Chemical Co.* v. *Hardman* was almost exactly the same as the one here, and there the court refused to grant an injunction. In *Fothergill* v. *Rowland*, 22 W. R. 42, 17 L. R. Eq. 132, also, an injunction was refused. Besides, the contract here is void as made without consideration. Other persons were supplied at 4½d. or 4d., and therefore the defendant had a right to have it at that price without binding himself in return: see sections 19 and 20 of the Electric Lighting Act. 1882; *The Diphwys Casson Slate Co.* (*Limited*), v. *Festiniog Railway Co.*, 2 Nev. & Mac. 73; *Holland* v. *Festiniog Railway Co.*, 2 Nev. & Mac. 278.

Astbury, in reply.—The plaintiff company have power given them to make these contracts by section 20 of the Act of 1882 and section 52 of their special Act. The agreement with the customer at 4d. was not an undue preference, for there were special advantages to them in the supply required by him, as he was a large consumer and wanted a supply in the daytime. The contract made by the defendant is not, then, without consideration.

BUCKLEY, J.—The first defence is that there is no negative stipulation upon which the court can grant an injunction. I think that I must construe the contract without reference to the legal consequences of the one construction or the other. Upon this part of the case I will refer to the observations of Lord Selborne in *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.*, made with reference to the case of *Lumley* v. *Wagner*, and the court refusing to act upon the implication of a negative, but acting upon the expression of it: "I should think it was the safer and the better rule, if it should eventually be adopted by this court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression." The cases since these observations have, I think, gone to show that that principle has been adopted by the courts. Now, here the consumer agrees to take the whole of the energy required for his premises from the company. The company, when asked, were bound under the statute to supply it. The consumer does not agree to take any energy at all; he may burn gas if he likes, and require none. The only bargain is as to the price, which was fixed at 4½d. The essence of the contract is an implied agreement by the defendant not to take from anyone else. Now it is said that the case of *Whitwood Chemical Co.* v. *Hardman*, where an injunction was refused, is the same as this. There the defendant said he would "give the whole of his time." But that was a case of a contract for personal services. And the parties did not contemplate any negative agreement, that the defendant should not serve others. On the other hand, there is the case of *Catt* v. *Tourle*, which is equally on all fours with the present, where the defendant agreed that the plaintiff should have the exclusive right of supplying all ale, &c., to him, and where an injunction was granted. It is said that that case turned on the doctrine of *Tulk* v. *Moxhay*. But the court were of opinion that from the above words they might imply a negative, and grant an injunction. *Fothergill* v. *Rowland* was a case of the sale of goods, and turned on the fact that damages were a complete remedy. In *Donnell* v. *Bennett*, where there were express negative words, Fry, J., granting an injunction, said: "The court ought to look at what is the nature of the contract between the parties, and if the contract as a whole is the subject of equitable jurisdiction, then an injunction may be granted in support of the contract, whether it contain or does not contain a negative stipulation." I think, then, that the fact that the contract here is affirmative, and not negative in form, is no ground for refusing an injunction. Next it is said that the contract was invalid because it purported to bind the parties for a term of years. But this contract is less than those authorized by sections 46 and 52 of the order, and therefore valid, because under them the company may require the consumer to receive a supply for at least two years, while here the consumer had not bound himself to take any at all. Next it is said that this contract is invalid under section 20 of the Electric Lighting Act, 1882, because there were contracts with other consumers at the same rate but for different terms of years, and one with a customer, Gates, for two years at 4d. a unit, and that these different terms and this different rate were not justified by the Act. But Gates was a very large customer, and moreover he burnt largely upon the day lead as distinguished from the night lead, a circumstance which to those companies is of great importance. Now the companies are entitled to take these matters into consideration in fixing the price. The circumstances in such a case are not similar to those of persons who are not on the day lead. Sections 19 and 20 of the Act of 1882, which are supplemented by sections 46 and 52 of the Mid-London order, are a direct statutory authority that the company may contract as to charges within their statutory limit of 8d. I think this is a contract which the plaintiff company were entitled to make, and that they should succeed in the action.

Injunction granted.

Solicitors for the plaintiffs, *Barlow & Barlow.*

Solicitors for the defendant, *Sydney Morse.*

Chan. Div. Joyce, J. } Feb. 16, 28.

In re YOUMANS' WILL. (*a.*)

Will—Rule in Shelley's case.

A testator devised certain property to trustees upon trust to receive the rents, &c., and to pay the outgoings and certain annuities for life to the testator's cousins, and then to pay the residue of the rents and profits to D. for life, and after the respective deceases of the said cousins and D., upon trust to convey the property, together with any accumulations of rents in the hands of the trustees, unto the right heirs of D.

Held, that, by virtue of the rule in Shelley's case, *the hereditaments belonged to D. in fee, subject to the annuities.*

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

Petition by William Douglas for payment out to him of a fund in court.

R. Youmans, by his will dated the 21st of August, 1877, devised the residue of his freehold, copyhold, and leasehold estates to trustees upon trust to receive the rents and profits thereof, and after the necessary payments to maintain the same, to pay thereout certain annuities to his cousins therein mentioned for their respective lives, and then to pay the residue of such net rents and profits half-yearly to William Douglas for his life, and from and after the respective deceases of the testator's said first cousins and the said William Douglas, upon trust to convey, surrender, and assign the said freehold, copyhold, and leasehold estates respectively, together with any accumulations of rents in the hands of the trustees, unto the right heirs of the said William Douglas.

The testator died in 1877.

Part of the estate comprised in this devise was purchased under their compulsory powers by the Great Central Railway Co., and the purchase-money was paid into court under the provisions of the Lands Clauses Consolidation Act.

One of the annuitants alone remained alive; and she had released from her annuity the land taken by the company.

JOYCE, J.—It appears to me that subject to what the effect of the will may be with regard to the period, if any, between the death of the petitioner and that of the annuitant if she survive him, the petitioner is, by virtue of the rule in *Shelley's case*, owner of the equitable fee simple of the property. It is clear that there would not be an accumulation of the surplus rents for more than twenty-one years from the death of the petitioner, and I am of opinion that any surplus rents accruing after that period would not be undisposed of but would belong to the right heirs of the petitioner. I am, therefore, of opinion that the property, subject to the annuity, belongs to the petitioner in fee simple. The annuitant having released her annuity, the petitioner is entitled to an order for payment out to him.

Solicitors. *Venn & Woodcock*, for *Pellatt & Pellatt*, Banbury; *Ullithorne, Currey, & Jennings*; *Lingards*.

IN BANKRUPTCY.

K. B. Div. (Wright and Darling, JJ.) March 26.

In re TAYLOR.
Ex parte TAYLOR. (*a*.)

Bankruptcy—Annulment of adjudication—Payment of debts in full—Discretion to refuse annulment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 35.

Where a bankrupt has been guilty of serious misconduct in the course of the bankruptcy, the court will refuse to annul the adjudication, even though the bankrupt has paid his debts and the costs of the bankruptcy in full.

Appeal by the bankrupt from the refusal of the registrar of the county court at Greenwich to annul the adjudication.

Taylor, the bankrupt, was a public-house broker and auctioneer.

In June, 1899, a client named Titley brought an action against him for negligence in connection with the purchase of a public-house, and obtained judgment for a sum amounting, with costs, to about £345.

Taylor failed to pay this amount, and Titley presented a bankruptcy petition against him.

A receiving order was made thereon upon the 26th of September, 1899.

Upon the 6th of October the bankrupt filed his statement of affairs showing liabilities amounting to £386, and a claim for £1,000 against a debtor as the only asset. In his private examination by the official receiver he also failed to disclose any cash assets.

Upon the 17th of November the bankrupt handed to the official receiver the sum of £450, which was more than sufficient to pay the whole of his debts with interest, and the costs of the bankruptcy. At his public examination upon the 21st of November he admitted that such sum of £450 formed part of a sum of £500 which he had failed to disclose in his private examination and in his statement of affairs. He asked leave to correct his omissions, and stated that he desired to pay all his debts in full. The examination was closed upon the 12th of December.

The official receiver paid all the creditors in full and the expenses of the bankruptcy out of the £450, and had a balance of £18 remaining. He made his report upon the conduct of the bankrupt upon the 16th of February, 1900, but no order for prosecution was made thereon.

In 1901 the bankrupt applied for the annulment of the adjudication upon the ground that all his debts had been paid in full. The official receiver opposed the application, which was refused by the registrar upon the grounds that the bankrupt had been guilty of misconduct in concealing the sum of £500, and that he had been guilty of fraud in connection with a bill of sale.

The bankrupt appealed.

Muir Mackenzie, for the appellant.—A bankrupt who is quite solvent should be entitled as of right to his discharge. [WRIGHT, J.—He has been guilty of two misdemeanours under the Debtors Act—false statement of affairs, and concealment of assets.] In *In re Duncan*, 40 W. R. 409, [1892] 1 Q. B. 879, the misconduct was much worse, nevertheless the court annulled the adjudication. It has always been the practice hitherto, in cases where the debts have been paid in full, and the debtor has been through his public examination, to annul the adjudication without regard to any misconduct of the debtor.

S. G. Lushington, for the official receiver, was not called upon.

WRIGHT, J.—I cannot possibly say that in this case the registrar was wrong in the exercise of his discretion. The bankrupt was admittedly guilty of two of the most serious offences that a bankrupt can commit He could never have obtained his discharge except for special reasons, and the registrar rightly thought that such a person ought to be punished by the stigma of undischarged bankruptcy. The registrar's decision cannot be got over by saying that whenever a bankrupt has paid his debts in full he is entitled to have his adjudication annulled, and suggesting that the court has no discretion under section 35 to refuse annulment in such a case. I am clearly of opinion that the court has a discretion, and that in such a case as the present an application for annulment ought not to be entertained until at least five years after the bankruptcy.

DARLING, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Batchelor & Cousins*.

Solicitor for the respondent, *The Solicitor to the Board of Trade*.

(*a*.) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Prob. Div. & Adm. Div. Admiralty. } Feb. 5; March 5.

"THE DEERHOUND." (a.)

Ship—Admiralty—Demurrage—Liability of charterers of ship and consignees of cargo.

The defendants chartered the plaintiffs' vessel, and guaranteed that the charter-party would be carried out in its entirety and on the conditions as to time provided therein and as to payment of demurrage legally incurred according to the terms of the charter-party. The defendants sold the cargo to the consignees, who were the holders of the bills of lading. On the arrival of the ship at the port of discharge, the consignees, having other ships in dock, were not permitted by the dock regulations to at once berth the plaintiffs' ship, and delay in discharging was thereby incurred, in respect of which demurrage was claimed from the defendants.

Held, that, inasmuch as the consignees had become agents of the charterers to receive the cargo and pay the freight in accordance with the terms of the charter-party, the charterers were not liable.

This was an appeal from the decision of the judge of the county court of Glamorganshire.

The plaintiffs, who were the Ogmore Steamship Co., were owners of the steamship *Deerhound*, and claimed from the defendants, Messrs. Borner & Co., the charterers of the plaintiffs' vessel, a sum of £22 as demurrage and £43 10s. 10d. as balance of freight.

The Deerhound was a vessel of 1,052 tons register, and was chartered to carry a cargo of iron ore from Porman to Senhouse Dock, Maryport.

The charter-party provided that the ship should discharge at one shilling per ton, but under the circumstances hereinafter appearing it was actually discharged at one shilling and fourpence per ton, and for this balance of freight the claim for £43 10s. 10d. was made.

The Deerhound arrived at Maryport on the 13th of June, but did not get into dock until midnight on the 15th of June.

Her charter-party, however, stipulated that she was to be berthed within twenty-four hours of her arrival.

The dock authorities had a bye-law by which they refused to allow, owing to the limited accommodation in the dock, more than one vessel at a time to be berthed to discharge or load for or from the same consignees or consignors, and on the arrival of the plaintiffs' vessel in the Senhouse Roads, Messrs. Cammells, the consignees of the cargo, had other ships in dock waiting to discharge. The dock authorities therefore refused to allow *The Deerhound* to enter the dock, and she was not actually berthed for discharging purposes until 10 p.m. on the 26th of June.

One of the questions sought to be determined by this appeal was whether the charterers of the vessel or the consignees of the cargo were entitled to recover demurrage. Another point raised was as to the recovery of a balance of freight, deduction having been made by the defendants under the following circumstance: the charter-party stipulated that the vessel was to give the use of her cranes and winches with the necessary steam power, and the use of the ship's hands. The cargo was to be discharged at one shilling per ton.

When the vessel arrived at Maryport it appeared that there was a dislocation in the working of the dock, the consequence of which was that on the fall of the tide the vessels were left on the mud. This gave considerable extra trouble in discharging, and the stevedore, who was the charterers' agent, declined to discharge the ship at less than one shilling and fourpence per ton. The master, however, offered the use of his winches and his men, but the stevedore declined to accept them or to allow his men to work at all unless they did the whole of the discharging themselves.

Laing, K.C., and *Sankey*, for the appellants (the defendants in the court below).

Robson, K.C., and *Bailhache*, for the respondents, contended that there was no difference between the charterers' liability and the consignees'.

The following cases were in the course of the arguments cited: *Watson* v. *Borner*, 4 Com. Cas. 335; *Ashcroft* v. *Crow Orchard Colliery Co.*, L. R. 9 Q. B. 540; *Tapscott* v. *Balfour*, 21 W. R. 245, L. R. 8 C. P. 46.

March 5.—BARNES, J., in delivering the considered judgment of the court, said: This is an appeal from the decision of the county court judge at Cardiff in an action by the plaintiffs, the owners of the steamship *Deerhound*, against the defendants, the charterers of that vessel, holding that the plaintiffs are entitled to receive from the defendants £22 for twenty-two hours' demurrage at Maryport and in respect of a charge of 4d. per ton on the cargo discharged which had been deducted from the freight payable by the charterers. The facts were as follows: On the 28th of May, 1900, the vessel was chartered by the plaintiffs to the defendants by charter-party of that date to load at Cartagena or Porman a cargo of iron ore, and proceed to Maryport, Senhouse Dock, and there deliver the same as customary when and as directed by the consignees, to whom notice was to be given of the vessel being ready to discharge, paying for discharging 1s. per ton for freight, to be paid as in the charter-party mentioned. The charter-party provided that the cargo was to be shipped at the rate of 200 tons per working day of twenty-four consecutive hours (weather permitting), Sundays and holidays excepted, and to be discharged on the same conditions (subject to certain exceptions). Days to be averaged to avoid demurrage. Time not to count between the hours of 1 p.m. on Saturdays and 7 a.m. on Mondays unless used, and that the time for discharging should count when the ship was in every respect ready in berth, but berth guaranteed within twenty-four hours after arrival, or time to count and in free pratique as per custom of port, written notice of such readiness to be given to consignees during office hours. Ship to work night and day if requested to do so, and to give use of cranes and winches with necessary steam power and hands, charterers paying all extra expenses of night work. Demurrage (if any) at the rate of 20s. sterling per hour. Despatch money at the rate of half the demurrage, not less than 10s. per hour, to be settled in discharge port; steamer to be consigned to Messrs. Gibson & Greenup and Mr. Joseph Holmes at Maryport. There was a cessor clause in the charter, but by a letter of the 21st of June the charterers guaranteed that the charter-party would be carried out in its entirety and on the conditions as to time provided therein, and to pay any demurrage legally incurred according to the terms of the charter-party. After loading under the charter-party the vessel proceeded to Maryport, and arrived in the harbour outside the Senhouse Dock on Wednesday, the 13th of June, and on the 14th at 10 a.m. the master gave notice to Messrs. C. Cammells & Co. (Limited), the consignees and holders of the bills of lading, to whom the defendants had sold the cargo, that the vessel had arrived and was ready to discharge. At the time the vessel

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

arrived as aforesaid the said consignees had other vessels at berths in the dock and waiting to discharge, and in consequence the vessel was not allowed, in accordance with the dock regulations, to enter the dock until midnight of the 15th. If the time is to count from the time at which the vessel entered the dock, it is admitted that she was afterwards duly discharged, but the plaintiffs claim that in the circumstances they are entitled to treat the time as counting from 10 a.m. on the 15th, and if they are right, I understand the effect would be to give them twenty-two hours' demurrage. The county court judge held that the case was governed by the case of *Ashcroft* v. *Crow Orchard Colliery Co.*, and that the plaintiffs were entitled to recover for twenty-two hours' demurrage. It was argued before this court that the decision was wrong in law, and also that the presence of the other vessels for the same consignees did not, according to the regulations, prevent *The Deerhound* from getting into dock. With regard to the second point, it seems clear that the case was based in the court below on the admissions of counsel, witnesses who were present to prove the facts, therefore, not being called, and that the case proceeded on the assumption that the fact that the consignees had other vessels at the berths in the dock and waiting to discharge did, according to the regulations and practice of the port, which the harbour-master acted on, prevent the vessel from getting into the dock until the night of the 15th, and I think the case must be decided on the principal point, which is one of general importance. Several cases were cited to us, but they appear to me to turn so much on their particular facts and the language of the particular charters that they are only indirectly of assistance in arriving at a conclusion in this case. In *Tapscott* v. *Balfour*, where a vessel was to proceed to a dock as ordered by the charterers and load coal, which would be supplied by a colliery agent and loaded from the tips, it was held that the lay days did not commence until the vessel got into dock, and that the charterers were not responsible for delay in her getting there caused by the colliery agent having three other vessels in the dock, and two more ready to go in, and not being permitted by the dock regulations to have more than three vessels in the dock at a time. It was the usual course to load through a colliery agent, and there was nothing improper or unreasonable in the course pursued by the charterers: see the remarks made by Bovill, C.J., L. R. 8 C. P., at p. 50. The next case is *Ashcroft* v. *The Crow Orchard Colliery Co.*, which the judge of the court below acted on. In my opinion that case does not govern the present case and is entirely different from it both in the language of the contract and the facts. The charter was for the loading of the plaintiffs' vessel with a cargo of coal at the port of Liverpool, to be loaded with the usual despatch of the port, or if longer detained to be paid 40s. per day demurrage, and the charterers engaged to load "on the above terms," and by a memorandum at foot the vessel was to load in the "Bramley Moor or Wellington Docks High Level Railway." By one of the regulations of the docks no coal agent was to be allowed to have more than three vessels in the docks loading, and to load, at the cranes at one time. The charterers acted as their own coal agents, and as they had three other ships loading in the docks, and other charters in the books having priority over the plaintiffs' vessel, she was not allowed to go into dock for thirty days after she was ready to do so. The judgment in that case seems to me to have proceeded on the ground that the court construed the particular contract before them as imposing an absolute obligation to load the vessel with the usual despatch of the port and that it was immaterial to consider whether the delay occurred outside or inside the dock: see the observations on this case made by Lord Esher in *Nelson* v. *Dahl*, 28 W. R. 57, 12 Ch. D. 568, at pp. 588, 589, and by Lord Blackburne in *Postlethwaite* v. *Freeland*, 28 W. R. 833, 5 App. Cas. 599, at p. 622. The last case was *Watson* v. *Borner*, 4 Com. Cas. 335, on appeal 5 Com. Cas. 377, where a steamship was chartered to carry a cargo to Dowlais Wharf, Cardiff. The cargo was sold by the charterers to the Dowlais Iron Co., the lessees of the wharf, which was in the Routh Dock, Cardiff. The company had the control of the wharf and the berthing of vessels there. The time for discharge according to the charter-party did not commence until 6 a.m. after the vessel was ready in berth. It was held that the charterers were not responsible for delay caused to the vessel in getting into berth, after she had got into dock, by the consignees in order to suit their business arrangements giving preference to other vessels which arrived at the dock after the plaintiffs' vessel. The ground of the decision appears to be that the owners of the vessel had agreed to take her to the wharf, that the delay was caused by the way in which the Dowlais Co. as proprietors of the wharf managed the business, and that the charterers were not responsible for this merely because the Dowlais Co. happened also to be the purchasers of the cargo. In the present case the plaintiffs agreed that the vessel should proceed to the Senhouse Dock, Maryport, and the charterers agreed, by the clauses in the charter-party as to discharge and guarantee of berth, to discharge her within a certain time after her arrival—that is, arrival in dock. It is the ordinary and natural implication that neither party should prevent the other from performing that part of the contract which falls to be performed by that other, and if the charterers by themselves or their agents, acting within the scope of their authority, had placed impediments in the way of the shipowners bringing their vessel into dock the charterers ought to be responsible for the delay so caused, as if the vessel had in fact arrived in dock. It appears to follow that if the charterers have other vessels which they have to discharge, and have arranged to discharge, in the dock before the vessel which by the charter is to proceed to the dock and by the practice of the port will not be admitted into the dock while the charterers have the other vessels in the way, the charterers do prevent the shipowners from performing their contract until the charterers have cleared away the impediments. The charterers, however, had sold the cargo to consignees. The position then is that those consignees became agents of the charterers to receive the cargo and pay the freight in accordance with the charter-party and their obligations arose after the vessel arrived in dock. It is true that the consignees had at the time of the vessel's arrival outside the dock other vessels at berths in the dock and waiting discharge, in consequence of which the plaintiffs' vessel was prevented from entering the dock, but the charterers are not, in my opinion, responsible for this. The engagements and actions of the consignees in relation to the other vessels were not entered into or taken by them as agents for the charterers. It was not contended there was anything unreasonable in the charterers selling the cargo to the particular consignees. The charterers would not know what the engagements of the consignees would be at the time of the vessel's arrival. As between the shipowners and charterers the delay is one of the risks taken by the shipowners when they agree to take their vessel to a particular dock. They could guard against it by proper stipulations in the charter-party. There appears to me to be nothing unreasonable in

the view which I have expressed of the shipowners' position. It is contemplated in this class of case that the cargo may be sold. Very frequently the charterers' liability under the charter-party ceases by virtue of a cessor clause on shipment. It was so in this case but for the letter of guarantee above referred to. In such cases the shipowners have to look to the consignees only at the port of discharge, and for this purpose the bills of lading usually incorporate the terms of the charter. Even when the charterers remain liable on the charter for its due performance the cargo is frequently sold to consignees who have to act for the charterers in performing their obligations under the charter-party with regard to the cargo, but are not otherwise the agents for the charterers, and the shipowners will have such rights against the consignees, as such, as are provided for by the bills of lading, but as against the charterers only such rights as are conferred by the charter-party. The shipowners know that in ordinary course the cargo may be received by persons other than the charterers and over whose other engagements the charterers have no control, and there is nothing in the charter-party imposing on the charterers the risk of such other engagements preventing the vessel from reaching the spot to which it has been agreed that she shall go. The result in this case is that the defendants are not liable in my opinion for the delay occasioned before the vessel arrived in dock. There is another point turning on the facts of the case and not of general importance. Owing to repairs to the Senhouse Dock, it was only available as a tidal harbour when *The Deerhound* arrived, and the steamer grounded after tide fall when discharging, and in consequence it was necessary to use the winches. The master of the vessel was ready and willing to give the use of the winches with necessary steam power, and the ship's hands to work them, but the stevedore's men would not allow the crew to work the winches and insisted on doing it themselves and on being paid 4d. per ton additional for discharging. The defendants, as I understand, have deducted the amount of 4d. per ton on the cargo discharged from the freight, and the county court judge has held that they were not entitled to do so. I am of the same opinion on the facts. The shipowner was only to pay 1s. per ton for discharging, and he was ready and willing to perform his part of the contract. The loss through the extra demand of the stevedore's men must fall on the charterers. The appeal must be allowed as to the item for demurrage. In my opinion each of the parties should pay their own costs of the appeal, except that the costs of the printing of the record should be divided between them.

Solicitors, *Downing, Bolam, & Co.*, for *Downing & Handcock*, Cardiff; *Ince, Colt, & Ince.*

Court of Appeal.

From K. B. Div.
(A. L. Smith, M.R., Vaughan Williams and Romer, L.JJ.) — May 3.

NICKOLL & KNIGHT *v.* ASHTON, EDRIDGE, & CO. (*a.*)

Sale of goods—Impossibility of performance—Implied condition—Shipment by named steamer—Damage to steamer rendering shipment impossible—Condition excusing vendor.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The defendants sold to the plaintiffs a cargo of cotton seed to be shipped by a named steamer at Alexandria during the following January. The contract contained a clause that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract was to be cancelled. The steamer, before arriving at Alexandria, stranded, without the defendants' default, and was so damaged that it became impossible to load the cargo in January; and in December the defendants gave the plaintiffs notice of this fact.

Held, by A. L. Smith, M.R., *and* Romer, L.J. (Vaughan Williams, L.J., *dissenting*), *that the contract was subject to the implied condition that the parties should be excused if, before breach, performance became impossible owing to the steamer ceasing to exist as a cargo-carrying steamer, without the defendants' default, when the time for the performance of the contract arrived.*

Judgment of Mathew, J. ([1900] 2 *Q. B.* 298, 5 *Com. Cas.* 252, 48 *W. R. Dig.* 50), *affirmed.*

Appeal by the plaintiffs from the judgment of Mathew, J. (reported [1900] 2 Q. B. 298, 5 Com. Cas. 252, 48 W. R. Dig. 50).

The action was brought to recover damages for breach of a contract dated the 24th of October, 1899, for the sale of a cargo of cotton seed.

The contract was in the form of the Cotton Seed Cargo Contract, 1892, issued by the Imperial Oil Seed Association.

By the contract the defendants sold to the plaintiffs a cargo to consist of from 1,600 to 1,900 tons of Egyptian cotton seed to be shipped at Alexandria and/or Port Said and/or Ismailia during the month of January, 1900, *per* the steamship *Orlando*, at £6 3s. 9d. per ton.

By clause 5 of the contract: "In case of prohibition of export, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof is to be cancelled."

By clause 7: "This contract is to be void as regards any portion that may not arrive by the steamer declared against this contract."

In November *The Orlando*, which had been chartered to load the cotton seed at Alexandria for the United Kingdom, grounded in the Baltic, and sustained such damage that it became impossible for the necessary repairs to be executed in time for her to load the cargo in January.

On the 20th of December the defendants gave notice of this to the plaintiffs.

The writ in the present action was issued on the 28th of February, 1900, claiming as damages £2,740, being the difference between the contract price, £6 3s. 9d., and £7 13s., the market price per ton of cotton seed on the 31st of January. The defendants contended that, the performance of the contract having become impossible, there was no breach of contract; and further, that, if there had been a breach, the proper measure of damages was the difference between the contract price and the market price at the end of December, when the defendants gave notice that it was impossible to carry out the contract, and they paid £750 into court calculated upon that basis.

Mathew, J., held that the contract was subject to the implied condition that the parties should be excused in case, before breach, performance became impossible, and that, therefore, there had been no breach of contract. He further said that, in his opinion, though it was not necessary to decide it, the plaintiffs were bound to mitigate the loss, when they were informed that the performance of the contract had become impossible, by purchasing another cargo at the end of December, and that therefore the sum paid into court would be the proper measure of

damages in case there had been a breach of contract. He accordingly gave judgment for the defendants.

Joseph Walton, K.C., and *F. W. Hollams*, for the plaintiffs.—There was no implied condition in the contract that the parties should be excused if the ship was prevented by some accident from going to Alexandria to ship the cotton seed. It was an absolute contract by the defendants to sell a cargo to be shipped at Alexandria. The defendants had to charter the ship and get her to Alexandria in January. The case is not like those cases where the existence of the thing is an implied condition of the contract, as in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826.

They referred on this point to *Shubrick* v. *Salmond*, 3 Burr. 1637; *Hills* v. *Sughrue*, 15 M. & W. 253; *Ashmore* v. *Cox*, [1899] 1 Q. B. 436, 47 W. R. Dig. 41; Leake on Contracts (3rd ed.), p. 608. Secondly, the measure of damages ought to be the difference between the contract price and the market price at the end of January.

R. M. Bray, K.C., and *E. Bray*, for the defendants.—The decision of Mathew, J., was right. The case comes within the principle laid down by Blackburn, J., in *Taylor* v. *Caldwell*.

They also referred to *Johnson* v. *Macdonald*, 9 M. & W. 600; *Robinson* v. *Davison*, 19 W. R. 1036, L. R. 6 Ex. 269; *Howell* v. *Coupland*, 22 W. R. 691, L. R. 9 Q. B. 462, on appeal 24 W. R. 470, 1 Q B. D. 258.

Joseph Walton, K.C., replied.—In *Taylor* v. *Caldwell* the thing no longer existed. Here *The Orlando* was still in existence; she never ceased to be a ship. She merely could not get to Alexandria in time. There is no implied condition in the contract relieving the defendants if the ship shall not be able to get to Alexandria in time: *Robinson* v. *Davison* is not applicable, as that was a case of personal service.

Cur. adv. vult.

May 3.—A. L. SMITH, M.R., read the following judgment: This is an action for damages by the buyers of a cargo of Egyptian cotton seed against the sellers for not shipping the same pursuant to a contract dated the 24th of October, 1899, and the question is whether upon its true construction the contract is a positive and absolute contract to ship the seed or a contract subject to any, and what, implied condition. The contract upon which the question arises, so far as material, is as follows: Sold this day to Messrs. Nickoll & Knight the following Egyptian cotton seed—namely, a cargo to consist of from 1,600 to 1,900 tons to be shipped by the steamship *Orlando* at Alexandria . . . during the month of January, 1900. (Signed) Ashton & Co. Clause 5 is as follows: "In case of prohibition of export, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof is to be cancelled." It is perfectly plain upon the face of the signed contract that the parties deliberately agreed that the shipment of the seed should not be in any ship or ships, but in one particular named ship, for the words in print "ship or ships" are obliterated, and the words "*per* steamship *Orlando*" are inserted in writing in their place, and it is equally plain that the contract could only be performed by the defendants shipping the contracted seed in the steamship *Orlando* during the month of January, 1900, and in no other ship. Now, is a contract such as this a positive and absolute contract by the shipper to ship on board the named ship the contracted cargo, or is it a contract subject to any, and what, implied condition? I find in the judgment of Blackburn, J., delivering the unanimous judgment of the Court of Queen's Bench in the year 1863 in *Taylor* v. *Caldwell*, 11 W. R. 726, 3 B. & S. 826, which case has been followed and applied in the Exchequer Chamber in *Appleby* v. *Myers*, L. R. 2 C. P. 651, 15 W. R. C. L. Dig. 127, and in the Court of Exchequer in *Robinson* v. *Davison*, 19 W. R. 1036, L R. 6 Ex. 269, and in the Queen's Bench in *Howell* v. *Coupland*, 22 W. R. 691, L. R. 9 Q. B. 462, affirmed in the Court of Appeal 24 W. R. 470, 1 Q. B. D. 258, that a rule as to the construction of certain contracts has been laid down, which rule is as follows: "Where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor." In my judgment the contract in the present case falls directly within this rule, for from the beginning the parties must have known that the performance of the contract would become impossible unless the particular thing specified—that is, the steamship *Orlando*—continued to exist as a cargo-carrying ship down to and during the month of January, 1900; and I have no doubt that the true construction of the contract is that it is not a positive and absolute contract as contended for by the plaintiffs, but is a contract subject to the condition that the parties shall be excused if, before breach, performance becomes impossible by reason of the particular specified thing—that is, the steamship *Orlando*—ceasing to exist as a cargo-carrying ship without the defendants' default. But it is argued that, although there may be this implied condition, it only applies if the particular thing actually perishes; for instance, it is suggested that, if the roof of the music-hall in *Taylor* v. *Caldwell* had alone been destroyed and the hall itself not burnt to the ground, the judgment in that case would not have been given, even although with the roof off the hall could not have been used for the purpose for which it was let, and it is said that, as the steamship *Orlando* did not actually perish, this case is not within the implied condition. I do not agree. In my judgment, if the ship ceased to exist as a cargo-carrying ship when the time for the performance of the contract arrived, so that it could not be used to ship the cargo in, the implied condition would attach. If the steamship had gone to the bottom before the month of January, 1900, and remained there during that month, so as to be wholly unable to take in a cargo, would not the ship have ceased to exist whereby the performance of the contract became impossible, the ship being then at the bottom of the sea? *Quoad* the performance of the contract, it would have perished; and what is the difference in principle between the ship being at the bottom of the sea and being stranded upon a rock in the Baltic, as the *Orlando* was, and thereby wholly unable to take in a cargo pursuant to the contract? In either case, in my opinion, the performance of the contract became impossible by reason of the particular specified thing—*i.e.*, the ship ceasing to exist as a cargo-carrying ship, or, in other words, as regards that purpose having perished. This is not a case in which the thing contracted is possible in itself and the contracting party is only unable to perform it by causes beyond his own control, such as in the case of an unexpected sudden frost: *Kearon*

v. *Pearson*, 10 W. R. 12, 7 H. & N. 386. In such a case it is the party's own fault for undertaking unconditionally to fulfil a promise. In the present case, as before pointed out, he has not done so, for the promise he has made is conditional. It also seems to me that the suggested point of the detention of a ship by adverse winds would clearly not fall within the above rule, for in such a case the ship has not ceased to exist at all. It exists as a cargo-carrying ship, but is merely behind time on its voyage. The next point taken by the plaintiffs was that by reason of clause 5 of the contract the implied condition of the continued existence of the ship was negatived, and that it was only the matters mentioned in that clause which excused the performance of the contract. In my opinion the matters mentioned in clause 5 in no way negative the true construction of the contract, which is that the contract is not positive and absolute, and that clause 5 affords an excuse for the not shipping of the cargo over and above the perishing of the ship, which is the implied condition. In my judgment it is not true to say that there is a warranty in this contract that the ship shall be in existence in January, 1900. I think that the judgment of Mathew, J., is correct, and that this appeal must be dismissed with costs.

VAUGHAN WILLIAMS, L.J., read the following judgment: I regret to say that I have come to a different conclusion from that arrived at by the Master of the Rolls, and with which I understand Romer, L.J., agrees. The question in this case is whether, according to the true construction of the cotton seed cargo contract, there was an absolute contract by the sellers, the now defendants, to load a cargo in January. In other words, did the sellers take upon themselves the risk of the ship declared by them under this contract being prevented by unforeseen circumstances beyond their control from loading a cargo at one of the ports of loading named in the contract during the month of January, 1900? It was argued by the plaintiffs that there was an absolute contract, and that the defendants did take the risk from which they had not in terms protected themselves. On the other hand, it was argued by the defendants that this was a case of a cargo to be shipped by a particular vessel at a named port, at a particular time, and that the obligation to load was made to depend on the arrival of that vessel at that port at the proper time, and that the defendants had not warranted that the vessel should be able and ready to take the cargo on board at the stipulated time, and, therefore, that the defendants were in the event which had happened of the disability of the ship through perils of the sea, without default of the defendants, to take the cargo at Alexandria at the proper time, relieved from further performance of a contract which assumed the continued existence and safe arrival of the vessel in a condition fit to take the cargo. The obligation to ship the cargo, the defendants argued, was not absolute, but, in common with every other obligation in the contract, was conditional on the arrival in proper time of the declared vessel at Alexandria.

Now it was settled by the judgment of Blackburn, J., in *Taylor* v. *Caldwell* that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Prior to the decision in *Howell* v. *Coupland* it used to be supposed that the doctrine as expressed by Blackburn, J., like the cases *de certo corpore* cited by him from the civil law, was based upon the assumption of the continued existence at the date for the fulfilment of the contract of something existing at the date of the making of the contract, which is obviously quite different from the present existence at the date for fulfilment of the contract of something to come into existence after the contract by the action of a party to it done in pursuance of the contract. The principle laid down in *Taylor* v. *Caldwell* was, however, somewhat widened in the case of *Howell* v. *Coupland*, for in that case it was decided that on a contract for the sale of a specific crop on particular land the seller is to be excused if performance is prevented by the subject-matter of the sale ceasing to exist, without default of the promisor, before the time of performance, even though the subject-matter of the contract was not in existence at the time of the contract, as is assumed, as it seems to me, in the principle as stated by Blackburn, J. The fact is that the answer to the question whether the obligation of the contract is dependent on the existence of some thing or combination of things at the time for fulfilment, or whether one party to the contract warrants the existence at that time of that thing or combination of things, is always a question of intention of the parties to be gathered from the contract as expressed, and the subject of it. Hannen, J., in *Baily* v. *De Crespigny*, 17 W. R. 494, L. R. 4 Q. B. 180, thus expresses himself: "There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Can it be said that the non-arrival of *The Orlando* at Alexandria in January (the event which caused the impossibility) was not or might not have been anticipated and guarded against in the contract? Or can it be said that that event cannot be reasonably supposed to have been in the contemplation of the contracting parties? Or that the general words were not used with reference to the possibility of the contingency which afterwards happened—viz., the non-arrival in time at Alexandria of *The Orlando* by reason of the perils of the sea? I do not think so, nor do I think business people would think so. The time of loading is a condition introduced into the contract for the benefit of the buyers. It is a condition which the buyers could waive. The event which caused the impossibility of loading in January is an event against which the sellers could have insured. The selection of the vessel, the terms of the charter of that vessel, the risk which the vessel selected would have to run by reason of the length of the preliminary voyage, are all matters within the control of the sellers. The buyers have no voice in the matter. Is it unreasonable to read the general

words as throwing on the sellers the risk of the non-arrival of the selected ship within the contract time? The sellers might have excepted this risk or insured against it. It seems to me that in order to prevent general words covering a particular obligation which in terms the general words are wide enough to include the particular obligation must be of the essence of the contract, and further, must be of the essence of the contract in such sense that neither party can waive the obligation; or, to express it in other words, the condition must be such that to waive it would be to make a new and a different contract. No doubt where a contract is made with reference to certain anticipated circumstances, and where without default of either party it becomes wholly inapplicable to any such circumstances, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made; but where a party to a contract promises the other party to do a certain thing, or to have a certain thing done, at or before a specified time, and fails to perform his promise, in such case even though the thing promised to be done is of the essence of the contract and a condition precedent, so that the promisor cannot claim to have the promisee carry out his side of the contract, this does not put an end to the contract in such sense that neither party can enforce any obligation under it against the other, but only gives the promisee the option to rescind the contract, unless indeed the anticipated circumstance which has failed to occur or continue is of such a character as to put an end in a commercial sense to the commercial speculation entered upon by the parties to the contract. But a circumstance which one party to the contract can waive, without putting an end to the commercial speculation, cannot be such a circumstance. In the present case nothing has caused it to be impossible for the sellers to supply cotton seed of the contract quality or to prevent them shipping it on board *The Orlando* at Alexandria; the sellers, according to my view, took upon themselves to promise that the owners of *The Orlando* should have her at Alexandria ready to take the cargo at a specified time. The peril of the sea has made it impossible for the owners of *The Orlando* to have her there at that time, and made it impossible, therefore, for the sellers to load *The Orlando* at Alexandria in January, but this event has not made it impossible that the contract should be carried out. On the contrary, if the buyers chose to waive the time condition, the contract can be performed by loading *The Orlando* at Alexandria. Nothing in the facts of this case suggests that the delay for repairs was so long as to put an end to the commercial speculation intended by the parties to the contract. By reason of the perils of the sea *The Orlando* did not arrive at the time the shipowner contracted it should arrive, but the delay was not such that the voyage was frustrated, neither was the contract of sale. It follows that the plaintiffs had a good cause of action on the failure of the sellers to load the cotton seed, even though the perils of the sea made it impossible for *The Orlando* to arrive at Alexandria at the specified time. I have thought it right to express my opinion in this matter (which unfortunately is contrary to that of my brethren) although it is not, for a reason which I will give, of very great practical importance with regard to the result of the action, for I entirely agree with the opinion of Mathew, J., as to the measure of damages in case the plaintiffs have a right of action, for, according to this measure, the sum paid into court, together with a denial of liability, is more than sufficient to satisfy the plaintiffs' cause of action.

ROMER, L.J.—A clear principle, applicable to cases of this kind, was laid down by Blackburn, J., in delivering the judgment of the Court of Queen's Bench in *Taylor* v. *Caldwell*. The passage in the judgment which states the principle has already been read. It was laid down after a review of all the cases and after very careful consideration. It has been followed in all the cases since that time, and has never been dissented from; and it works complete justice. It is a principle which is easy to follow, and affords a certain guide in a doubtful and difficult branch of the law. It is most useful to business men that the law on the subject should be clear and well defined, and the principle above referred to should be adhered to and not rendered doubtful or weakened by making exceptions to its application. Does that principle apply to the present case. In my opinion it does. I think that the parties to this contract must from the beginning have known that it could not be fulfilled unless in January, 1900, the particular specified thing necessary for the carrying out of the contract—that is, the steamship *Orlando*, continued to exist; and they must at the date of the contract have contemplated such continuing existence as the foundation of what was to be done. Then is there here any implied warranty by the defendants that the ship shall continue to exist? There is certainly no express warranty to that effect. Nor do I think that any such warranty can be implied. Some liability in respect of the ship on the part of the vendors must no doubt be implied, and difficult cases may arise as to the extent of this liability. But we have not in this case to decide as to the extent of that liability, for I think that it cannot be implied that the liability extended to a warranty that the ship would continue to exist. That being so, the principle applies. The next question is, Did the ship continue to exist in January, 1900, within the meaning of the statement of the principle. I think not. I think that the ship did not exist within the meaning of the phrase as used by Blackburn, J. The ship was not in January, 1900, in existence as a cargo-bearing ship. This fact has already been dealt with by the Master of the Rolls, and I need not add anything to what he has said. I should perhaps say with regard to the argument founded on clause 5 of the contract that that clause, in my opinion, does not affect the above view, for the different special circumstances dealt with in that clause all contemplate the existence of the ship. I therefore agree with the Master of the Rolls in thinking that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward, & Hawksley.*

Solicitors for the defendants, *Tilleards.*

From Chan. Div. (Collins and Stirling, L.JJ.) — May 3.

SPENCE v. COLEMAN AND INSPECTOR-GENERAL IN COMPANIES' LIQUIDATION. (a.)

Company — Winding-up — Undistributed assets—Payment in to Companies' Liquidation Account—Inspector-General—Shareholder—Garnishee order—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 15.

In order to put into force the garnishee procedure the

(a.) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

judgment creditor must show that there was a debt due from the garnishee to the judgment debtor.

Payment to the Companies' Liquidation Account by a liquidator of a sum due to a judgment debtor does not constitute the relation of debtor and creditor as between the Inspector-General and the judgment debtor, and therefore the garnishee procedure does not apply.

This was an appeal from an order of Day, J., made in chambers, and raised a question of some importance as to the liability of officials of the Board of Trade with regard to money paid to the Companies' Liquidation Account by the liquidator of a company.

A company called the Bluebell Proprietary Co. (Limited) was wound up voluntarily, and the liquidator after paying the debts of the company and the costs of liquidation had a surplus in hand for distribution among the shareholders.

The defendant Coleman, one of the shareholders, had a sum of £116 19s. 5d. due to him.

The liquidator sent the usual notices to him, but he was absent abroad and his address was not known, and the notices were returned through the post.

Under these circumstances the liquidator, as he was required to do by section 15 of the Companies (Winding-up) Act, 1890, paid the said sum of £116 19s. 5d. to the Companies' Liquidation Account at the Bank of England.

A creditor of Coleman named Spence recovered judgment against him for £1,829 18s. 9d., and he obtained from Day, J., a garnishee order absolute against the Inspector-General as garnishee, attaching the sum of £116 19s. 5d. to answer *pro tanto* the judgment debt.

The order was in the ordinary form, that "the said garnishee do forthwith pay to the said judgment creditor the debt due to him from the judgment debtor, or so much thereof as may be sufficient to satisfy the judgment debt, and that in default thereof execution may issue for the same."

The Inspector-General in Companies' Liquidation appealed.

The Companies (Winding-up) Act, 1890, s. 15, provides: "(3) If it appears . . . that any liquidator of a company has in his hands or under his control any money representing unclaimed or undistributed assets of the company which have remained unclaimed or undistributed for six months after the date of their receipt, the liquidator shall forthwith pay the same to the Companies' Liquidation Account at the Bank of England . . . (5) Any person claiming to be entitled to any money paid into the Bank of England in pursuance of this section may apply to the Board of Trade for payment of the same, and the Board of Trade may, on a certificate of the liquidator that the person claiming it is entitled, make an order for the payment to that person of the sum due. Any person dissatisfied with the decision of the Board of Trade in respect of any claim made in pursuance of this section may appeal to the High Court." It has been decided that section 15 applies to companies in voluntary liquidation: *In re Stock and Share Auction and Banking Co.*, 42 W. R. 300, [1894] 1 Ch. 736.

Sir Robert Finlay, A.G., Muir Mackenzie, and *R. J. Parker*, for the appellant, argued that no debt was due from the Inspector-General or any other official of the Board of Trade to the judgment debtor, and that if there were such a debt the only mode of obtaining payment was that provided by sub-section 5 of section 15 of the Act of 1890, and that consequently the garnishee procedure had no application.

They referred to *Prout* v. *Gregory*, 38 W. R. 204, 24 Q. B. D. 281; *Hunter* v. *Greensill*, 21 W. R. 263, L. R. 8 C. P. 24; *Dolphin* v. *Layton*, 27 W. R. 786, 4 C. P. D. 130; *In re Warwick and Worcester Railway Co., Ex parte Turner*, 2 De G. F. & J. 254, 19 W. R. Ch. Dig. 116; *Klauber* v. *Weill*, 17 Times Law Rep. 344.

Rufus Isaacs, K.C., and *McIntyre*, for the judgment creditor, contended that sub-section 5 of section 15 did not apply, because the judgment creditor could not obtain a certificate from the liquidator that he was entitled to the fund unless he first obtained a garnishee order. The case of *In re Warwick and Worcester Railway Co., Ex parte Turner*, was an authority in their favour because an official of the Board of Trade was not an officer of the court, and could not direct him to pay in the same way as it could direct its own officer.

COLLINS, L.J., said that in order to put in force the garnishee procedure the judgment creditor must establish that there was a debt due from the garnishee to the judgment debtor. In his lordship's opinion there was no debt due from anyone who could be named as regarded the sum paid into the account at the bank. The effect of a number of cases which had been cited was that when there was in the hands of an officer of the court a sum of money which was payable to a given person the relation of debtor and creditor did not exist between the officer of the court and that person. That was the principle of the decisions, and it had been applied to (amongst others) trustees in bankruptcy and the registrar of a county court. It was contended that that principle did not apply to the present case. His lordship thought that that argument was not well founded. The proceedings were regulated by the Companies (Winding-up) Act, 1890. Section 15, sub-section 3, provided for the payment of the money to the account, and by sub-section 5 provided as to the way in which the money paid in was to be paid out to a claimant. For this purpose the person who had the custody of the money was an officer of the Board of Trade and could do nothing without their order. Every principle laid down in the cases referred to applied equally to an officer of the Board of Trade. There could be no doubt that as between him and the judgment debtor there was no debt due from him, but only an obligation on his part to hand over the money under the direction of the Board of Trade It appeared to his lordship that there was no debt due to the officer, and if there was a debt there was only one means of recovering it—namely, that pointed out by sub-section 5 of section 15. It was said that under no circumstances could the judgment debtor avail himself of sub-section 5 because the liquidator had not the materials for certifying that the judgment creditor was entitled to the money. That argument cut both ways. It might be that this mode of recovering the money was not framed to meet this particular case. Whether the fund could or could not be reached in some other way the court had not now to decide. It was sufficient to say that the garnishee procedure did not apply to the present case.

STIRLING, L.J., agreed and said that in *In re Warwick and Worcester Railway Co., Ex parte Turner*, which had been relied upon, a company was indebted to a judgment creditor, and, notwithstanding the liquidation of the company, an order was made attaching money in their hands to answer the debt, but no order was made against the liquidator. Here the order was made against the Inspector-General, which was a totally different order

from that made in *Ex parte Turner*. In that case an order had been made in the proper form, and effect was given to it in the winding up. In the present case no proper order attaching the fund had yet been made. However much it might be regretted that every kind of property of a judgment debtor could not be attached to answer his debt, the court must not depart from the rules which had been laid down.

Appeal allowed.

Solicitors, *Solicitor to the Board of Trade; Bird, Moore, & Strode.*

Appeal.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 14.

DREDGE *v.* CONWAY, JONES, & CO. (*a.*)

Master and servant—Employers' liability—Accident—Compensation—Repair of building—Whitewashing—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

Whitewashing the ceilings of a house held to be "repairing" a building within the meaning of section 7 of the Workmen's Compensation Act, 1897.

Wood *v.* Walsh, 47 *W. R.* 504, [1899] 1 *Q. B.* 1009, *is overruled by* Hoddinott *v.* Newton, Chambers, & Co., ante, *p.* 380, [1901] *A. C.* 49.

Appeal from the decision of the judge of the Gloucester County Court in an arbitration under the Workmen's Compensation Act, 1897.

The applicant for compensation was the widow of a workman who had been killed by an accident while engaged in the service of the employers upon certain inside work at St. Mark's Schools at Gloucester.

The estimate for the work undertaken by the employers comprised the following particulars—viz., scraping and whitening or distempering ceilings, brushing down and distempering or redistempering walls, cleaning and touching up with paint certain woodwork and portions of walls, painting certain chimney pieces, window sashes, and balusters, cleaning roof timbers, repairing kerbs of grates and resetting hearths of fireplaces, rehanging a door, providing and fixing knobs to a desk, and replacing or providing and refixing hat hooks. Extra to this estimate there was certain additional work, which, besides work of a similar description, included repairs to spouting and roof, and the reglazing of broken window panes.

The building was over thirty feet in height.

On the day of the accident a workman named Vaughan was at work on the top landing of the premises, whitewashing and stopping the staircase ceiling. He was working on an erection formed in the following manner: On the top landing two short ladders were placed against opposite walls, and a plank 8ft. or 10ft. long was placed between them, with its ends resting one on each ladder within a round or two of their tops. From the next landing below and reaching up to the top landing was placed a ladder about 22ft. long, and from this long ladder to the plank resting on the two short ladders was placed a second plank 16ft. long, with one end resting on one of the top rounds of the long ladder, and the other end resting on the shorter plank. Vaughan found that he could not reach the higher part of the arched ceiling from the 16ft. plank, and called to the deceased man Dredge, who was foreman of the work, to help him. Dredge brought a step ladder, and placed it on the 16ft. plank, with its top resting against the wall. He then mounted the step ladder, and worked at the upper part of the ceiling, while Vaughan stood on the 16ft. plank and held the step ladder steady.

After about a quarter of an hour's work, and while Dredge was liming the walls or ceiling, something gave way, and the step ladder and the two men were thrown from the 16ft. plank down the well of the staircase to the ground floor, and Dredge was killed. It appeared that the work on which Dredge and Vaughan were engaged, and for which the arrangement of ladders and planks was being used at the time of the accident, was that of preparing the ceilings for whitewashing by removing the old whitewash and filling up cracks with plaster.

There was evidence that in the lower part of the walls some of the bricks had become decayed and holes had formed in their surface, and that these holes would have to be similarly plastered. But this part of the work did not appear to have been done until after the accident.

The county court judge was of opinion, on the authority of *Hoddinott* v. *Newton, Chambers, & Co.*, 47 W. R. 499, [1899] 1 Q. B. 1018, and *Maude* v. *Brook*, 48 W. R. 290, [1900] 1 Q. B. 575, that the arrangement of ladders and planks constituted a scaffolding within the meaning of section 7 of the Workmen's Compensation Act, but he held, on the authority of *Wood* v. *Walsh*, 47 W. R. 504, [1899] 1 Q. B. 1009, that the employment of the deceased was not an employment to which the Act applied, because the work on which he was engaged was not that of constructing or repairing a house by means of a scaffolding; for whitewashing ceilings and preparing them for whitewashing was not structural repair, and, though repairs to roofs and spouting might be structural repairs, there was no evidence that that work had been begun at the time of the accident, and assuming repairs to fireplaces to be structural, they were not done by means of a scaffolding. He therefore made an award in favour of the employers, but, in case the Court of Appeal should be of the contrary opinion, he found that the sum to which the applicant would be entitled was £254 3s.

The applicant appealed.

Ruegg, K.C., and *Morton Brown*, for the applicant.

Arthur Powell, for the employers.

A. L. SMITH, M.R.—This is an appeal in a case under the Workmen's Compensation Act, in which the county court judge has decided in favour of the masters. This decision, at the time when it was given, was quite right; it was in accordance with the judgment of this court in *Wood* v. *Walsh*. But since then the case of *Hoddinott* v. *Newton, Chambers, & Co.* has been taken to the House of Lords, and the House of Lords have put a different construction upon section 7 of the Workmen's Compensation Act from that which we put upon it: *ante*, p. 380, [1901] A. C. 49. The question is whether the contract for work entered into by the employers in this case was a contract to do repairs to a building within the meaning of section 7. The building was over thirty feet in height, and the work on which the deceased man was engaged was done by means of a scaffolding. If we had heard this case before the decision of the House of Lords in *Hoddinott* v. *Newton, Chambers, & Co.*, I should have said that this work—viz., whitewashing

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

ceilings, was not within the purview of the Act, because the Act only applied to structural repairs to a building as a whole. In *Hoddinott's case* we had to deal with a stable, which had been built some months, which did not require repair, but which required strengthening by the introduction of iron stays. We held that, as the building was neither being constructed nor being repaired, the case did not come within the section. The House of Lords said that we were wrong. Lord Macnaghten stated the matter thus: "The question, as it seems to me, is this: Was the work—the thing that was actually being done—a work of construction or a work of repair, or something which was neither the one nor the other, neither construction nor repair? It seems a strong thing to say that when a building is once completed according to the original design you cannot have anything further in the way of construction unless the work be of such a character as to make the building practically a new building. That, however, was the argument. But the Act, it will be observed, uses the word 'construction,' not the word 'erection.' It speaks of a building 'being constructed,' not of a building 'being erected.' And it couples 'construction' with 'repair.' Now repair, as the word is commonly understood, is repair whether much is done or little. Repair for the most part is occasional and partial." He does not say, as we said, that repair must be structural. He does not agree with us in thinking that it must be repair of a building as a whole. Then he winds up in these words: "Construction, repair, demolition, these three operations cover, I think, every varying phase in the life of a building from its beginning to its end." Lord Macnaghten does not adopt the limitation which we put on section 7. The question now is whether painting and whitewashing come within the meaning of the word "repair." Painting is certainly one of the incidents of a building, and so is whitewashing. They seem to me to come within the words used by Lord Macnaghten, and after reading his judgment I cannot say that they are not included in repair. Lords Morris, Davey, and Brampton agreed with Lord Macnaghten. It follows that what this court decided in *Wood* v. *Walsh & Sons* is no longer law. I do not decide that mere ornamentation of a building is repair, but I hold that painting is repair, and so is whitewashing. The appeal must therefore be allowed.

COLLINS and ROMER, L.JJ., concurred.

Appeal allowed.

Solicitor for the applicant, *C. T. Courtney Lewis*, for *W. Langley-Smith*, Gloucester.

Solicitors for the employers, *Hurd & Son*, for *F. Treasure*, Gloucester.

High Court of Justice.

K. B. Div.
(Kennedy and Phillimore, JJ.) } May 6.

ATTORNEY-GENERAL *v.* BRUCE AND ANOTHER. (*a.*)

Revenue—Legacy duty—Heirlooms—Person chargeable—Absolute interest—Legacy Duty Act, 1796 (36 *Geo.* 3, *c.* 52), *s.* 14.

A testator directed that certain chattels should be considered as heirlooms and enjoyed by the person or persons for the time being beneficially entitled to a certain mansion-house under the limitations of settlements whereby the mansion-house and certain estates were settled upon A. for life, with remainder to the eldest son of B. (who predeceased the testator) in tail male. A. and C. (B.'s eldest son) resettled the mansion-house and estates on A. for life, with remainder to C. for life, with remainders over, and assigned the chattels to the trustees of the resettlement in trust to allow them to devolve as heirlooms with the mansion-house and estates.

Held, that legacy duty became payable upon the death of A. in respect of the chattels, with the payment of which the trustees of the resettlement were chargeable, being persons having "an absolute interest therein" within the meaning of section 14 *of the Legacy Duty Act*, 1796.

Information.

By his will dated the 14th of December, 1865, the second Marquis of Ailesbury, K.G., directed that the library of books and manuscripts and the bookcases, pictures, drawings, and framed prints, and the statues, vases, marbles, bronzes, and ornamental china and glass in or about his mansion at Savernake Forest and the pleasure-grounds and gardens belonging thereto (with certain exceptions), and also a portion of the plate and plated articles, should be considered as annexed to the said mansion-house at Savernake Forest as heirlooms to be enjoyed by the person or persons for the time being beneficially entitled to the said mansion under the limitations contained in settlements made on the testator's marriage in May, 1837, or subsequently, and upon or subsequent to the marriage of the testator's nephew George John Brudenell Bruce with Lady Evelyn Mary Craven so long as the rules of law and equity should permit.

The testator died on the 6th of January, 1878, and his will was proved on the 3rd of April, 1878.

Under and by virtue of settlements dated respectively, the 10th of May, 1837, and the 3rd of January, 1863 (being the settlements above referred to), the mansion-house at Savernake, together with certain freehold estates, was settled and stood limited at the death of the second marquis to the following uses (omitting limitations which failed)—to the use of Ernest Augustus Charles Brudenell Bruce, third Marquis of Ailesbury, for life, with remainder to the use of the first son of the marriage of George Brudenell Bruce (who predeceased the testator) and Lady Evelyn Mary Bruce in tail male, with divers remainders over.

George William Thomas Brudenell Bruce (commonly called Viscount Savernake), afterwards fourth Marquis of Ailesbury, was the first son of George John Brudenell Bruce.

By an indenture of resettlement dated the 16th of July, 1885, and made between the third Marquis of Ailesbury of the first part, Viscount Savernake of the second part, and the defendant Lord Frederick Bruce and Hugh Mewburn Walker of the third part, in pursuance of an agreement therein mentioned between the third marquis and Viscount Savernake, the mansion-house at Savernake and the freehold estates were appointed and granted by them to the following uses—that is to say (so far as is material to be stated), to the use of the third marquis for life (by way of restoration of his former life estate), with remainder to the use of Viscount Savernake for life, with remainder to the use of the first and every other son of Viscount Savernake successively according to their respective seniorities in tail male, with remainder to the use of Lord Henry Brudenell Bruce, the eldest surviving son of the third marquis, for his life, with remainder to the use of George William James Chandos Brudenell

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Bruce, the first son of Lord Henry Brudenell Bruce, for his life, with remainder to the first and every son of George William James Chandos Brudenell Bruce successively according to their respective seniorities in tail male, with remainders over.

By the same indenture, and in pursuance of the said agreement between them, the third marquis and Viscount Savernake, as settlors, assigned to Lord Frederick Bruce and Hugh Mewburn Walker, their executors, administrators, and assigns, all the articles which by the will of the second Marquis of Ailesbury were directed to be maintained and considered as annexed to the mansion-house at Savernake Forest as heirlooms, to be enjoyed by the person or persons entitled to the mansion-house under the existing settlements, to hold them upon trust to allow them to go and devolve and remain as heirlooms, together with premises thereinbefore appointed and granted respectively, so far as the rules of law or equity would permit, but so that the same should not vest absolutely in any person thereby made tenant in tail male by purchase unless such tenant should attain the age of twenty-one years, but on the death of such tenant in tail male by purchase under the age of twenty-one should go, devolve, and remain in the same manner as if they had been freeholds of inheritance, and had been settled accordingly.

The third Marquis of Ailesbury died on the 18th of October, 1886. His grandson Viscount Savernake thereupon became the fourth marquis. He became bankrupt and died without issue on the 10th of April, 1894.

Lord Henry Brudenell Bruce thereupon became fifth marquis, and he became entitled for life to the freehold estates, and the above-mentioned heirlooms vested in the defendants, the present trustees of the resettlement, upon the trusts declared by the indenture of resettlement.

The Commissioners of Inland Revenue claimed that under the circumstances aforesaid legacy duty under 36 Geo. 3, c. 52, on the chattels settled by the will of the second marquis as heirlooms became payable by the defendants either on the execution of the indenture of the 16th of July, 1885, or on the death of the third marquis in October, 1886.

Section 14 of the Legacy Duty Act, 1796, enacts as follows: "Provided always and be it further enacted, that no duty shall be paid on any article of plate, furniture, or other things, not yielding any income, and given to or for the benefit of, or so as that the same be enjoyed by different persons in succession, whilst the same shall be so enjoyed in kind only by any person or persons not having any power of selling or disposing thereof, so as to convert the same into money or other property yielding income; but if the same shall be actually sold or disposed of, or shall come to any person or persons having power to sell or dispose thereof, or having an absolute interest therein, then, and in each and every such case, the same duty shall be chargeable and paid thereon as if the same had been originally given absolutely and with full power to sell or dispose thereof and shall be chargeable upon and paid by the person or persons for whose benefit the same shall be sold or who shall have power to sell or dispose thereof or an absolute interest therein, and shall become a debt of such person or persons. . . ."

Sir R. Finlay, A.G., and *Vaughan Hawkins*, for the Crown.—The exemption in section 14 of the Act only applies so long as the chattels are in the hands of persons with a limited interest. When they come into the hands of a person with more than a limited interest then the duty becomes payable. This took place on the death of the third marquis. The settlement in 1885 could not prevent the liability to duty accruing. Otherwise it would be possible, by means of successive resettlements, to postpone the payment of duty *ad infinitum*. The defendants, as trustees of the resettlements, are liable to pay the duty inasmuch as they are persons "having an absolute interest" in the chattels: see *Bliss* v. *Putnam*, 7 Beav. 40; *Nisbett's Trustees* v. *Learmonth*, 8 Ct. Sess. Cas. (2nd series) 69; and *Bryan* v. *Mansion*, 5 W. R. 483, 3 Jur. N. S. 473.

Danckwerts, K.C. (*Spencer Butler* with him), for the defendants.—Unless the Crown can clearly show that the property is within the terms of the Act they must fail: see *Commissioners of Inland Revenue* v. *Angus*, 38 W. R. 3, 23 Q. B. D. 579, at p. 589, and *Tennant* v. *Smith*, [1892] A. C. 150, at p. 154, 40 W. R. Dig. 216. On the death of the third marquis the chattels in question came into the hands of the fourth marquis, a person not having any power of selling or disposing thereof. They were therefore exempt from the payment of duty by virtue of section 14 of the Legacy Duty Act, 1796. Heirlooms are a *damnosa hereditas*. There is therefore no absurdity in holding that they are exempt from duty *ad infinitum*. Assuming that the duty is payable, the only person liable to pay it was the fourth marquis. The scheme of the Act is that the executors shall be primarily liable to pay the duty, and that upon payment of the legacy to the person entitled to it before the duty had been paid such person becomes jointly liable with the executor: see section 6. It is true that by section 14 the person having an absolute interest in the chattels is made liable to pay the duty, but that means the person having an absolute beneficial interest.

KENNEDY, J.—The question in this case turns upon the effect to be given to section 14 of the Legacy Duty Act, 1796. Now it seems clear that if there had been no resettlement the fourth marquis would have become the absolute owner of these heirlooms. But by reason of the resettlement he did not become so. What he did become, subsequently, was a bankrupt. But the trustees, who are the defendants to the information, did become possessed of the heirlooms upon the trusts of the resettlement. The question is, has the legacy duty become payable by them? That question seems to me to turn on this, whether or not the fact that the heirlooms never became under the circumstances the property of the fourth marquis, but passed to the defendants, prevents there having been anybody in fact who was the absolute owner, because before the ownership accrued to the fourth marquis they came into the hands of the defendants as trustees under a document which, as it were, again tied up the heirlooms in a special way; or whether, again, the section never came into operation at all because of the mere fact of the settlement having intervened before the marquis ever became, or could become, absolute owner. In my view our decision must be governed by the principle which was applied by Lord Cranworth in *Bryan* v. *Mansion*. Where, in fact, there would have been an absolute owner from whom the legacy duty would have been claimable by the Crown, and he chooses to part with the property by assignment to somebody else, then it is a question whether that somebody else (in this case the defendants) ought not to be treated as persons who are assignees, and not as persons taking under a will, or under a disposition of that kind, and whether they must not take with what they got by the assignment the liability to pay the duties which would have become due from the assignor. It seems to me that the defendants are, within the principle of Lord

Cranworth's decision, assignees who are subject to the burden as well as the benefit of the assignment, that burden being the burden laid upon the fourth marquis by the terms of section 14. In my view, therefore, the Crown is entitled to succeed in this action.

PHILLIMORE, J.—I am of the same opinion. This case raises two points—one very easy, the other somewhat difficult. The second Marquis of Ailesbury bequeathed a great number of specific chattels upon terms as nearly as possible corresponding to the limitations of certain estates under two settlements. Under the marquis's will and those settlements, and in the events which happened, the fourth marquis would, if nothing had been done to defeat his interest, have become absolutely entitled to these chattels by reason of his being tenant in tail male in possession of the estates. Before the estates or chattels came into possession he executed a new settlement, tying up the estates and the chattels, reducing his own individual interest in them to an estate for life, and limiting various lives and remainders over. He then became bankrupt and died. The result is that hitherto the Crown has got no duty upon his coming into possession of the chattels, section 14 of the Legacy Duty Act, 1796, preventing any duty attaching while the chattels are out in life interest.

It is said, in the first place, that there is no duty payable at all, because the effect of the resettlement before the chattels vested in possession is to prevent there ever being an absolute interest. Now this class of resettlement of chattels as heirlooms is very old, and I should say that since the Legacy Duty Act has been passed there must have been more than one such resettlement every year in the 100 odd years it has been in existence, and it is certainly strange to learn that the Crown has been deprived of all duty on those chattels during the whole of that period, either by submitting not to ask for duty under such settlements or by not amending the law. However that may be, I have not the slightest doubt that it does not lie in the mouth of the fourth marquis, or those claiming title under him, to say that the property has not vested in absolute possession. The fourth marquis would have had an absolute interest in the chattels if he had not divested himself of possession before his interest came into possession and passed it on to the defendants. He cannot defeat the right of the Crown by so doing.

Then comes the difficult question whether the defendants are liable instead of himself. Now one cannot help seeing that, in this particular case, the Crown might be defrauded of a very just claim if we were to hold that the defendants were not liable. The fourth marquis became bankrupt, but before his bankruptcy he had passed his absolute interest in these chattels to the defendant. It is possible if he had kept them he would never have been bankrupt; it is still more possible that there would not have been enough to satisfy the preferential claim of the Crown against his assets for this duty. Therefore I confess I approach the contention on the part of the defendants with some hesitation; but I think that contention disappears on a consideration of the three cases cited to us, and more especially of the decision of Lord Cranworth in *Bryan* v. *Mansion*. Probably the true view of section 14 is that the persons who at the moment when the interest actually vests in possession have the right to call for the property are the persons within the meaning of that section, and are the persons then having an absolute interest therein who are made liable. Either on that ground or upon the ground of extension—for which we have the sanction of the Lord Chancellor—it seems to me that the Crown is entitled to succeed.

Judgment for the Crown.

Solicitor for the Crown, *Treasury Solicitor.*

Solicitors the defendants, *Nichol, Manisty, & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 2.

BROADBENT *v.* SHEPHERD. (*a.*)

Local government — Nuisance — Abatement — "Owner" of premises — Appeal — Case remitted — "Owner" ceasing to be owner before rehearing—Jurisdiction to make order on "owner"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 96, 98, 104.

The court having held, upon a case stated by justices, that the respondent, a person receiving the rack-rents as agent for the landlord, was the "owner" of the premises upon whom an order could be made under sections 94 *and* 96 *of the Public Health Act,* 1875, *to abate a nuisance thereon arising from structural defects* (*see* ante, *p.* 205), *the agent resigned before the case came again before the justices, who, under the change of circumstances, refused to make the order.*

Held, that the justices should have made the order on the agent, for it would not be entirely nugatory, as, if disobeyed, it would have enabled the local authority to enter on the premises and do the work itself and charge the expenses on the person liable.

Appeal by special case from the decision of justices for the West Riding of Yorkshire, on a complaint laid by the appellant, on behalf of the Castleford Urban District Council, against the respondent, as the statutory "owner of certain premises in the district, and alleging failure on the part of the respondent to comply with a notice served on him under section 94 of the Public Health Act, 1875, requiring him to abate certain nuisances on the said premises.

The complaint originally came on before the justices on the 27th of June, 1900, when it appeared that the nuisance existed and was due to structural defects, but that the respondent was a mere rent collector or agent for the real owners of the premises.

The justices were of opinion though the respondent was "owner" of the premises within the definition of that term in section 4 of the Public Health Act, 1875, it was not the intention of the Act to create two ownerships under section 94, and that the definition of "owner" did not apply to the interpretation of that section; and they therefore dismissed the complaint. On the application of the appellant, they, however, stated a special case on the point for the determination of the High Court.

On the 15th of November, 1900, the High Court ordered that the decision of the justices should be reversed, and remitted the case to the justices with an intimation that a rent collector or agent is an "owner" for the purposes of section 94 of the Public Health Act, 1875: see *ante*, p. 205, and 17 Times L. R. 52 for report of these proceedings.

On the 5th of December, 1900, the complaint, having been reinstated in accordance with the decision of the High Court, again came on for hearing. It then appeared that the respondent had, since the last hearing, resigned the agency of the property.

The justices were urged by the appellant to make an order on the respondent to abate the nuisance.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

They, however, were advised that they had no power to make an order on the respondent, on the ground that such an order can only be made on a person who is an "owner" of the premises when the order is made. They accordingly dismissed the complaint, subject to the present case.

Macmorran, K.C., and *Scholefield*, for the appellant.—The justices ought to have made the order, because, although the respondent was then no longer "owner," he was owner when the case first came before them. Even now the order would not be nugatory, for it would give the local authority power to enter on the premises and do the work if the order were not carried out by the person made liable under powers given them by sections 98 and 104 of the Public Health Act, 1875.

No one appeared for the respondent.

THE COURT allowed the appeal.

Lord ALVERSTONE, L.C.J.—When the case was originally before this court, consisting of Kennedy, J., and myself, we held that the justices ought to have made the order, because the person against whom it was sought was "owner" of the premises within the definition given in the Act. I assume that if they had made the order then it would have been an order to abate the nuisance within a given number of days. What has happened is, shortly, this: At some time after the first hearing before the justices the respondent had ceased to be agent to collect the rents for the landlord. If the sole object of the order sought were to obtain a personal remedy against the respondent as an individual, though even in that case I am not prepared to express an opinion that such an order could not be made, different considerations would arise. It might then be said that the order would be a mere empty order, and ought not to be made. But when sections 96, 98, and 104 are looked at it seems clear that one object of the order would be to give the right to the local authority to enter upon the premises and do the work necessary to abate the nuisance and recover the expenses from the person responsible. We have held that the justices had originally jurisdiction to make the order on the respondent as the agent; and, in my view, when the case went back to them they should then have made the order they should have made in the first instance, unless, as I have pointed out would not be the case in this instance, that order would have been wholly nugatory. We think that the justices ought to have made the order, notwithstanding that the former agent had ceased to be agent on the second occasion that the matter came before them, because that order, if disobeyed, would have given the local authority power by virtue of section 98 to enter upon the premises and do whatever might be necessary in execution of the order. By section 104 power is given to a local authority in such a case to recover their costs and expenses from the owner for the time being of the premises. The order, therefore, would not have been nugatory, and the justices ought to have made it. The case must again be remitted.

LAWRANCE, J., concurred.

Solicitors, *G. T. B. Thurnell*, for *Claude Kemp*, Castleford.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.)

April 30.

STEAD v. NICHOLAS. (a.)

Fishery — Fishery district — Reservoir within the geographical boundary of a fishery district—Jurisdiction of Board of Trade—Taking trout or char from reservoir—Freshwater Fisheries Act, 1878 (41 *&* 42 *Vict. c.* 39), *s.* 6—*Salmon and Freshwater Fisheries Act,* 1886 (49 *&* 50 *Vict. c.* 39), *s.* 3.

Neither section 6 *of the Freshwater Fisheries Act,* 1878, *nor section* 3 *of the Salmon and Freshwater Fisheries Act,* 1886, *give power to the Board of Trade to include an artificial water reservoir frequented by trout and char in a fishery district.*

Appeal from a decision of two justices for the West Riding of Yorkshire dismissing an information laid by the appellant against the respondent and charging him with a breach of section 35 of the Salmon Fishery Act, 1865, as extended to trout and char by sections 6 and 7 of the Freshwater Fisheries Act, 1878, by fishing for trout without a licence in the Thrybergh reservoir.

The only question was whether the reservoir, which had been constructed under statutory powers and belonged to the corporation of Doncaster, was to be considered within the Yorkshire fishery district.

The limits of the district were defined by a certificate given by the Board of Trade acting under section 3 of the Salmon and Freshwater Fisheries Act, 1886, as follows: "The limits of the Rivers Derwent, Wharfe, Nidd, Ure, Swale, and Ouse, and the fishery district of the said rivers include all such estuaries, rivers, streams, brooks, lakes, ponds, canals, dykes, cuts, drains, channels, watercourses, and waters as lie within" the limits defined by certain lines and boundaries in the said certificate set forth and described.

Geographically the reservoir was within the bounds of the fishery district, but it was contended that the Board of Trade had not by the words of their certificate included the reservoir in the district, and if they had that they had no power so to do.

H. Avory, K.C., and *Waddy*, for the appellant.—Although there are cases decided before 1878 which show that an artificial reservoir is not a "tributary" of a river within the meaning of the Salmon and Freshwater Fisheries Acts, and therefore that a reservoir could not then be included within a fishery district under the earlier of those Acts, such a reservoir may now be included under powers given to the Board of Trade by sections 6 and 7 of the Freshwater Fisheries Act, 1878, which enact that the provisions of the Fishery Acts of 1865 and 1873 relating to the formation, alteration, combination, and dissolution of fishery districts, and to the authority of the conservators, should thenceforth "extend to all waters within the limits of this Act frequented by trout or char." There was no question that if there was power to include this reservoir in the district the Board of Trade had done so.

T. Willes Chitty, for the respondent.—The only effect of section 6 of the Act of 1878 was merely to extend provisions of the earlier Acts previously confined to salmon rivers and their tributaries to trout streams and their tributaries. It is perfectly clear from the wording of the Acts themselves that waters

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

to be protected under those Acts must be rivers or tributaries of rivers. An artificial reservoir not being included within the scope of the statutes, the attempt of the Board of Trade to include the Thrybergh reservoir within their certificate is *ultra vires* and the magistrates were right in refusing to convict.

THE COURT dismissed the appeal.

Lord ALVERSTONE, L.C.J.—In this case we are asked by the appellant to say that any water frequented by trout and char must be deemed to come within the limits of a fishery district if it is included within the geographical area of that district as defined by the certificate of the Board of Trade. Speaking for myself I should have been glad to adopt the appellant's construction of the statute, but the course of legislation renders that impossible. There is an established code as to salmon rivers and the Legislature has extended its protection to trout rivers or streams as the rivers or streams were frequented by salmon also. Now it is clear that section 6 of the Freshwater Fisheries Act, 1878, did not introduce fresh legislation but merely provided that on and after the passing of that Act portions of the existing code should extend and apply to all waters within the limits of the Act frequented by trout or char. When the provisions of that Act are read alone, I agree it would be reasonable to construe it as meaning to apply to any water in England except water in Norfolk, Suffolk, and Norwich (which are excepted from the operation of the Act by section 3), though that would be no doubt an unusual meaning for the expression "limits of this Act." But the real answer to the appellant's construction of the Act is this—namely, that the Legislature only intended that the provisions of the previous Acts should be extended to include trout and char frequenting waters in which the salmon were already there protected by statute. It would therefore be going too far to construe that section as extending the legislation to waters of another character. For this reason the decision of the justices is right and this appeal fails.

LAWRANCE, J., gave judgment to the same effect.

Solicitors for the appellant, *Steavenson & Couldwell*, for *J. E. Jones*, York.

Solicitors for the respondent, *Coode, Kingdon, & Cotton*, for *T. B. Sugden*, Town Clerk, Doncaster.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 24, 25.

DICKSEE (*Appellant*) v. HOSKINS (*Respondent*). (a.)

Metropolis — Building — Public-house — Separation of part used for trade from part used as dwelling-house —Fire-resisting materials—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 74, *sub-section* 2.

Section 74, *sub-section* 2, *of the London Building Act,* 1894, *does not apply to the case where certain rooms on business premises are used for the purpose of residence, but only to buildings in which the part used for the purposes of trade or manufacture is so structurally separated from the part used for the purposes of a dwelling-house as to constitute a separate tenement.*

Special case.

This was a case stated by G. G. Kennedy, Esq., metropolitan police magistrate.

On Tuesday, the 17th of October, 1900, an appeal under section 150 of the London Building Act, 1894, wherein F. C. Hoskins was the appellant, and B. Dicksee was respondent, was heard before the above magistrate sitting at the Southwark police-court, and upon such hearing the following facts were proved or admitted:

On the 11th of July, 1900, the respondent F. C. Hoskins, a builder, served notice on the appellant, a district surveyor under section 145 of the above Act, of the proposed erection of a building at No. 87, Old Kent-road, together with plans showing that the proposed building was the re-erection of a licensed beerhouse on the site of an old beerhouse called the "Horse Shoe."

On the 15th of August, 1900, the appellant, as such district surveyor, served upon the respondent a notice of objection to the proposed erection of the said building under section 150 of the said Act of 1894, on the ground that it would be in contravention of sub-section 2 of section 74 of the said Act.

The building, when erected, it appeared, would exceed ten squares in area, and would contain (1) in the basement beer and wine cellars, (2) on the ground floor a bar, public lobby, saloon bar, private bar, bar parlour, and a public room, (3) on the first floor a sitting-room, three bedrooms, and a kitchen, and (4) on the top floor attics.

The old house and the site of the new building were licensed and used, and the new building, when completed, would be licensed and used, for the sale of wine and beer, to be consumed on and off the premises under the Beerhouse Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 64), and the Refreshment-house Act, 1860 (23 & 24 Vict. c. 27), and the Acts amending the said Acts respectively.

The trade of the said beerhouse, it appeared, would be carried on on the basement and ground floor and the licensee and his family would reside in the upper floors of the building. The whole of the building would be covered by the justices' certificate and excise licence. The plans for the new building were submitted to and approved by the licensing justices for the Newington division of the County of London.

The floors separating the ground floor from the first floor, and the staircase leading to the first floor, would not be constructed of fire-resisting materials, and if sub-section 2 of section 74 of the said Act applied to this building the provisions of that section would be contravened.

It was contended for the appellant that sub-section 2 applied to the proposed building as it was to be used in part for the purposes of the trade of a beerhouse and in part as a dwelling-house.

It was contended for the respondent that sub-section 2 did apply to a beerhouse, and the decision of *Carritt* v. *Godson & Son*, [1899] 2 Q. B. 193, 47 W. R. Dig. 126, was relied on.

The magistrate found as a fact that the basement and ground floor of the said building were intended to be used for the purposes of the trade of a beerhouse, and that the part above the ground floor was intended to be used as a dwelling-house for the licensed occupier, and he held that the case was governed by the decision in *Carritt* v. *Godson*, and he accordingly allowed the appeal and overruled the objection of the district surveyor.

The question for the opinion of the court was whether such decision was right in law.

The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.) (Local), s. 74, sub-section 2, provides as follows: "In every building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for the purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

floors constructed of fire-resisting materials, and all passages, staircases, and other means of approach to the part used as a dwelling-house shall be constructed throughout of fire-resisting materials."

Section 5, sub-section 23, provides as follows: "The expression 'square' applied to the measurement of the area of a building means the space of 100 superficial feet."

Avory, K.C., and *H. W. Rowsell*, for the appellant.

Danckwerts, K.C., and *W. F. Crates*, for the respondent, were not called on.

Lord ALVERSTONE, L.C.J.—In deciding this case I do not wish at all to found my decision on the judgment of my brothers in *Carritt* v. *Godson & Son*, although I think that decision was perfectly right, because it is possible it may be suggested there was an additional ground for the decision in that case—namely, the possibility of access to the part of the premises by a yard into which the lobby opened.

In this case we have to decide a very important point—namely, what is the meaning of sub-section 2 of section 74 of the Building Act, 1894. I do not think it can be properly contended that that sub-section was meant to apply to the case of the use of rooms in one dwelling-house partly for trade and partly for residence. In the present case there was an ordinary house intended to be used as a beerhouse, and it makes no difference to my mind at all whether it was or was not going to be used as an hotel. The upper floors would, under all ordinary circumstances, be used for the purpose of residence by the licensee. The licence would cover the whole house.

Now, the finding of the magistrate is that the basement and ground floor of the building were intended to be used for the purpose of the trade of a beerhouse and that the part above the ground floor was intended to be used as a dwelling-house by the licensed occupier. I understand that finding to mean that the licensed occupier would live there. In my opinion, whatever be the use of the premises, be they licensed premises or ordinary shop premises or manufacturing premises, if the state of things is that in the one tenement or dwelling-house some people sleep in rooms which are part of that dwelling-house or tenement, the necessity or the obligation to have fireproof divisions does not arise.

Now I come to the words of the section "In every building used in part for the purpose of trade and in part as a dwelling-house." I do not tihnk we can or ought to shut our eyes to the common and known state of things in the year 1894, when this Act was passed.

It was perfectly well known that there were shops with bedrooms over them much larger than ten squares, and it was also perfectly well known that it had become a common practice to have the ground floor and basement, and sometimes the first floor, applied as a separate tenement to trade purposes, and above that as a separate tenement approached by a staircase, a part of the building which was used as a dwelling-house. I am satisfied in my own mind that the section was intended to apply to a building of which there is one part used for trade and another part used as a dwelling-house, those two parts being structurally separated and approached by separate entrances, thus forming two separate tenements.

I can only say that the reasoning in *Carritt* v. *Godson* entirely supports this view, and is an authority in favour of the view which I take, and would have been binding on us, but I wish it to be distinctly understood, speaking for myself, that I have arrived at this conclusion, be it right or be it wrong, on the considerations which arise on the language of this section and the purview of the section quite apart from that decision, with which decision, however, I entirely concur. I think this appeal should be dismissed.

LAWRANCE, J.—I entirely agree. I only desire to say this about *Carritt* v. *Godson*, that with regard to the judgment, both of my brother Day and myself, it was directed almost entirely to agreement with the argument of the learned counsel for the respondents and did not go further. We agreed with him, took the views he took, that the building was not used partly for the purpose of trade and partly as a licensed house, and that being so it was not necessary to go further into the case. I entirely agree with the extension of the principle, if I may so call it, which has been stated by the Lord Chief Justice in his judgment.

Appeal dismissed. Leave to appeal given.

Solicitors, *W. A. Blaxland; P. G. Gates.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — April 16.

THE KING v. NORTH-EASTERN RAILWAY CO. (a.)

Highway — Obstruction—Indictment—Practice—Verdict of acquittal—Motion to stay entry of judgment—Misdirection.

Where a verdict of not guilty has been returned upon an indictment for an obstruction to a highway, the court will not order the entry of judgment to be stayed, on the ground of a misdirection of the judge before whom the indictment was tried, for the purpose of giving an opportunity for the question to be raised again upon a fresh indictment.

Rex v. Inhabitants of Wandsworth, 1 *B. & Ald.* 63, *considered.*

Rule *nisi* directed to the defendants to show cause why the entry of judgment upon the verdict on an indictment for obstructing a highway should not be stayed until further order.

At the general quarter sessions of the peace for the county of Durham, held on the 26th of June, 1899, an indictment was preferred before the grand jury at the instance of the Stanley Urban District Council against the North-Eastern Railway Co., whereby the company was charged with obstructing certain Queen's highways by placing and maintaining thereon certain lines of rails and certain gates, fences, and buildings, and other encroachments, and by running and shunting of engines and trains upon and across the said highways.

A true bill having been found by the grand jury, the indictment was removed by a writ of *certiorari* into the Queen's Bench Division of the High Court of Justice, and on the 12th of July, 1899, the company pleaded not guilty thereto.

The indictment was tried at the summer assizes, 1900, for the county of Durham, before Ridley, J., and a special jury.

It appeared from the evidence given on behalf of the prosecution that upon and across both the highways in question a double line of rails was maintained by the company and also fences, gate-posts, and swing-gates enclosing the rails.

It also appeared that a signal-box and a dwelling-house had been erected and were maintained by the company, and it was alleged that these buildings

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

encroached upon the highway leading from Wolsingham to Newcastle, and that a portion of this highway had been enclosed and was used as a garden in connection with the dwelling-house.

The company, in support of their plea of not guilty, claimed to be justified in maintaining the rails, buildings, fences, and gates alleged to obstruct the highways, and to run and shunt engines and trains on and across the highways by virtue of a grant of wayleave, pursuant to an Act of 13 Geo. 3, from the Bishop of Durham, and another grant of wayleave from the Ecclesiastical Commissioners, and by virtue of the statutes 5 Vict. cxxvii. under which the Pontop and South Shields Railway Co. was incorporated, and 9 & 10 Vict. c. cccxxx., by which the undertaking of the company was transferred to the North-Eastern Railway Co. They denied that the signal-box, dwelling-house, or garden were upon any portion of the highways.

The learned judge refused to leave to the jury any question with reference to the placing of the lines of railway, and the running and shunting of engines and trains, upon and across the highways, and held that although the lines of rails and the shunting of engines and trains would have been obstructions to the highways, the North-Eastern Railway Co. was authorized to maintain them upon the highways, and directed the jury to find a verdict of not guilty upon the first two counts, which related to these matters. It was alleged on behalf of the applicant that the learned judge misdirected the jury in addressing them upon the remaining counts. The jury found a verdict of "not guilty" on the first two counts. Upon the other count they found a like verdict. In answer to the learned judge they stated that they were not decided on the question of the limits of the highway. The learned judge did not ask the jury whether they had considered the question of the limits of the highway, though asked to do so by the applicants, and the judge gave judgment that the verdict was a general one of not guilty.

Scott Fox, K.C. (*Manisty, K.C.*, with him), showed cause.—It is true that the courts have in special cases, where rights would be bound, suspended the effect of a verdict of not guilty upon an indictment in order that a fresh indictment might be brought unprejudiced by the former verdict: see *Rex* v. *Inhabitants of Wandsworth*, 1 B. & Ald. 63; *Reg.* v. *Inhabitants of Southampton*, 19 Q. B. D. 590, 36 W. R. Dig. 89. But in the present case no rights would be determined by the proceedings sought to be stayed, for the offence is a continuing one. It would be straining the rule laid down in the above cases to apply it in the present instance. The ordinary rule that a verdict of not guilty in criminal proceedings shall not be interfered with ought to prevail: see *Reg.* v. *Johnson*, 8 W. R. 236, 2 E. & E. 613; *Reg.* v. *Duncan*, 7 Q. B. D. 198, 29 W. R. Dig. 69; and *Reg.* v. *Russell*, 2 W. R. 555, 3 El. & Bl. 942.

Tindal Atkinson, K.C., and *Bethune*, in support of the rule.—We are entitled to the benefit of the rule laid down by Lord Ellenborough in *Rex* v. *Inhabitants of Wandsworth* on the ground that the judge has decided against us upon one part of the case and has withdrawn that part of the case from the jury, and on the ground that he has misdirected them on the other part of the case. We are therefore entitled to have the proceedings stayed until the trial of a fresh indictment.

Lord ALVERSTONE, L.C.J.—The object of the rule sought to be obtained in this case is to obtain a decision from the court that upon an indictment for obstruction to a highway the proceedings may be stayed upon the ground that there has been some misdirection on the part of the learned judge. Mr. Tindal Atkinson has been obliged to admit that the case is novel inasmuch as he is asking us to extend the practice which was laid down by Lord Ellenborough in *Rex* v. *Inhabitants of Wandsworth*. If we could see our way to holding that the same principle ought to apply we should not hesitate to lay down the rule, but as I have ventured to point out in the course of the argument there is a broad distinction of principle between the two cases. In *Rex* v. *Inhabitants of Wandsworth* Lord Ellenborough appears to have laid down the rule that under special circumstances, where rights would be affected by previous proceedings, he would suspend the effect of the former verdict because great injustice might arise from precluding further discussion, and he referred to a previous case, *Reg.* v. *Inhabitants of Middlesex*, in which he had so acted. Now, there have been a long series of decisions, including *Reg.* v. *Russell*, *Reg.* v. *Johnson*, and *Reg.* v. *Duncan*—all of them applications for a new trial—in which the court has uniformly refused to grant a new trial, but even in those cases the court thought it right to take the same action as Lord Ellenborough, L.C.J., took in *Rex* v. *Wandsworth*, and as Lord Coleridge, L.C.J., pointed out in *Reg.* v. *Inhabitants of Southampton*, they of course could have done so as the rule moved in one form would not have precluded them from giving a remedy. Ought we to extend the rule to cases of obstruction to a highway? The reasoning used by the learned judges in more than one of those cases would seem to afford a conclusive argument against any such extension. It has been most fairly admitted by Mr. Tindal Atkinson that in the event of an indictment being preferred in respect of a continuance of the same obstruction the present acquittal could not be used as an answer by the defendant to the proceedings. Therefore, as I have already pointed out, an attempt is being made to induce us to extend the rule laid down as to cases where rights would be affected to cases where rights would not be affected. The main ground on which this has been urged is the difficulty in which the prosecutors would find themselves, and we were urged to extend the rule because, it was said, the learned judge had misdirected the jury, and had withdrawn a part of the case from their consideration. Assuming that the judge had misdirected the jury, that would not be sufficient to justify the court in staying the proceedings. The learned judge has not given a judgment which will finally determine the rights of the parties. He has directed the jury as to his view of the legal rights applicable to the facts before him. Mr. Atkinson says that any other judge who tries another indictment will feel himself bound to adopt exactly the same view of the law. I do not think that any judge would feel himself so bound. He would endeavour to apply to the facts then before him his own view of the law. In *Reg.* v. *Duncan* the application was for a new trial, and was based on misdirection, but nevertheless the application was refused. Coleridge, L.C.J., in *Reg.* v. *Southampton*, indicated that in a proper case, although the application was for a new trial, the court would have adopted the course adopted by Lord Ellenborough, of which he approved, and would have stayed the proceedings. Therefore inasmuch as the prosecutors can to-morrow take fresh proceedings in respect of the obstruction, it would in my opinion be wrong to extend the rule of arresting the entry of judgment to a case in which no rights have been determined but the only question has been whether the jury thought there was an obstruction or not.

I will add that there seems to be a further broad

distinction between this case and the cases cited, because the parties can by informing the Attorney-General obtain the use of his name and then the proceedings can be carried to the superior courts and to the House of Lords if necessary, so that any ruling of the learned judge can be finally determined. In my opinion the rule ought to be discharged.

LAWRANCE, J.—I entirely agree.

Rule discharged.

Solicitors for North-Eastern Railway Co., *A. Kaye Butterworth.*

Solicitors for the Stanley Urban District Council, *George Reader & Co.*

K. B. Div. (Bigham, J.) March 15, 18; April 3.

LORENZO REPETTO *v.* MILLARS KARRI AND JARRAH CO. (LIMITED). (*a.*)

Ship — Bill of lading—Freight—Right of captain to sue for.

The defendants chartered a ship to carry a cargo. The charter-party provided that the captain should sign bills of lading at any rate of freight without prejudice to the charter-party. A cargo was loaded, and bills of lading incorporating the terms of the charter-party were signed by the captain of the ship. The defendants were the shippers and also the consignees and receivers of the cargo.

Held, that the captain had signed the bills of lading merely as agent for the owners, and was not entitled to sue the defendants for freight.

Action tried in the Commercial Court before Bigham, J., without a jury.

The action was brought to recover a balance of freight under bills of lading signed by the plaintiff as master of *The Beecroft.*

The goods in respect of which the freight was claimed had been shipped on board *The Beecroft* by the defendants, who were also the consignees and receivers of the goods.

The Beecroft had been chartered to the defendants by her owner by a charter-party dated the 28th of August, 1899.

The defendants alleged that by a charter-party dated the 24th of January, 1899, a vessel called *The Gio Batta Repetto*, belonging to the same owner as *The Beecroft*, was chartered by the owner to the defendants for a voyage from Albany to the United Kingdom or Continent with timber to be shipped by the defendants; that during the voyage general average sacrifices were made and general average expenses were incurred in respect of which the owner became indebted to the defendants in a general average contribution amounting to £217 16s. 10d., which had not been paid.

The defendants before action tendered, and after action paid, to the plaintiff as agent for the owner the sum of £39 1s., and claimed to set off the amount of the general average contribution against the balance of the plaintiff's claim.

The defendants also counterclaimed a like sum.

The bills of lading sued upon were, so far as material, in the following terms:

"Shipped in good order and condition by" the defendants upon *The Beecroft* now lying, &c., and bound for London "whereof L. Repetto is master for the present voyage . . . 267 pieces of jarrah timber . . . to be delivered in the like good order and condition at the said port of destination, loss and damage by detention, by the act of God, restraint of princes and rulers, public enemies or people, quarantine, epidemics, pirates or robbers, barratry of the master and crew . . . collisions, stranding or other accidents of the seas, rivers, canals, and navigations of whatsoever kind (even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowner . . . always mutually excepted . . . unto Millars Karri and Jarrah Forests (Limited) or their assigns, he or they paying freight for the same as per charter-party dated the 28th of August, 1899, all the terms and exceptions contained in which charter are herewith incorporated . . . (Signed) L. Repetto, Master."

The charter-party of the 28th of August, 1899, provided that *The Beecroft* should proceed to Fremantle, and there load a cargo of timber from the defendants' agents and proceed therewith to a safe port in the United Kingdom or on the Continent, and deliver the same on being paid freight as provided.

The charter-party contained the usual exceptions and the following clause: "The captain to sign bills of lading at port of loading at any rate of freight without prejudice to this charter, and should the bills of lading for the entire cargo show less sum in the aggregate than the amount of freight due the ship under this charter (allowing for advances to the master) the difference to be paid at port of loading in cash. The charterers' liability under this charter to cease on ship being loaded. Ship to have an absolute lien on the cargo for freight, dead-freight, and demurrage."

Scrutton, K.C., and *Leck*, for the plaintiff.

J. A. Hamilton, K.C., and *P. C. Morris*, for the defendants.

The following authorities were cited: *Isberg* v. *Bowden*, 8 Exch. 852; *Gullischen* v. *Stewart*, 32 W. R. 763, 13 Q. B. D. 317; *Brouncker* v. *Scott*, 4 Taunt. 1; *Priestley* v. *Fernie*, 13 W. R. 1089, 3 H. & C. 977; *Smith* v. *Plummer*, 1 B. & Ald. 575; *Atkinson* v. *Cotesworth*, 3 B. & C. 647; *Thompson* v. *Davenport*, 9 B. & C. 78; *Sims* v. *Bond*, 5 B. & Ad. 389; *Calder* v. *Dobell*, 19 W. R. 978, L. R. 6 C. P. 486; *Jesson* v. *Solly*, 4 Taunt. 52; *Cawthron* v. *Trickett*, 12 W. R. 311, 15 C. B. N. S. 754; *Evans* v. *Forster*, 1 B. & Ad. 118; *Allen* v. *Coltart*, 31 W. R. 841, 11 Q. B. D. 782; *Elbinger Actien-Geseltschaft* v. *Claye*, L. R. 8 Q. B. 313, 21 W. R. Dig. 207; *Shepard* v. *De Bernales*, 13 East 565; *Westport Coal Co.* v. *McPhail*, 46 W. R. 566, [1898] 2 Q. B. 130; *Jones* v. *Nicholson*, 10 Exch. 28; *Sewell* v. *Burdick*, 33 W. R. 461, 10 App. Cas. 74; *Rodocanachi* v. *Milburn*, 35 W. R. 241, 18 Q. B. D. 67; *Wagstaff* v. *Anderson*, 28 W. R. 856, 5 C. P. D. 171; *Cock* v. *Taylor*, 13 East 399; *Moorsom* v. *Kymer*, 2 M. & S. 303: *Steamship County of Lancaster* v. *Sharp*, 24 Q. B. D. 158, 38 W. R Dig. 189; *Shields* v. *Davis*, 6 Taunt. 65.

Cur. adv. vult.

April 3.—BIGHAM, J.—This action is brought by Lorenzo Repetto, the master of a vessel called *The Beecroft*, to recover balance due for freight. The endorsement on the writ shows that the gross freight was £3,383 6s. 5d., and that this amount has been reduced by payments on account by disbursements for the ship at the ports of loading and discharge to a sum of £256 17s. 10d.; since action brought a further sum of £39 1s. has been paid, leaving £217 16s. 10d.,

(*a.*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

the balance sued for. The defendants do not deny that they owe this balance, but they say that they owe it to the owners, and not to the plaintiffs, and that they have a set-off, as against the former to the amount of the claim. The question I have to determine is whether the plaintiff (the master) can maintain the action. The facts are as follows: By a charter-party dated August 28, 1899, Fortunato Repetto (not the plaintiff) chartered *The Beecroft* to the defendants to bring a cargo of timber from Australia at an agreed rate of freight, the defendants undertaking to provide the cargo. The charter-party contained the usual exceptions. The freight was to be paid on unloading and right delivery of the cargo. Then there was the following clause: "The captain to sign bills of lading at port of loading at any rate of freight without prejudice to this charter, and should the bills of lading for the entire cargo show less sum in the aggregate than the amount of freight due the ship under this charter (allowing for advances to the master) the difference to be paid at the port of loading in cash. The charterers' liability under this charter to cease on vessel being loaded. Ship to have an absolute lien on the freight, dead-freight, and demurrage." The defendants loaded the cargo and presented bills of lading to the plaintiff for signature. These bills of lading described the cargo as shipped by the defendants in *The Beecroft*, "whereof L. Repetto is master." The exceptions were more extensive than those mentioned in the charter-party. The bill of lading provided that the cargo should be delivered to the shippers or their assigns, "they paying freight for the same as per charter-party dated the 28th of August, 1899, all the terms and exceptions contained in which charter are herewith incorporated." These bills of lading the plaintiff signed as master of the ship. The ship then proceeded on her voyage, and on her arrival at the port of discharge the cargo was delivered to the defendants against presentation of the bills of lading. This action was then brought, and it was no doubt brought in the name of the master, Lorenzo Repetto, in the hope that the defendants might thereby be precluded from setting up the set-off which they allege they have against Fortunato Repetto.

There are only two ways in which a promise can possibly arise on the part of the defendants to pay freight to the plaintiff. It can arise out of the bill of lading itself, or it can arise by implication from the delivery of the goods by the plaintiff at the request of the defendants. There can be no doubt that when a master signs a bill of lading without qualification, that is to say without anything in the document to show that he does so merely as agent, he makes himself personally liable to the shipper. The shipowner who has authorized the master to sign the bill of lading is also liable upon it. The master is estopped from denying the truth of the representation which he has made, in other words he is not allowed to give evidence to discharge himself from a liability which he has apparently undertaken; and the shipowner is bound by the contract because it has been entered into on his behalf and with his authority. Thus two separate liabilities are created for the performance of one contract. But no difficulty arises out of this state of things, for the shipper has not a concurrent remedy against both master and owner; he has merely a right to elect which of the two he will hold liable, and having once finally elected his remedy against the other is gone. And as either master or owner may be sued, so either may sue, for the existence of the liability on the one hand involves the existence of the correlative right on the other. These rules apply not merely to contracts created by bills of lading, but to all simple contracts; they form part of the law relating to principal and agent.

Now applying this law to the circumstances of the present case, one must look to see what it is that the master has signed. It is not a mere bill of lading in the ordinary form; it is a bill of lading which in express words incorporates all the terms of a charter already made between the master's owner and the charterers (the defendants). Thus the two documents must be read as one, and it is to the contract so created that the plaintiff has put his signature. Then, reading the two documents together, does it appear that in signing he did so as agent merely, or does it appear that he did so as principal? By the charter-party the shipowner promises the defendants that his servant the master shall sign bills of lading as presented. Why is is this provision inserted? It is inserted with two objects: First, to enable the charterers in case they ship their own goods (as they did in this case) to obtain a negotiable instrument which they can transfer by indorsement, and on which, if need be, they can obtain money; and, secondly, it is inserted to enable them, in case they ship the goods of other people, to hand to such other people bills of lading which in their hands can serve a similar purpose and which shall express the freight they may have agreed to pay. These are the only objects with which the provision is inserted, and in my opinion the plaintiff, when he signed the bills of lading sued on, did so merely in order to effectuate the first of these purposes, and so to carry out the promise which his owner had made by the charter-party. I think this is the meaning to be put on the two documents when read together. It is neither apparent from the documents, nor is it the fact, that the master or the charterers intended that a new contracting party should be introduced into the business by the signing of the bills of lading. It is not necessary to consider what the effect might have been if the bills of lading had been indorsed to third parties so as to pass the property in the goods. Here the charterers, the shippers, the consignees, and the receivers of the cargo are one and the same, and the Bills of Lading Act has therefore no bearing on the case. I come to the conclusion that the master's signature to the bills of lading must be read as the signature of a mere agent fixing a liability on his principal only. The master therefore could not be sued, and it follows as a consequence that he cannot sue.

A point was taking during the argument that the master could not be taken to have intended to contract, inasmuch as he had excluded himself by the contract from the consequences of his own barratry, and it was said that it was absurd to suppose that the man could have contracted upon such a footing, I am not disposed to attach much importance to this point, for I think it very likely that the clause in the bill of lading, which is different from the clause in the charter-party by which the liability of the person signing the bill of lading in respect of his own barratry is excluded is on the bill of lading *per incuriam*. It occurs in the printed part of the document and was probably overlooked and not struck out.

It was also contended that the master is entitled to sue, if not on the bill of lading, at all events on an implied contract to pay the freight. It was said that the master held possession of the goods in order to enforce the shipowner's lien, and that he had given up the possession at the request of the defendants, who were, as I have said, the consignees and receivers of the cargo, and that it must, therefore, be implied from the request, and from the fact that he had given up possession, that the defendants had

promised to pay the freight. I do not think that there is anything in this point. It was not at the request of the defendants to the master that the lien was parted with and possession of the goods given up. The application by the receivers for possession of the goods was made to Messrs. Clarkson, the shipowners' agents, and it was the shipowners, through their agents, who gave up possession at the receiver's request. I find as a fact that there was no request for possession made to the master, and that therefore no implied contract to pay him arose.

The question was argued as to what the position would be if the master stood in the relation in which the plaintiff contended that he did stand—that is, as principal on the contract. It was said that, inasmuch as the charter-party contained a clause for cesser of liability, the defendants would not be liable to pay. I do not agree. In my opinion the defendants would be liable if the master could sue and certainly would be liable if an action were brought by the shipowner for the freight mentioned in the bill of lading. I think the case of *Gullischen* v. *Stewart* makes that clear. The bill of lading is supplementary to the charter-party and creates the liability which, but for the bill of lading, would probably be gone—namely, the liability to pay the freight. The two documents which must be read together are in a sense one contract, but the bill of lading, which is the later document, I think overrides the charter-party and makes the defendants liable to pay the freight, but the person to sue in this case is, in my opinion, the shipowner and not the master. For these reasons I am of opinion that the plaintiff's case fails, and it follows that the defendants' counterclaim is misconceived. If, however, it should be held on appeal that the plaintiff is entitled to recover the freight sued for, the defendants are to be at liberty to prove their counterclaim if they can do so.

Judgment accordingly.

Solicitor for plaintiff, *Robert Greening.*

Solicitors for defendants, *James White & Leonard.*

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) — Jan. 14.

In re MATEO CLARK.

Ex parte BUENOS AYRES AND PACIFIC RAILWAY (LIMITED). (*a.*)

Bankruptcy—Practice—Withdrawal of proof—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *Sched. II.*

A creditor will not be allowed to withdraw his proof otherwise than unconditionally while a motion is pending to expunge such proof.

Application by the Buenos Ayres and Pacific Railway Co. (Limited), creditors of Mateo Clark, for leave to withdraw their proof without prejudice to the presentation of a fresh proof in case it should subsequently appear that there was any debt due to them.

Mateo Clark, the debtor, was a contractor and the builder of the railway. He had covenanted with the railway company to grant to them indefeasible titles of certain lands through which the railway ran. He gave the company a number of their own shares as security for the performance of his covenants. A receiving order was made against him in 1896, but he had not been adjudged bankrupt, having proposed a scheme of arrangement with his creditors. At the date of the receiving order he had not succeeded in obtaining indefeasible titles to the lands in question for the company, and the shares which the company held as security for the performance of the covenants were of small value.

The company, therefore, had put in a proof for damages for breaches of covenant, and had assessed their security at a very small amount.

Subsequently, however, the company succeeded in obtaining some of the titles in question, and the shares held by them as security had also risen greatly in value, so that at the date of the present application their security was enough to cover the whole of their claims against the debtor. They therefore applied for leave to withdraw their proof without prejudice to their right to put in a fresh proof in the future in the event of their security decreasing in value.

Reed, Q.C., and *Carrington*, for the applicants.—A proof may be withdrawn at any time before it is adjudicated upon for the purposes of dividend: *In re Rhoades*, 47 W. R. 432, [1899] 1 Q. B. 905. [WRIGHT, J.—But you ask leave to withdraw your proof conditionally.] Yes, the shares held by the company as security may depreciate in value, and the company would desire in that case to put in a fresh proof revaluing their security.

Muir Mackenzie, for the debtor.—The company should not be allowed to withdraw their proof otherwise than absolutely. There is a motion pending to expunge their proof and if successful it will result in showing that there never was any provable debt due to the company.

Reed, Q.C., replied.

WRIGHT, J.—It seem to me that I ought not to establish a precedent in allowing a conditional withdrawal—if I may so call it—of a proof as distinguished from an absolute withdrawal of it, while there is a motion pending to get rid of the proof. If the company had been willing absolutely and finally to abandon their proof I cannot say that there could have been any objection to it. But as they are not willing to do that, and as there is a motion pending by the debtor to get rid of the proof altogether, it seems to me that nothing is gained by allowing the withdrawal of the proof with a reservation that it may hereafter be presented afresh. I think the best course is to refuse this application for withdrawal, but reserve the costs of it until after the hearing of the debtor's motion so that I can see whether there was any substance in the present application or not, and give leave to the company now to amend their proof.

On the hearing of the motion the company may ask the court to take into consideration in their favour the fact that they made the offer, though qualified, to withdraw their proof at the present stage. I do not know whether it will make any difference as to the costs of the motion, but it may; and the company are not to be prejudiced on the hearing of the motion by anything which has taken place here to-day.

Application dismissed.

Solicitors for the applicants *Ashurst, Morris, & Crisp.*

Solicitors for the debtor, *Harwood & Stephenson.*

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

Court of Appeal.

From Chan. Div. (Collins and Stirling, L.JJ.) — May 21.

In re NEW ZEALAND MIDLAND RAILWAY CO. SMITH *v.* LUBBOCK. (*a.*)

Practice—Costs—Company—Debenture-holder's action—Insufficient assets.

Where the assets in a debenture-holder's action are insufficient to pay the debentures in full, the plaintiff is entitled to solicitor and client costs out of the fund realized.

This was an appeal from the decision of Kekewich, J. The action was brought by the plaintiff on behalf of herself and all other the debenture-holders of the company to enforce their security. The assets of the company were insufficient for the payment of the debentures in full.

Upon the further consideration of the action the question arose whether the plaintiff was entitled to have her costs taxed as between solicitor and client or as between party and party.

Kekewich, J., directed taxation as between party and party. He was of opinion that although the case of *In re Queen's Hotel Co., Cardiff*, 48 W. R. 567, [1900] 1 Ch. 792, was distinguishable owing to the fact that the fund in that case was more than sufficient to pay the class of debenture-holders represented by the plaintiff in that case, the principle of that decision applied, and that the rule under which the plaintiff in a creditor's administration action, where the estate was insufficient for the payment of the creditors in full, was entitled to solicitor and client costs, though well settled, rested on no sound principle, and ought not to be extended to debenture-holders' actions.

The plaintiff appealed.

Warrington, K.C., and *A. à B. Terrell*, for the plaintiff.

Renshaw, K.C., and *J. F. Waggett*, for the trustees of the debenture-holders.

P. O. Lawrence, K.C., and *A. R. Kirby*, and *C. T. Mitchell*, for other parties.

COLLINS, L.J., said that the learned judge below felt himself bound by a rule of practice which debarred him from giving to the plaintiff other than party and party costs. The plaintiff had succeeded by her diligence in bringing a fund into court for the benefit of the debenture-holders, and she claimed that, having done so, she should not be put in a worse position than the other debenture-holders. As matters stood she had come out of the discussion without being recouped her expenses of recovering the fund. The simple principle, at least in creditors' administration actions, was that where a fund exclusively belonged to a class there should be complete indemnity to the person by whose diligence that fund was realized and secured, and there was no such indemnity where the person obtained only party and party costs. In *Thomas* v. *Jones*, 8 W. R. 328, 1 Dr. & Sm. 134, the principle was extended to a new class—namely, to legatees, and Kindersley, V.C., there laid down the principle which ought to govern such cases, which was that where a creditor institutes proceedings on behalf of himself and all the other creditors, and it turns out that the estate applicable to the payment of debts is insufficient, the estate belongs to the creditors exclusively, and therefore if a creditor has, for the benefit of all the other creditors, instituted a suit in which he has recovered a fund, it is extremely unreasonable that the fund which would be divisible among the creditors *pro rata* should be applied in the payment of debts without recouping that creditor what he has properly expended in recovering the fund, and he is clearly entitled to his costs as between solicitor and client. If the fund is sufficient to pay all the creditors and there is a surplus, that surplus does not belong to the creditors, but to the legatees. That was a reasonable principle, and there was no reason why it should not be applied to debenture-holders' actions as well as to creditors' administration actions. The matter, however, did not rest there, since there were two unreported decisions, one by North, J., and one by Stirling, J., in which the principle had been given effect to in debenture-holders' actions. The decision of Cozens-Hardy, J., in *In re Queens' Hotel Co. Cardiff*, in which party and party costs only were allowed, was a case of a different kind, for there the assets were more than sufficient to pay in full the creditors whom the plaintiff represented and the surplus did not belong to the debenture-holders. Where the fund was sufficient to pay the debenture-holders in full it might well be that different considerations would apply. The principle was perfectly well established and was founded on common sense, and the learned judge below was wrong in thinking that he was debarred from applying it to the present case.

STIRLING, L.J., agreed, and said the question was whether the practice with regard to costs in creditors' administration actions rested upon principle or was an anomaly and a mere rule of thumb. The principle had been formulated by Kindersley, V.C., in *Thomas* v. *Jones*, and the only difficulty arose from the fact that the courts had not always been quite logical in carrying out that principle. His lordship saw no reason why the practice should not apply to debenture-holders' actions, and being based on principle he thought it ought to be so applied. The decision of Cozens-Hardy, J., *In re Queen's Hotel Co., Cardiff*, did not affect the present case at all, and was quite in accordance with the principle laid down by Kindersley, V.C. His lordship was not quite sure whether the principle was properly applied in the case *In re McRae*, 32 Ch. D. 613, 34 W. R. Dig. 47, but that case did not stand in the way of holding in the present case that the principle applied.

Appeal allowed.

Solicitors, *W. H. Smith & Son; Golding & Hargrove; Slaughter & May; Blyth, Dutton, Hartley, & Blyth.*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

From K. B. Div. (A. L. Smith, M.R., and Vaughan Williams and Romer, L.JJ.) — May 3.

REX *v.* BISHOP OF SALISBURY. (*a.*)

Ecclesiastical law — Churchwarden — Election of parishioners' churchwarden—Right of minister to vote as ratepayer—Canon 89—*Sturges Bourne's Act*, 1818 (58 *Geo.* 3, *c.* 69), *s.* 3.

The minister of a parish has no right to vote in his capacity as a ratepayer in the election of the parishioners' churchwarden.

Judgment of Wills *and* Channell, JJ. (ante, *p.* 399, [1901] 1 *Q. B.* 573), *affirmed.*

Appeal from a judgment of a Divisional Court of

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

the King's Bench Division (Wills and Channell, JJ.) discharging a rule *nisi* for a writ of *mandamus* to the Bishop of Salisbury commanding him to admit Samuel Vine to the office of churchwarden of the parish of Winterborne Came, in the county of Dorset (*ante*, p. 399, [1901] 1 Q. B. 573).

At the election of the parishioners' churchwarden for the parish of Winterborne Came, held on the 23rd of April, 1900, two candidates, Samuel Vine and John Stevens Passmore, were nominated. A poll was demanded, and was taken on the 7th of May. Passmore received twenty-nine votes given by nineteen ratepayers, and Vine received twenty-three votes given by eight ratepayers. The rector, who presided, claimed the right to vote as a ratepayer, and he gave the six votes to which he was entitled by virtue of his assessment to Vine, the result of which was that the votes were equal. The rector then gave his casting vote in favour of Vine, and declared him duly elected.

Both candidates claimed the right to be admitted to the office of churchwarden, and they both applied for admission to the Bishop of Salisbury, who was then holding his triennial visitation.

On the 21st of June the bishop gave his decision in favour of Passmore, who was thereupon admitted to the office.

Vine then applied to the Archdeacon of Dorset to admit him as churchwarden. The archdeacon refused the application on the ground that he had no jurisdiction to admit churchwardens during the bishop's visitation.

Vine obtained a rule *nisi* for a *mandamus* to the archdeacon, but this was discharged by the Court of Appeal: see *Reg.* v. *Sowter*, *ante*, p. 338, [1901] 1 Q. B. 396.

Vine thereupon commenced the present proceedings and obtained a rule *nisi* for a writ of *mandamus* to the bishop.

By canon 89 of the Canons of 1603, which is declaratory of the common law, as it stood before the passing of Sturges Bourne's Act, "All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice then the minister shall choose one and the parishioners another; and without such a joint or several choice none shall take upon them to be churchwardens."

By the Vestries Act, 1818, commonly called Sturges Bourne's Act (58 Geo. 3, c. 69), s. 2: "In case the rector or vicar or perpetual curate shall not be present, the persons so assembled"—that is, in pursuance of a notice of vestry meeting—"shall forthwith nominate and appoint by plurality of votes . . . one of the inhabitants of such parish to be the chairman of and preside in every such vestry; and in all cases of equality of votes upon any question arising therein the chairman shall (in addition to such vote or votes as he may by virtue of this Act be entitled to give in right of his assessment) have the casting vote."

By section 3: "In all such vestries every inhabitant present, who shall by the last rate which shall have been made for the relief of the poor have been assessed and charged, upon or in respect of any annual rent, profit, or value not amounting to £50, shall have and be entitled to give one vote and no more; and every inhabitant there present who shall in such last rate have been assessed or charged, upon or in respect of any annual rent or rents, profit, or value amounting to £50 or upwards (whether in one or in more than one sum or charge) shall have and be entitled to give one vote for every £25 of annual rent, profit, and value upon or in respect of which he shall have been assessed or charged in such last rate, so, nevertheless, that no inhabitant shall be entitled to give more than six votes."

The Divisional Court were of opinion that the rector was not entitled, either by the common law, or by section 3 of Sturges Bourne's Act, to vote in his capacity as a ratepayer in the election of the parishioners' churchwarden. They accordingly held that the bishop had dealt with the matter rightly, and they discharged the rule.

The prosecutor appealed.

Bray, K.C., and *Edwardes Jones*, for the prosecutor.—By common law, as declared by the canon, the minister is entitled to vote as a parishioner in the election of the parishioners' churchwarden. The expression "the parishioners" does not exclude the minister. The common law rule was laid down in the judgment of the Court of Queen's Bench delivered by Lord Denman, C.J., in *Reg.* v. *D'Oyly*, 12 A. & E. 139. The question was as to the right of the minister to preside at the election of the parishioners' churchwarden, and Lord Denman said, "It is clear that, as a parishioner, he might give a vote deciding the nomination." The *dictum* ascribed to Lord Hardwicke in Strange's report of *Stoughton* v. *Reynolds*, 2 Str. 1044, that the minister seems to have no share in the election of the second churchwarden, is not to be found in the other reports—viz., Fortescue, 168, and Lee temp. Hardwicke, 274. Moreover *Stoughton* v. *Reynolds* was at least partially overruled in *Wilson* v. *M'Math*, 3 Phillim. 67. At any rate the minister has a right to such a vote under section 3 of Sturges Bourne's Act, which expressly enacts that every inhabitant present at the vestry who is assessed to the poor rate is entitled to vote. The intention of the Act is that property is to be represented. A distinction must be drawn between the right of the minister as a spiritual person to appoint one churchwarden and his right as an inhabitant ratepayer to vote in the election of the other churchwarden. And it can make no difference whether he is a ratepayer in respect of property held by him in his private capacity or in respect of his ecclesiastical freehold. The words of the section are quite general and unqualified, and there is no ground for saying that they are not applicable to an election of a people's churchwarden.

They also cited *Ranson and Knott* v. *Campkin*, 2 Rob. Eccl. Rep. 370; *Reg.* v. *Kirby*, 10 W. R. 13, 31 L. J. Q. B. 3.

Dibdin, K.C. (*C. W. Holgate* with him), for the bishop.—The canon draws a clear distinction between the minister and the parishioners. Primarily the election of churchwardens is a matter for the vestry as a whole. But if the minister and the parishioners cannot agree, then the minister is to choose one churchwarden and the parishioners another. The term "the parishioners" is clearly used here in a sense excluding the minister. The argument for the prosecutor treats "the parishioners" as equivalent to "the vestry." The minister and the parishioners together constitute the vestry. Lord Denman's proposition in *Reg.* v. *D'Oyly* is only a *dictum*. Sturges Bourne's Act is a general Act dealing with the holding of vestries for parochial matters. It ought not to be construed as altering the law relating to the election of churchwardens. If it has taken away the right of the people other than the minister to choose their churchwardens, it must equally have taken away the right of the minister to choose his churchwarden.

He referred to *The Queen* v. *Allen*, 21 W. R. 190, L. R. 8 Q. B. 69.

Cur. adv. vult.

May 3.—A. L. SMITH, M.R., read the following judgment: Prior to the passing of Sturges Bourne's

Act in 1818 there can be no doubt that, if the minister and the parishioners of a parish did not agree as to the appointment of the churchwardens, the minister appointed his churchwarden—that is, the incumbent's churchwarden, and the parishioners appointed their churchwarden—that is, the people's churchwarden. And the 89th canon of the Canons of 1603, which is declaratory of the common law, makes this abundantly plain. The canon is as follows: "All churchwardens or questmen in every parish shall be chosen by the joint consent of the minister and the parishioners, if it may be; but if they cannot agree upon such a choice, then the minister shall choose one and the parishioners another, and without such joint and several consent none shall take upon them to be churchwardens." I agree with my brothers Wills and Channell that in this canon the parishioners are mentioned in such a way as to show that in case the vestry cannot agree the minister is to choose his own churchwarden, and the parishioners as opposed to and distinguished from him are to choose their churchwarden. The term "parishioners" in the canon means the minister's parishioners, and would not include the minister himself. And, accordingly, it is not in dispute that in practice the minister never did take part in the voting for the parishioners' churchwarden. But it is said on behalf of the appellant that the effect of Sturges Bourne's Act was to alter the position of affairs and that, while it left unaffected the right of the minister to choose his own churchwarden, it at the same time gave him the right to vote in the election of the parishioners' churchwarden. Now, in the first place, it is to be observed that the Act, which is intituled "An Act for the Regulation of Parish Vestries," is perfectly general in its character, and does not refer in terms to the election of churchwardens, or purport to alter the then existing law and practice whereby, at a vestry meeting, in case of the vestry not agreeing in the selection of the churchwardens, the minister, who is part of the vestry, on the one hand was entitled to choose his churchwarden, and the parishioners on the other hand, as distinguished from the minister, were at the vestry meeting entitled to vote for the parishioners' churchwarden. And on the best consideration I can give to the matter I do not think that the Act was intended to alter, or that on its true construction it did alter, the existing law and practice in the way contended for by the appellant. If the Act was intended to alter the existing law and practice as to the election of churchwardens in the way contended for, it is difficult to see why it should not also have altered the right of the minister to choose his own churchwarden. But the appellant shrinks from contending this, and, indeed, such a contention could not be supported. I think that the true reading of the Act is that, although the class of persons who as parishioners are entitled to vote at a vestry meeting and their franchise are by the Act altered, yet the election of churchwardens was not otherwise intended to be altered or affected, so that, in case of the vestry not being able to agree, the minister is still entitled to choose his churchwarden, and his parishioners apart from him, though presided over by him as chairman if he be present, are entitled to vote for the other churchwarden. I understand that the point now taken by the appellant—viz., that the minister can now vote for the people's churchwarden—is a novel one, and that, although Sturges Bourne's Act has been in operation since the 3rd of June, 1818, the practice has been to act upon the construction of the Act adopted by me. The view of the Act I have expressed is borne out by an examination of its material sections. Section 1, after reciting that it is expedient to regulate the manner of holding parish vestries and the right of voting therein, enacts that public notice shall be given of the vestry meeting and the special purpose thereof, and by section 2 it is enacted that, in case the rector, vicar, or perpetual curate shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint by plurality of votes to be ascertained as thereinafter directed — that is, by every inhabitant present who has the new franchise conferred upon him by section 3—one of the inhabitants of such parish to be the chairman and preside in every such vestry, and in all cases of equality of votes, upon any question arising therein, the chairman shall, in addition to such vote or votes as he may by virtue of this Act be entitled to give in right of his assessment, have the casting vote. This second section appears to me only to deal with those cases in which there is an equality of votes amongst those present who on the subject voted upon are entitled to vote. I cannot find in this section any indication that where the voting is upon the election of the parishioners' churchwarden, and the minister is chairman, he is to be entitled to vote as a parishioner, and then, if the votes be made equal by his vote, have a right to vote as chairman. The next section (section 3) enacts that in all vestries the inhabitants present shall be entitled to vote according to the new franchise prescribed in that section. That section is perfectly general, and no doubt regulates generally who are to vote at vestries and what votes they shall have. But full effect can be given to it as a general enactment without implying that the minister shall have the right to vote for the people's churchwarden, or that the parishioners shall vote for the rector's churchwarden. It will be noticed that throughout this section there is not a word said as to the questions upon which, or the persons for whom, the voters with the new franchise are to vote, and in my judgment it leaves untouched the question as to how churchwardens are to be chosen. It appears to me that after the Act, as before it, if the vestry cannot agree in selecting the churchwardens, they are to be selected, one by the minister and the other by his parishioners. The choice of the parishioners, apart from the minister, could, and would, be ascertained by their votes in the manner prescribed by the Act. I see no sufficient reason why this should not be done without its following as a necessary corollary that the minister is to vote in his character of parishioner, or inhabitant, or ratepayer. I agree in the view taken by my brother Channell that the machinery and procedure of the Act can be applied in taking the votes on the question as to the election of the parishioners' churchwarden without its thereby following that the minister is to vote in his character of ratepayer. It does not appear to me to be necessary to review the authorities, which have been sufficiently dealt with in the court below. And in the result I agree with the Divisional Court, and I think that this appeal should be dismissed.

VAUGHAN WILLIAMS, L.J.—I agree. I do not think Sturges Bourne's Act meant to alter the respective relative rights of the parson and his parishioners in the matter of selection and election of churchwardens by the one and the other.

ROMER, L.J., concurred.

Appeal dismissed.

Solicitors for the prosecutor, *Jenkins, Baker, & Co.*

Solicitors for the bishop, *Robins, Hay, Waters, & Hay*, for *E. Archdall Ffooks*, Registrar of the Archdeaconry of Dorset.

High Court of Justice.

Chan. Div. } Kekewich, J. } May 15.

ELLIMAN, SONS, & CO. (LIMITED) v. CARRINGTON & SON (LIMITED). (a.)

Contract—Restraint of trade—Contract not to retail goods supplied by plaintiff below a fixed price.

A contract entered into with a manufacturer not to retail his goods below a fixed price is not a contract in restraint of trade.

The plaintiffs in this action were the proprietors of Elliman's Embrocation.

Before delivering their goods they made purchasers sign an agreement not to retail them below certain fixed prices, and to obtain from every dealer whom they might supply a signed agreement in similar terms.

The defendants purchased certain goods from the plaintiffs, after signing the agreement in the usual form, but resold some of them to dealers without obtaining from them the stipulated agreements. The dealers were thereby enabled to retail the goods at sums below the fixed price, whereupon the plaintiffs brought this action for an injunction and damages.

The defendants did not dispute the facts, but contended that the contract was unenforceable as being in restraint of trade.

Renshaw, K.C., and *E. Ford*, for the plaintiffs.

Warrington, K.C., and *Austen Cartmell*, for the defendants.—The whole object of the contract is to upset the natural laws of supply and demand, and is therefore directly injurious to the public, and it interferes with the right of the individual to carry on his business in his own way: *Hilton* v. *Eckersley*, 4 W. R. 326, 6 E. & B. 47. An agreement merely for the purpose of raising prices is not enforceable: *Urmston* v. *Whitelegg*, 63 L. T. Rep. 455, 55 J. P. 453, 39 W. R. Dig. 193. It is settled that an agreement which is in restraint of trade can only be enforced if it is reasonable for the protection of the party in whose favour it is imposed and at the same time is in no way injurious to the public: *Nordenfelt* v. *Maxim-Nordenfelt Co.*, [1894] App. Cas. 535, at p. 565.

KEKEWICH, J.—The defendants' point is that the contract is unenforceable, and that conclusion, they say, follows from the fact that it is in restraint of trade. In one sense, no doubt, the contract is in restraint of trade, for it prevents one party from being able to do what he pleases with the goods. On the other hand, the plaintiffs are not bound either to sell or manufacture the goods; and if they do sell they are at liberty to charge whatever price they please. That is the right of every owner of goods, and neither the moral nor the legal ideas which once attached to the sale of corn can apply to embrocation. So it was perfectly competent for the plaintiffs to bargain with the defendants or anyone else that they should not retail the goods below a fixed price. The cases cited are all well known and must be recognized, but they are not in point. To call in public policy and say that that is to prevent the plaintiff from exercising his own liberty in the matter is to ride an exceedingly high horse. Still the defendants have broken the contract, not by retailing the goods below the fixed price, but by failing to obtain contracts of a like nature from dealers whom they supplied. Of this they must bear the consequences. It is not a case for an injunction, as the plaintiffs have the remedy in their own hands by closing their account and refusing to sell the defendants any more goods. It is reduced, therefore, to a question of damages, which, it is admitted, must be merely nominal. The defendants must pay 20s. damages and costs.

Solicitors, *Dalston, Son, & Elliman*; *Robbins, Billing, & Co.*, for *Charles Mills*, Oldham.

(a.) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

Chan. Div. } Farwell, J. } May 7, 13.

POWELL v. BRODHURST. (a.)

Mortgage—Joint account—Part discharge of joint debt—Receipt by one of two joint creditors—Remedies of mortgagor at law and in equity—Joint account clause—Disclosure of trusts.

In a foreclosure action for £4,000 the defendant claimed to redeem for £3,000, contending that a payment of £1,000 to a firm in which one of his joint creditors was a partner, but which did not appear to have been authorized to act as agent in the matter, discharged the mortgage pro tanto.

Held, that, although the payment to one of the joint creditors might have been a good discharge of the joint debt in law, yet the court of equity would consider all the facts of the case and decide whether it was equitable to deprive the plaintiffs of their legal title to the charge as a whole, and that in this case the plaintiffs were entitled to foreclosure, the principal sum being £4,000.

Steeds v. Steeds, 37 *W. R.* 378, 22 *Q. B. D.* 537, *explained.*

Matson v. Denis, 4 *De G. J. & S.* 345, *followed.*

On the 1st of March, 1872, the defendant executed a mortgage of real estate at Worksop to Barnett and Birch to secure £6,000 and interest at 4 per cent. per annum, and by the same deed covenanted to pay the said sum on the 1st of September, 1872.

In 1875 £1,000, part of the £6,000, was repaid.

Both the mortgagees died, and on the 1st of September, 1878, the executor of the survivor transferred the £5,000 mortgage debt and the securities to Cartmell Harrison and J. C. Ingram.

In 1888 the defendant paid off another £1,000, leaving £4,000 only remaining on the security.

In 1890 this sum of £4,000 and the securities for it were transferred to de Paravacini and James Ingram.

In August and September, 1892, the defendant sent two cheques for £500 each to the firm of Ingram & Harrison, and these sums were accepted by Cartmell Harrison (by a letter of the 31st of August, 1892) as in part discharge of the mortgage debt.

Both the sums of £1,000 previously paid off had been paid in like manner by the defendant to the firm, and had been duly applied by them.

Both the sums of £500 were paid into the account of the firm, and were credited in the books of the firm to the defendant, and the interest on the mortgage debt was throughout paid to the firm, and after September, 1892, was paid on £3,000 only.

On the 26th of September, 1897, de Paravacini died, and on the 25th of December, 1897, James Ingram died, and on the 1st of May, 1900, his executors transferred the mortgage debt and security to the plaintiffs. The mortgage debt was stated in the transfer to be £4,000, but the transferees had notice of the payment of the two sums of £500 to the firm of Ingram & Harrison before its execution. The

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

money was in fact trust money, and no consideration therefore passed from the plaintiffs to the executors. The plaintiffs therefore stood in the same position as James Ingram, and the action was to be regarded as an action by him. The defendant had no notice when he paid the two sums of £500 in 1892 that the mortgage debt was trust money.

James Ingram, one of the transferees in 1890, was the senior partner in the firm of Ingram & Harrison from a period prior to 1891 till his death in December, 1897. He was taken ill at the end of 1891, and did not come to the office at all in 1892. He came for a few days in 1893 and 1894, but he never really attended personally to any business after 1891. The other partners in the firm from 1891 till December, 1897, were Cartmell Harrison and J. C. Ingram.

The plaintiffs claimed to have an account taken of what was due under the covenant in the mortgage and an order for payment, and an account of what was due under or by virtue of the mortgage, and foreclosure.

The defendant admitted that £3,000 was owing and secured, but denied his liability to pay more, and claimed to redeem on the footing that £3,000, and not £4,000, was owing on the security.

W. H. Upjohn, K.C. (*G. Cave* with him), for the defendant, argued the case first.—The true nature of the transaction was that the defendant, the mortgagor, paid money on account to one of two joint mortgagees, who afterwards became the survivor on the joint account; he was James Ingram, who admittedly was a member of the firm which received the £1,000. But neither James Ingram nor his executors could have sued for the other moiety, and their transferees can be in no better position. The mortgage is merely a security for the debt covenanted to be paid, and is to be diminished by the amount of reduction of the debt: *Matson* v. *Dennis*, per Stuart, V.C., in 12 W. R. 596. Apart from the notice of the trust, at common law the payment by the debtor to one of two joint creditors is a good payment to the extent to which he is entitled to assume that that creditor is beneficially entitled *Steeds* v. *Steeds*, 37 W. R. 378, 22 Q. B. D. 537; and, before the Judicature Act, *Morley* v. *Bird*, 3 Ves. 629; *Wallace* v. *Kelsall*, 7 M. & W. 264; *Husband* v. *Davis*, 10 C. B. 645, at p. 650; and *Rigden* v. *Vallier*, 2 Ves. sen. 252, cited in a note to *Lake* v. *Craddock*, 3 P. Wms. 158. [The cases of *Marsh* v. *Keating*, 1 Bing. N. C. 198, 219; *Webb* v. *Ledsam*, 1 K. & J. 385, 3 W. R. Ch. Dig. 101; and *Turner* v. *Smith*, 49 W. R. 186, [1901] 1 Ch. 213, were also referred to.] What is good defence at law is a good defence at equity in the circumstances of this case.

J. G. Butcher, K.C., and *H. E. Wright*, for the plaintiffs.—The defendant cannot say that the payment was not made to the firm, or that it was made to James Ingram through the firm, when its agency to receive it is not proved. Even if he could, there is no authority that a payment to, and discharge by, one of two trustees is a good discharge of the debt. So long as two persons are entitled to receive a mortgage debt, the receipt of one is inoperative. The payment in 1892 was not good then, and cannot be validated by the death of his co-creditor in 1897. The defendant can only redeem on payment of the full £4,000, to which the mortgagees and their transferees are entitled, as there is no misconduct in the present case. The doctrine of *Steeds* v. *Steeds* cannot be applied to the present question, which is one of equity: see *Barton* v. *North Staffordshire Railway Co.*, 36 W. R. 754, 38 Ch. D. 458, at p. 465. If the defendant succeeds no trustees will be safe again in lending trust moneys without disclosing the trust. [FARWELL, J., referred to Robbins on Mortgages (1897 ed.), p. 845, and cases there cited.]

W. H. Upjohn, K.C., replied.

FARWELL, J., after stating the facts as above, said: There are therefore two questions involved—(1) the liability under the covenant, which is a question of common law, and (2) the liability in the foreclosure action, which is a question of equity. In my opinion the old rule of common law, that payment to one of two joint creditors is a good discharge of the joint debt, still remains good. There was no possible conflict of any equitable rule with this, because no bill would lie in Chancery to recover a mere money demand. Equity no doubt had to deal with debts in the administration of the estates of deceased persons and in the liquidation of companies, but in determining whether claims for debts had been discharged or not equity followed the law, and indeed in cases of difficulty, before 15 & 16 Vict. c. 56, ss. 61 and 62, sent cases for the opinion of the common law courts. There is nothing inconsistent with this in *Steeds* v. *Steeds*. The question there was whether it was so clear that the debt claimed was joint that the defence should be struck out, and it was held that there was a conflict between law and equity in the presumption to be drawn from the existence of a security to two without words of severance, and that the rule of equity as to such presumption now prevails. But that was a conflict of presumptions—whether there was or was not a joint tenancy, and had no relation to the legal consequences flowing from the existence of an admitted joint tenancy. In the present case both sides agree that this is a joint debt, and, having regard to the words of the covenant and the 61st section of the Conveyancing Act, I take this to be correct. But the joint debt in this case was not paid to either of the joint creditors, but to the firm of which one of them was a member. Now, payment of a private debt due to a member of a firm, to the firm of which such creditor is a member will not, in my opinion, support a plea of payment in the absence of evidence, express or implied, that the creditor has authorized the receipt of the money by the firm as his agents. The mere fact that the person who has made the payment would have a good cause of action against the firm to recover the money if the sum is not accepted in payment, does not make it payment. The defendants to such an action must be all the partners, and there is no set-off either in law or in equity of the private debt of one defendant against the joint debt of the firm: see Lindley on Partnership (5th ed.), p. 292 (4), and cases cited there. It is, no doubt, generally true that a man may do by his agent anything that he can do himself, and I will assume that a joint creditor may effectually receive payment of a joint debt by his agent; and, in an ordinary case, I should infer agency from the receipt and expenditure of the money by the firm, and its entry in the firm's books; but there is a great difficulty in coming to such a conclusion in the present case. If James Ingram did in fact authorize the firm to receive this money he was guilty of a breach of trust, and the court never infers that a man is guilty of a wrongful act unless the inference is irresistible. In the present case it is apparent from the admitted facts relating to James Ingram that he took very little part in the business of the firm after 1891. It is quite possible that he knew nothing whatever of the receipt of this money, and, although he would be liable jointly with his partners to refund it because he had had the benefit of it, as he must be taken to have known, it does not necessarily follow that he authorized the receipt. I do not

think that I am bound, or, indeed, ought, to convict him of such a breach of trust. I do not, however, propose to rest my judgment solely on this ground. The real contest between the parties has been as to the extent to which the property is charged. The plaintiffs argued that, even assuming that the £1,000 has been paid off, so that £3,000 only could be recovered under the covenant at law, nevertheless the defendant can only redeem on payment of the full £4,000. The defendant argued that the mortgage is merely a security for the debt covenanted to be paid, and that if, and so far as, the debt is gone, the mortgage must be diminished to the same extent, and, indeed, Stuart, V.C., decided the case of *Matson* v. *Denis*, 12 W. R. 596, on this very ground. That was an objection to title between vendor and purchaser, and the Vice-Chancellor said that the purchaser was entitled to evidence that the joint debt was properly discharged; that a joint debt was properly discharged by payment to one joint creditor; that at law the receipt of one joint creditor was an extinction of the debt; and that no law was applicable but that of debtor and creditor; and he ordered the purchaser to pay his purchase-money into court, with costs. But his judgment did not meet with approval in the Court of Appeal. I have referred to it because it shows that the very point now argued was raised and decided. Knight Bruce, L.J., says, 4 De G. J. & S, at p. 350: "The question is, whether when an equitable charge is vested in two persons—and, as I will assume, as joint tenants—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate. In my judgment, and in the absence of special circumstances such as are not shown to exist in the present case, that cannot be done. The purchaser is entitled to have it taken here that Mr. McLeay was alive at the time, and that some money has, without any consent on his part, been paid to the other joint tenant or tenant in common. That, I repeat, in my judgment does not discharge the estate in equity. Especially in the case of vendor and purchaser I think the purchaser has a right to say that the whole £3,000 was not shown to be discharged, but that it is consistent with the evidence to suppose that it may be still an available charge in equity." Turner, L.J., shortly referred to the facts and concurred, adding that that part of the order under appeal which directed the payment of the purchase-money into court was right, and ought to stand, because the title was good and the question raised only one of conveyance. An order was made accordingly, by which the purchase-money was to be brought into court. No costs were given on either side, but the costs of the plaintiffs in the suit were directed to be costs in the cause. The reasoning of the Court of Appeal is contrary to the reasoning of Stuart, V.C., in the court below, which I have read. It was urged that this amounts only to an expression of opinion that the purchaser was entitled for his protection to have the concurrence of a possible claimant, but I cannot regard it as confined to this, and I am, of course, bound by the decision, and not the less because it coincides with my own opinion and the general practice of conveyancers, for, if the defendant is right, the joint account clause ought never to be inserted where the mortgage money is held in trust, and the existence of the trust ought always to be disclosed—a course which would revolutionize a settled practice of many years' standing. The fallacy of the defendant's argument consists in the assumption that the question whether the money covenanted to be paid is recoverable at law is the only relevant consideration in foreclosure or redemption proceedings and in disregarding the principles of equity that underlie foreclosure and redemption. The mortgagee's estate is absolute at law on breach of the covenant to pay on the appointed day, but the court interferes for the benefit of the mortgagor on the terms that he does equity. The mere payment of the principal and interest legally recoverable is not necessarily sufficient. For example, money laid out in permanent improvements may have to be paid, although there is no covenant under which it could be recovered at law, and in a mortgage of a reversionary interest in land where time runs from the falling into possession of such interest, foreclosure will be granted although the remedy on the covenant is statute barred (*Hugill* v. *Wilkinson*, 36 W. R. 633, 38 Ch. D. 480), and arrears of interest for more than six years may be retained in an action to redeem a mortgage of a reversion (*Dingle* v. *Coppen*, 47 W. R. 279, [1899] 1 Ch. 726); and the mortgagee's right to tack and consolidate depend on the same principle. If a mortgagor chooses to pay otherwise than in strict accordance with the terms of his contract he does so at his own risk. The proviso for redemption in a mortgage to several is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagees or the survivor of them; and if a mortgagor pays to one, although such payment may be a good discharge in law, yet the matter is at large when he comes into equity, and the court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and treats the payment as good in whole, or in part, or altogether bad, accordingly. It is not a question of fixing the mortgagor with notice of a trust, but it is the inquiry that the court makes to satisfy itself that it is just and equitable under all the circumstances to deprive the mortgagee of his legal title to the property comprised in the mortgage. This is an answer to the last argument of the defendant—that James Ingram was the actual survivor, and therefore could have received the money and given a valid receipt at a later date. The mortgagor did not, in fact, pay to the survivor, but to one of two. He can rely only on the receipt as at the time when it was given, and he has only himself to thank because he chose to pay otherwise than in accordance with the contract. Indeed, on his own evidence he trusted to the firm of Ingram & Harrison to do what was right with the money, and to endorse a receipt for the £1,000 on the mortgage. The judgment will be in the usual form (*Farrer* v. *Lacy Hartland*, 34 W. R. 22, 31 Ch. D. 42, at p. 51), the principal sum due being £4,000, not £3,000.

Solicitors, *Bowman & Curtis Hayward*; *Vertue*, for *Hodding & Co.*, Worksop.

Chan. Div.
Farwell, J. } March 21, 22.

WHITBREAD & CO. (LIMITED) v. WATT. (a.)

Vendor and purchaser — Building estate — Deposit — Purchaser's option to rescind if houses not built — Lien for deposit.

A purchaser has a lien for a deposit paid under a

(a.) Reported by PAUL STRICKLAND, Esq., Barrister-at-Law.

contract for the sale of a plot of land when the contract goes off for want of title, and also when the contract is rescinded under a condition enabling the purchaser to rescind.

Rose *v.* Watson, 12 *W. R.* 585, 10 *H. L. Cas.* 672, *followed.*

Dictum *of* Kay, L.J., *in* Rodger *v.* Harrison, 41 *W. R.* 291, [1893] 1 *Q. B.* 161, *dissented from.*

Originating summons.

By a contract dated the 25th of January, 1897, F. Saunders, the vendor, agreed to sell, and the plaintiffs, as purchasers, to purchase, a freehold plot on a building estate of the vendors for the sum of £500, to be paid as to £200 by way of deposit on the signing of the contract, and as to the balance of £300 on the completion of the purchase with interest.

The contract provided: "Clause 3.—The purchase is to be completed as soon as 300 houses shall have been erected on the said estate (but without prejudice to clause 10 hereof) at the office of the vendor's solicitors, and the purchasers are to have possession as from the day of completion, when the balance of purchase-money, with interest as aforesaid, is to be paid. All outgoings up to that time will be cleared by the vendor, his heirs or assigns."

Clause 9 enabled the vendor to cancel the contract if the purchasers made any requisition which the vendor should be unable or unwilling to comply with.

"Clause 10.—If 300 houses shall not be erected on the said Woodhouse estate within two years from the date of this agreement, the purchasers shall have the right, by giving seven days' notice in writing to the vendor, to rescind and cancel this agreement, and at the expiration of such seven days the agreement shall absolutely cease and determine.

"Clause 11.—In the event of either the vendor or the purchasers cancelling this contract by virtue of any of the powers herein given, no costs, expenses, loss, or damage of any kind whatsoever shall be claimed or paid from one to the other, but the deposit without interest shall be returned by the vendor to the purchasers."

The plaintiffs paid Saunders the deposit of £200. Saunders afterwards sold and conveyed the Woodhouse estate to Saxelby, who mortgaged it.

In November, 1900, the mortgagees sold and conveyed the estate to the defendant Watt with notice of the contract of the 25th of January, 1897.

The 300 houses were not built, and Saunders did not pay or account for the deposit to any of his successors in title.

On the 3rd of December, 1900, the plaintiffs wrote to the defendant rescinding the contract of the 25th of January, 1897, and claiming payment of the deposit of £200, which was refused.

The summons claimed a declaration (1) that under the contract of the 25th of January, 1897, the plaintiffs were entitled to a charge or lien on the hereditaments therein described by way of security for the repayment of the deposit of £200 paid by them to Saunders on signing the contract, and (2) enforcement of the said security by foreclosure or sale.

Hon. Frank Russell, for the plaintiffs, referred to *Wythes* v. *Lee,* 4 W. R. 184, 316, 3 Drew. 396, at p. 402, 25 L. J. Ch. 389; *Rose* v. *Watson,* 12 W. R. 585, 10 H. L. Cas. 672.

Brinton, for the defendant, referred to *Williams* v. *Edwards,* 2 Sim. 78; *Dinn* v. *Grant,* 5 De G. & Sm. 451; *Rodger* v. *Harrison,* 41 W. R. 291, [1893] 1 Q. B. 161.

FARWELL, J., after stating the facts, said: The 300 houses have not been built, and on the 3rd of December, 1900, the plaintiffs gave the defendant notice to rescind, and on their behalf it is contended that they have a lien for their deposit on the estate in the hands of the defendant. On the other hand it is said that the lien arises only on the vendor's default, and depends on his default. The defendant's contention is inconsistent with the law as settled by the authorities and well stated in Robbins on Mortgages, vol. 2, p. 1376: "If a purchaser advance all or any part of the money to the vendor, and the contract is broken off, an implied contract arises, by which the purchaser has a lien on the land; and if the purchaser properly declines to complete, he has a lien for the deposit and interest on unpaid purchase-money, and for interest on the payments and also for the costs of a suit by himself or the vendor to compel performance of the contract, and this lien attaches on the deeds. If the purchase goes off through the fault of the purchaser, of course he has no lien for what he has paid." That seems to me to be a complete and accurate statement of the law. Then in *Wythes* v. *Lee* Kindersley, V.C., contrasts the case of a purchaser and a vendor, and what he says is quite consistent with an absence of any wrong-doing or default. He says: "This is clear, that the vendor, if he has parted with the estate to the purchaser before he has got his money, has a lien for it on the estate; that is unquestionable. Now, does the right of the purchaser, if the contract goes off, stand in principle on the same footing as that of the vendor?" Then after considering that aspect of the case, he says: "When a contract is made and then goes off, it appears to me that in principle and justice the equity of the purchaser to a lien on the estate ought to stand on as good a footing as the lien of the vendor after conveyance." The matter came before the House of Lords in *Rose* v. *Watson.* That case, to my mind, is on all fours with the present. There was, first, a contract, then a mortgage with notice, and then default by the vendor, and the House of Lords held that the purchaser who had paid a deposit had a charge for that deposit and interest in priority to the mortgagees. It was put by Lord Cranworth thus: "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When instead of paying the whole of his purchase-money, he pays a part of it, it would seem to follow, as a necessary corollary, that to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent." And Lord Westbury in the same case had previously pointed out that the money paid in conformity with the contract was part of the purchase-money under the contract; at p. 682 he says: "It was money advanced upon the faith that the land the subject of the contract would become the property of the respondent; and being so paid as part of the purchase-money under the contract, and being paid in advance, on the faith of the vendor's performance of the contract, I think that your lordships will have little difficulty in coming to the conclusion that those sums of money thus paid formed principal sums, in respect of which there became a lien from the time of the payment of them; in consequence of the subsequent failure of the vendor to perform the contract, and becoming such lien, they bore fruit consequently—that is to say, they entitled the person who is possessed of that lien to claim interest in respect of them." The lien is created by

the contract under which the money is paid as part of the purchase-money and on the faith that the contract will be carried out, and not by the default of the vendor. The default gives rise to the necessity for enforcing the lien, but the lien arises from the contract. I see no reason why a condition that, if 300 houses are not built the purchaser may rescind, should be held to differ in any way from the ordinary condition in a contract that, if the purchaser makes or insists upon any requisition or objection to the title which the vendor is unable or unwilling to comply with the vendor may rescind. There is no default there, but I venture to think it would not be arguable, and I do not think counsel for the defendant contended that the purchaser in such a case would have no right to a lien in the same way as if the purchase went off by reason of want of title on the part of the vendor. It is not default. It is rather misfortune. I hold, therefore, that on authority and on principle the purchaser has a lien, both when the contract goes off for want of title, and when the contract is rescinded under a condition enabling the purchaser to rescind. If the purchaser himself makes default the case is entirely different. If the purchaser makes default in such a way as to deprive himself of any debt at all, he cannot have a lien for that which does not exist. The only authority against the view which I have expressed is a *dictum* of Kay, L.J., in *Rodger* v. *Harrison*, and if the Lord Justice was right in that expression of opinion, it is, no doubt, decisive of the present case. The *dictum* was not necessary for the decision of the case before him, the point in which was the meaning of the word "assurance" in the Yorkshire Registries Act, 1884. The Lord Justice says: "If there be a lien for the purchase-money paid, when does that lien come into existence? Certainly not at the date of the contract. It cannot, then, be assumed that the contract will go off by default of the vendor. The purchaser's right, then, is to have the land itself." With every respect to the Lord Justice, that is not accurate. It is directly in the teeth of the decision of *Rose* v. *Watson*, in which the lien was anterior to the default; *Rose* v. *Watson* was not cited to him, and could certainly not have been present to his mind.

Solicitors for the plaintiffs, *Martineau & Reid.*

Solicitor for the defendant, *H. P. Spottiswoods.*

Chan. Div. Joyce, J. } May 6-9, 21.

DAMPER v. BASSETT. (a.)

Easement—Right of way—Private right of way—Prescription Act (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 3, 4—*Unity of possession of alleged dominant and servient tenements by lessee.*

Unity of possession of the dominant and servient tenements in the person of a lessee for years during the twenty years next before action brought is sufficient to bar a claim to a right of way under the Prescription Act.

Onley *v.* Gardiner, 4 *M. & W.* 496, *and* Battishill *v.* Reed, 4 *W. R.* 603, 18 *C. B.* 696, *followed.*

Trial of action.

Sarah Rachel Damper, the plaintiff in this action, was the owner of a farm known as Springfield Farm, Penshurst, Kent, and Elizabeth Bassett, the defendant, was part owner of an adjoining farm known as Holt's Farm.

The plaintiff's case was that the defendant had committed a trespass by driving a horse and cart across certain meadows forming part of Springhill Farm on to the highway.

The defendant admitted the act complained of, but justified it as having been committed in assertion of a private right of way which she claimed under the Prescription Act.

Many witnesses were called, and much conflicting evidence was given as to the user of the alleged right of way.

It was, however, proved, amongst other things, that from the year 1877 one George Ashby became tenant both of Holt's Farm and of Springhill Farm, and remained tenant of both until his death in 1898, after which his representatives remained in possession until Michaelmas, 1899.

Hughes, K.C., and *Boxall*, for the plaintiff.—In order to claim under the Prescription Act, the right of way must have been enjoyed as an easement and as of right: *Bright* v. *Walker*, 1 C. M. & R. 211, at p. 219; *Monmouth Canal Co.* v. *Harford*, *ibid.* 614. During the period of the unity of possession neither of these can have existed. Moreover, the easement must have been enjoyed during the twenty years next before action brought: *Onley* v. *Gardiner*, 4 M. & W. 496; *Battishill* v. *Reed*, 4 W. R. 603, 18 C. B. 696.

Younger, K.C., and *Church*, for the defendant.—*Bright* v. *Walker* and *Onley* v. *Gardiner* do not affect the case, because there the plaintiff was not in a position to prove twenty years' user without taking into account the period covered by the unity of possession. All that those cases go to prove is that there must have been, at some time or other, continuous enjoyment of the easement for twenty years, and that the terms of the Act are not satisfied by adding together isolated periods. The only case on which the proposition rests is *Battishill* v. *Reed*, and that case should not be followed In *Simper* v. *Foley*, 2 Jo. & Hem. 555, 10 W. R. Ch. Dig. 23, unity of ownership was held only to produce a suspension of the easement; and so in *Ladyman* v. *Grave*, 19 W. R. 863, L. R. 6 Ch. App. 763, where it is decided that the interruption indicated by the statute means an adverse interruption.

They also cited *Hollins* v. *Verney*, 33 W. R. 5, 13 Q. B. D. 304; *Thomas* v. *Thomas*, 2 Cr. M. & R. 34; and Gale on Easements, at pp. 165 and 209. They further asked permission, if necessary, to amend the pleadings and claim the right by immemorial user.

Hughes, K.C., in reply.

Cur. adv. vult.

May 21.—JOYCE, J.—This is an action of trespass by the owners of Springhill Farm against the defendant as owner, or part owner, of Holt's Farm, in driving a horse and cart from Holt's Farm across certain meadows forming part of Springhill Farm to the highway leading to Penshurst. The defence is that the act complained of was done in exercise of a private right of way, which is thus pleaded in paragraph 4 of the statement of defence: "For upwards of forty years prior to the commencement of this action the defendant and her predecessors in title, and persons employed by and serving them respectively, have uninterruptedly and as of right passed and repassed with cattle, horses, wagons, carts, and carriages, and on foot for all purposes along and over the roadway coloured red on the plan printed hereon between the points marked A and B on such plan." This I understand to be a plea of a right of way under the Prescription Act (2 & 3 Will. 4, c. 71); and the defendant contended, while the plaintiffs disputed, that the existence of the alleged right of way could

(a.) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

be made out under the provisions of section 2 of that Act, and this was the issue which the plaintiffs came to the trial prepared to meet, and which was tried accordingly. Now, the action was instituted on the 28th of May, 1900. It appeared that from the year 1877 until his death in 1898 one Ashby, as tenant, was in occupation, not only of Springhill Farm, but of Holt's Farm, and his representatives remained in occupation until Michaelmas, 1899. In other words, for the twenty years, and for twenty-three years of the forty years, immediately preceding the action there was unity of possession of the alleged servient and alleged dominant tenement, so that the private right of way alleged, if it ever existed, could not during the last twenty-three years have been enjoyed as of right as an easement. This being so the plaintiffs insisted upon the provisions of the fourth section of the Act and the decisions in *Bright* v. *Walker*, *Onley* v. *Gardiner*, and *Battishill* v. *Reed* as being fatal to the defendant's claim to have acquired a right of way under the Prescription Act. I understood the defendant's counsel to contend that the two last-mentioned decisions have been overruled or ought not to be followed, relying upon certain *dicta* that have fallen from the court in cases where the easement in question was the right to the access of light, which, it is well settled, stands, as compared with other easements, upon a special and peculiar footing under the provisions of the third section of the Prescription Act. I do not consider myself entitled, nor indeed do I see any reason why I should desire, to hold myself not bound by the decisions of the eminent judges who decided the cases I have mentioned, and in particular *Onley* v. *Gardiner* and *Battishill* v. *Reed*. They have not either of them been overruled or, so far as I am aware, expressly disapproved of; and I must, therefore, follow them. But at all events the case of *Baxter* v. *Taylor*, 4 B. & Ad. 72, shows that the user, if any, of the alleged right of way at any time during the last forty years would, under the circumstances, be no evidence of right as against the owners of the freehold of Springhill Farm—that is to say, against the present plaintiffs. As a matter of fact, it does not appear that at any time during Ashby's possession of the two farms the alleged way or right of way was actually used in any sense whatever. For all necessary purposes of communication between the two farms Ashby, at least for many years before his death, made use of an opening in the boundary fence at an entirely different place from that at which it is now alleged that the right of way existed. In the circumstances stated, I consider that the claim of the defendant to a right of way under the provisions of section 2 of the Prescription Act fails as well by reason of the fact that there cannot possibly have been any continuous user of the kind required by the Act for either twenty years or forty years next before the action as also because the enjoyment, if any, during either of those periods would not, in my opinion, have been effectual as against the plaintiffs.

His lordship also found against the defendant upon the facts, and refused leave to amend the pleadings at so late a stage in the proceedings. He granted an injunction against the defendant, gave one shilling damages, and ordered the defendant to pay the costs.

Solicitors, *Starling & Wright; Prior, Church, & Adams*, for *Gorham, Warner, & Sons*, Tonbridge.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 8.

PICKFORD (*Appellant*) v. CORSI (*Respondent*). (*a.*)

Pawnbrokers — Unlawful pawning of stolen article—Conviction of pawner for larceny—Liability of pawner to further proceedings by pawnbroker—Pawnbrokers Act, 1872 (35 & 36 *Vict c.* 93), *s.* 33.

Where a person steals an article and unlawfully pledges it with a pawnbroker, and is subsequently charged with the theft and is convicted, the pawnbroker does not thereby lose the right to take proceedings against the pawner under section 33 *of the Pawnbrokers Act*, 1872, *because the pawner has been convicted of larceny by the owner of the goods.*

This was an appeal on a case stated by Haden Corser, Esq., metropolitan police magistrate, the point raised being whether a man is liable to be convicted of the offence under the Pawnbrokers Act of unlawfully pledging goods belonging to another person after he has been already convicted of the larceny of the same goods.

The facts, as stated by the case, were as follows: At a court of summary jurisdiction holden at the Worship-street police-court, one of the police courts of the metropolis, on the 24th and 31st days of January, 1901, an information bearing date the 13th of January, 1901, preferred by the appellant against Antonio Corsi (hereinafter called the respondent) under section 33 of the Pawnbrokers Act, 1872, charging that he, the said respondent, on the 5th of January, 1901, had knowingly and designedly pawned with the appellant, being a pawnbroker within the meaning of the said Pawnbrokers Act, 1872, two rings, being the property of one Constance Laura Biddulph, the respondent not being employed or authorized by the said Constance Laura Biddulph to pawn the same, was heard and determined by the aforesaid magistrate, and upon such hearing the said information was dismissed. Upon the hearing of the said information the following facts were either admitted or found in evidence: "1. The appellant is a licensed pawnbroker within the meaning of the Pawnbrokers Act, 1872. 2. On the 5th of January, 1901, the respondent pledged with the appellant two rings for £6 then advanced by the appellant to the respondent on the security thereof, which said rings had been stolen by the respondent at the Avenue Studios, where he was employed as an artist's model, and which were the property of the said Constance Laura Biddulph. 3. On the 16th of January, 1901, the said Constance Laura Biddulph charged the respondent at the Westminster police-court with stealing the said two rings on a day prior to the said 5th of January, 1901. The respondent was convicted and was thereupon bound over by recognizance in the sum of £10 to come up for judgment if called upon. 4. The appellant declining to give up the said rings, the said Constance Laura Biddulph, on the said 16th day of January, 1901, issued against the appellant a summons under the Act 2 & 3 Vict. c. 71, s. 27, for unlawfully refusing and neglecting to deliver the said two rings to her. This summons was heard on the 22nd day of January, 1901, at the said Westminster police-court, when the appellant was ordered to deliver the said two rings to the said Constance Laura Biddulph on payment by her to the appellant of the sum of £3, and in compliance with the said order the

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

appellant delivered the said two rings to the said Constance Laura Biddulph and received the said sum of £3 from her. The respondent has not repaid the said sum of £6 advanced by the appellant on the security of the said rings nor any part thereof. 5. It was contended for the appellant that the conviction for larceny of the said rings did not prevent the respondent being proceeded against under section 33 of the Pawnbrokers Act, 1872."

The magistrate was of opinion that the respondent having been convicted of larceny of the said rings, was not liable to be convicted of another criminal offence in respect of the same property, and upon the same facts as those proved upon the conviction for larceny; that the offence under section 33 of the Pawnbrokers Act, 1872, was a criminal offence, inasmuch as a penalty is awarded, and the fact of a court of summary jurisdiction having the power in addition to imposing a penalty to award to the pawnbroker any sum not exceeding the full value of the pledge, did not constitute a civil remedy merely for the purpose of recouping the pawnbroker for any loss he might have sustained.

Section 33 of the Pawnbrokers Act, 1872, provides as follows: "If any person knowingly and designedly pawns with a pawnbroker anything being the property of another person, the pawner not being employed or authorized by the owner thereof to pawn the same, he shall be guilty of an offence against this Act, and shall be liable, on conviction thereof in a court of summary jurisdiction, to forfeit any sum not exceeding five pounds, and, in addition thereto, any sum not exceeding the full value of the pledge as ascertained by the court. The forfeitures when recovered shall be applied towards making satisfaction thereout to the party injured, and defraying the costs of prosecution as the court directs."

Avory, K.C. (*C. L. Attenborough* with him), for the appellant.—The magistrate should have convicted the respondent. Unless the larceny changed the property and gave the property to the respondent the conviction cannot be an answer to these proceedings. The magistrate has confused the two questions, because the same evidence was used in order to prove the guilt on the second occasion. No doubt this was a criminal offence because it is subject to a penalty, but the question is, Could the respondent plead *autrefois convict*, and is it *res judicata*? He could not plead *autrefois convict* for this reason: that it is not the same offence, and it is not an offence involved necessarily in the other. It is a conclusive answer to the plea *autrefois convict* or *res judicata* that it is not the same transaction which forms the subject of inquiry. A man who steals goods does not necessarily pawn them—it is a separate and subsequent transaction. This case is governed by *Fancett* v. *Bierman*, 14 Times L. R. 148, where the question was raised whether, under this section, the pawnbroker was the proper person to take proceedings. The magistrate held that the pawnbroker is not the party injured within the meaning of the Pawnbrokers Act, and that he had no right to take proceedings under this section, but that it was only the owner of the property. The court overruled that contention and said that the pawnbroker was the person injured within the meaning of this section. That case decides the present case because the learned judges held that there were two separate offences, one committed against the owner of the property, and a second offence committed by the man against the pawnbroker. The object of this Act is the protection of pawnbrokers, and the object of the section is to give the pawnbroker a remedy against any person who deceives him by pawning property that does not belong to him, the necessary consequence of that being that the pawnbroker ultimately has to give up the property and may or may not get back from the owner the amount which he has advanced. In this case he gets back half the amount. That is a usual order to make when the pawnbroker has not been guilty of any neglect or default. The confusion in the magistrate's mind is very clearly expressed in *Reg.* v. *Ollis*, *ante*, p. 76, [1900] 2 Q. B. 758. In that case a man was indicted for false pretences and acquitted. There was a second indictment for false pretences, and evidence which had been given on the first trial was repeated at the second trial, and the question was whether that was admissible. The magistrate thought that because the same evidence was called to prove the one offence as was called to prove the other, therefore the man was entitled to be acquitted. Darling, J., says, at p. 780: "By the admission of this evidence the defendant was not *bis vexatus*, for I feel sure that those words are not to be understood as meaning that a man is not to be more than once annoyed by the same evidence. I think they mean that he is not to be by legal process twice exposed to the risk of being found guilty of the same crime, or the same tort, or liable twice to pay the same debt, be it to the State or to his fellow citizen. To hold otherwise seems to me to rule that evidence which has been given once shall never be produced again against the same defendant; yet it is plain that up to a certain point the evidence must often be the same, although the defendant is accused of wrongs done to two distinct persons, and that in different suits or forensic proceedings." So it is here—up to a certain point the evidence is the same, but the evidence necessary to convict the man of larceny does not involve proving that he has pawned the article. He may be convicted of larceny without any proof that he has pawned. He was guilty of the offence of larceny before he committed the other offence. Supposing a man having stolen some valuable diamond ornament, in order to prevent detection or out of mere spite, smashed the diamond ornament up with a hammer, could it be doubted that he might be convicted of wilful damage? The magistrate was wrong here, and the respondent ought to have been convicted of this second and subsequent offence.

No one appeared on behalf of the respondent.

Lord ALVERSTONE, L.C.J.—In my opinion the learned magistrate ought to have entertained this case. I think the ground may be shortly put, as has already been put by the argument of Mr. Avory, that this is a statute which was passed, not only for the protection of owners of goods, but also for the protection of pawnbrokers, and that the offence is knowingly and designedly pawning goods which are the property of somebody else. It would seem strange that because as in this particular case the goods have been stolen before they have been pawned, and the ownership of the goods has been proved not to be that of the man who pawned them, the pawnbroker should lose his right to such remedy as the section gives him. I think that it would require express words in a statute to make it an answer to the offence of illegally pawning goods to say that there had been a previous conviction in respect of the depriving of another owner of the property in those goods. I think in this case the learned magistrate ought to have dealt with the charge.

LAWRANCE, J.—I agree.

Appeal allowed. Case remitted to the magistrate.

Solicitors, *Attenborough & Son.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) May 6.

SOUTH LONDON ELECTRIC SUPPLY CORPORATION v. PERRIN. (a.)

Metropolis—Public health — Nuisance—Sending forth black smoke—No evidence offered that any particular individual or property was annoyed or injured thereby — Necessarily a nuisance — Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 24 (b).

The appellant company was convicted under section 24 (b) *of the Public Health (London) Act*, 1891, *of sending forth black smoke "in such quantities as to be a nuisance."*

Held, that as the evidence proved that black smoke was sent forth in such quantity and for such periods as must necessarily amount to a nuisance, the conviction must be affirmed, as it was not necessary in such circumstances to show that the black smoke was a nuisance or an injury to any particular individual or property.

Appeal by case stated from the decision of a metropolitan police magistrate sitting at Lambeth police-court, convicting the appellant company of an offence under section 24 (*b*) of the Public Health (London) Act, 1891.

Ten several complaints were preferred by the respondent Wm. James Perrin against the appellants, charging that at their premises the following nuisance existed—to wit, "a chimney (not being the chimney of a private dwelling-house) sending forth black smoke in such quantity as to be a nuisance." The matters complained of took place on ten days between the 1st and 14th of November, 1900, and at the hearing before the magistrate it was proved that black smoke issued from the appellants' chimney, which was 180 feet in height, on the days mentioned in the summonses at various times during those days.

On the 5th of November smoke issued from the chimney on various occasions amounting in all to 128 minutes, and on several other occasions during the ten days in question the same thing happened for more than seventy minutes during the day.

On the 13th of November smoke came from the chimney for not not more than sixteen minutes.

No witness stated that the black smoke was a nuisance to himself.

Upon these facts the magistrate convicted the appellants and imposed the maximum penalty of £10 for each offence and £10 costs.

The ground of the appeal was that proof of the mere issuing of smoke from the chimney was not sufficient to support a conviction.

Cripps, K.C. (*Scott Fox, K.C.*, and *Samuel Fleming* with him) for the appellant company.—To support a conviction there must be evidence that the smoke issued in such volume as to create either a nuisance to a particular individual or an injury to property. There is no such evidence here, and therefore the alleged annoyance caused to the neighbourhood by the smoke falls short of a nuisance at common law. The offence is the permitting of smoke to issue "in such quantities as to be an annoyance" and the mere issue of smoke from a chimney in itself constitutes no offence under the statute.

Stanley v. *Farndale*, 56 J. P. 709; *Stinson* v. *Browning*, 14 W. R. 395, 35 L. J. M. C. 152; and *Hill* v. *Somerset*, 51 J. P. 742, were cited during the argument.

Horace Avory, K.C., and *Lowenthal*, for the respondent, were not heard.

Lord ALVERSTONE, L.C.J.—In this case I think the magistrate was right. But while I think the appeal should be dismissed, I must not be thought to say that in my judgment a magistrate ought to convict simply on evidence that smoke had been seen coming out of a factory chimney in every case. On the other hand I think there are many cases, and this is one, where the evidence of the quantity of smoke that has been permitted to pour forth amounts to so patent a nuisance that it becomes unnecessary to show that any particular individual is annoyed or any specific property injured before he ought to convict. In my opinion the evidence here shows that on the days in question the smoke must necessarily have amounted to a nuisance, and therefore it is impossible to argue that there ought not to have been a conviction under the statute. Under the circumstances we cannot say that the magistrate was wrong in coming to the conclusion that he arrived at.

LAWRANCE, J., concurred.

Appeal dismissed with costs.

Solicitors, *Frith & Co.; Miller, Smith, & Bell.*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) May 4.

CORBETT v. BADGER. (a.)

Metropolis — Building — District surveyor — Fees — Builder in default—Right to recover fees from owner or occupier—Limitation of time—Summary Jurisdiction Act, 1848 (11 & 12 *Vict. c.* 43), *s* 11—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 154, 157 (1) (2).

A district surveyor can take summary proceedings to recover his fees from the owner of a building under section 157 *of the London Building Act*, 1894, *within six months from the date of the receipt of the bill of fees by the owner.*

Special case stated by Mr. Kennedy, a metropolitan magistrate, on the hearing of eight summonses issued on complaints by the respondent to recover fees amounting to £546 7s. 6d., alleged to be due to him as district surveyor for the district of Lewisham, under the London Building Act, 1894.

In 1899 the appellant was the owner of the St. German's estate, Hither Green, and he contracted with a builder named Lawrence to erect certain houses on the estate. The houses were duly erected by Lawrence, who was paid the contract price by the appellant, which under the contract was to include any fees which Lawrence might be called on to pay to the district surveyor under the above Act.

The builder, however, became insolvent before the fees were paid, and the district surveyor thereupon took out summonses against the building owner, as the statute provided that if the builder was in default with his payment of the fees the owner or occupier should be liable.

At the hearing of the summonses the building owner took the objection that none of the summonses were issued within six months of the time the respective complaints arose, and this depended upon a quantity of detailed evidence as to the progress

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

made with the buildings. In the result the magistrate overruled the appellant's contention, and ordered him to pay in all fees amounting to £546 7s. 6d. and costs.

The building owner appealed, and the question was whether the complaints had been made within six months after the matter of complaint arose as required by the Summary Jurisdiction Act, 1848.

Section 154 of the London Building Act, 1894, provides that certain fees shall be paid by the builder, or in his default by the owner or occupier, to the district surveyor; and section 157 enacts: "(1) That at the expiration of the following periods—that is to say, (a) of fourteen days after the roof of any building surveyed by the district surveyor under this Act has been covered in . . . the district surveyor shall be entitled to receive the fees due to him from the builder employed in erecting such building . . . or from the owner or occupier of the building so erected. . . . (2) If any such builder, owner or occupier refuses to pay the said fees they may be recovered in a summary manner on its being shown to the satisfaction of the court that a proper bill specifying the amount of the fees was delivered to or sent to him in a registered letter addressed to his last known residence."

Macmorran, K.C., and *R. C. Glen*, for the appellant.

Ruegg, K.C., and *Montague Shearman*, for the respondent.

Lord ALVERSTONE, L.C.J.—In my opinion this case is one of considerable difficulty, but I think we ought not to interfere with the decision of the learned magistrate. It seems that the roof was completed in December, 1899, and at some date after the expiration of fourteen days from then the surveyor became entitled to the fee now claimed. Between the 17th of January and the 10th of September, 1900, the district surveyor delivered to the builder the fee bills contemplated by sub-section 2 of the 157th section of the London Building Act, 1894. On the 2nd of July, 1900, the builder Lawrence became bankrupt. On the 20th of October, 1900, notices of the claim for fees were sent to the building owner; and on the 8th of November these summonses were taken out against him. The point we have now to consider is whether the six months ran from the expiry of the fourteen days above referred to or whether they ran either from the time when the bills were given to the builder (in which case some of the summonses would be out of time), or whether they ran from the date of the notices to the owner on the 20th of October, 1900 (in which case none of them would be out of time). The material words of section 11 of the Summary Jurisdiction Act, 1848, speak of the time "when the matter of such complaint arose," and I agree it would be quite possible to hold, as we are invited by the appellant to do, that the "matter of complaint arose" when there was a neglect to pay the fees after fourteen days by the builder. It seems to me, however, that we ought not to take that view because at that time the whole of the matter of complaint was clearly not ascertained. For instance, some of the fees under the Act required calculation and under those circumstances the principle enunciated in *Poole and Forden Highway Board* v. *Gunning*, 51 L. J. M. C. 49, 30 W. R. Dig. 89, applies—namely, that at that time the amount could not be so ascertained as to require the debtor to pay. As against the builder I think the time would run from the date when the bills were sent to him. As against the builder, I think we must hold that time did not run until he had received a bill under sub-section 2 before referred to. What we have to do is to consider when there was a default. I cannot myself say that the neglect of the owner to pay in default of the builder was such a default as would make the six months begin to run, until the fee bills have been served on him. During the argument it was contended on behalf of the appellant that he ought not to be ordered to pay the money twice over. That is a question which we have no jurisdiction to deal with, although no doubt under the circumstances the failure of the builder has worked a substantial hardship on the building owner. For the reasons I have stated none of the summonses were in my opinion issued too late, and the decision of the magistrate must therefore be affirmed.

LAWRANCE, J., concurred.

Solicitors, *West, King, Adams, & Co.; H. G. Barnard.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 3.

WILLIS v. LOVICK. (a.)

County court—Practice—Notice of statutory defence—Gaming Act, 1892 (55 *Vict.* c. 9), *s.* 1—*County Court Rules*, 1889, *ord.* 10, *rr.* 10, 18a.

The Gaming Act, 1892, *created a statutory defence, of which it is necessary for the defendant to give notice under the County Court Rules*, 1889, *ord.* 10, *r.* 18a.

Appeal from the Westminster County Court.

The plaintiff brought an action in the county court claiming from the defendant the sum of £8 15s. 10d., of which the particulars were as follows:—

"1900, October 21-27.—To 25 per cent. commission in cash received by the defendant on the introduction of plaintiff, and on which commission was agreed to be paid—cash received, £11 15s. 2d.; commission, £2 18s. 10d.

November 4-10.—The like; cash received, £38 0s. 5d. —commission, £9 10s. 1d."

Credit was given for £3 13s. 1d., cash received in account.

There was an alternative claim for money had and received by the defendant for the use of the plaintiff.

The only answer to this claim set up by the defendant at the trial was that the contract on which the plaintiff relied was void by the Gaming Act, 1892 (55 Vict. c. 9), s. 1.

The county court judge gave judgment for the plaintiff on the ground that no notice of the defence had been given in pursuance of the County Court Rules, ord. 10, rr. 10 and 18a.

Magee, for the defendant.—It is not necessary to give notice of a statutory defence when the action is based upon an illegal contract: *Scott* v. *Brown, Doering, McNab, & Co.*, 41 W. R. 116, [1892] 2 Q. B. 724. *Ex turpi causa non oritur actio.*

See also *Brutton* v. *Branson*, [1898] 2 Q. B. 219, 48 W. R. Dig. 41.

Wildey Wright and *H. L. Ormsby*, for the plaintiff, were not called on.

Lord ALVERSTONE, L.C.J.—The county court judge has decided that the defence that the contract sued on was void by virtue of the Gaming Act, 1892, cannot be raised unless notice thereof has been given under ord. 10, rr. 10 and 18a, of the County Court Rules, 1887. Rule 10 provides that "where the defendant

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

intends to rely upon any of the grounds of defence mentioned in rules 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of this order, or upon any counterclaim, he shall file a notice stating thereon his name and address, together with a concise statement of such grounds, five clear days before the return day. . . ." Rule 18*a* provides that "when in any action the defendant relies upon any statutory defence, or any defence of which he is required by any statute to give notice, he shall in his statement set forth the year, chapter, and section of the statute, or the short title thereof, and the particular matter upon which he relies." The county court judge thought that the defence raised by the defendant came within these words.

On the particulars of claim the action might have been maintainable and the commission recoverable, notwithstanding the Gaming Acts; no one could tell on the face of the particulars that they involved a gaming transaction. I do not lay down any rule as to what a statutory defence is; I agree with what Wills, J., said in *Brutton* v. *Branson*, and I think the ground of his decision is one on which we may fairly act. That was a case under the Statute of Frauds, and Wills, J., pointed out that the non-existence of a writing to satisfy the statute had always been treated as a matter of defence and that, if it was a defence, it was a statutory defence. Mr. Magee says that that reasoning cannot apply to a statute passed so recently as 1892, but it is a gaming statute and for many years the defence that a wagering contract cannot be enforced has been held to be a defence which must be specially pleaded. I have no doubt that the county court judge was right in disallowing the defence, because no one could know from the particulars of claim what defence was going to be raised.

It is clear that the Court of Appeal in *Scott* v. *Brown* thought fit to deal with this point as a matter of law, but no rule was laid down in cases where the county court judge thinks that the defence is statutory that he must allow it to be raised or adjourn the trial to enable the defendant to give notice. We should be interfering with a useful rule if we overruled the county court judge's decision in this case.

LAWRANCE, J., concurred.

Solicitor for the defendant, *H. A. Grey*.

Solicitor for the plaintiff, *J. F. Bonney*.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — April 30.

DUCKWORTH *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO. (*a.*)

Railway company—Passenger—Ticket—Incorporation of conditions—Delay caused by negligence of company—Liability of company for loss to passenger.

D. travelled by an early workman's train, which arrived late, and he consequently lost a day's wages.

Held, that the railway company were not liable, because the printed notice on the back of the ticket—to the effect that the departure or arrival of the trains at the times specified in the time-table was not guaranteed nor were the company under any circumstances to be held responsible for delay or detention, however occasioned, or any consequences arising therefrom—was a condition incorporated into the contract; and therefore the plaintiff could not recover, notwithstanding that the delay was caused by the admitted negligence of the defendants.

Appeal by the railway company from the decision of his Honour Judge Bompas, sitting in the Burnley County Court, who gave judgment for the plaintiff in an action raising the question of liability of the company to compensate a passenger for loss of a day's wages due to the admitted negligence of the company, whereby the train by which the plaintiff travelled was late in arriving at Burnley.

The defendants, the Lancashire and Yorkshire Railway Co., are accustomed to run a train for workmen every morning from Rose-grove to Burnley.

The usual time taken is three minutes, the train being timed to start at 5.45 and arrive at 5.48.

On the 18th of October the plaintiff took a workman's ticket by this train.

The train started, but before reaching Burnley was stopped, the signals having been left against it by the negligence of the signalman.

The train did not arrive until ten minutes past six—that is, twenty-two minutes late.

The plaintiff was a weaver at a mill, and was going to his work. He went straight to the mill, but he found on getting there that another weaver had been already put in his place, and he lost his day.

He then brought this action in the county court to recover 4s. 6d., his day's wages.

The defendants admitted the negligence of the signalman, but said the ticket was issued subject to the regulations contained in the company's time-tables.

Under the heading "General Regulations" was this notice: "The hours or times stated in the company's time-books, tables, bills, and notices are appointed as those at which it is intended, so far as circumstances will permit, the passenger trains should arrive at and depart from the several stations, but their departure or arrival at the times stated, or the arrival of any train passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their lines is not guaranteed; nor will the company under any circumstances be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The right to stop the trains at any station on the lines, although not marked as a stopping station, is reserved."

The learned judge was of opinion that a contract was implied by the issuing of the ticket that, having taken the passenger into the train and started it, the defendants would take reasonable care to carry him, not only in safety, but with reasonable speed, to his destination, and he did not think the notice in the regulations abrogated this contract, and that as it was admitted that through the negligence of the defendants' servants the defendants had taken an unreasonable and wholly unnecessary time in carrying the plaintiff between the two stations indicated on his ticket, he gave judgment for the plaintiff for the sum claimed.

The railway company appealed.

C. A. Russell, K.C., and *Hogg*, for the railway company, contended that notwithstanding their admitted negligence, they were protected by the condition and were entitled to succeed on the authority of *Le Blanche* v. *London and North-Western Railway Co.*, 24 W. R. 808, 1 C. P. D. 286, and *McCartan* v. *North-Eastern Railway Co.*, 54 L. J. Q. B. 441, 33 W. R. Dig. 175.

F. H. Mellor, for the plaintiff, contended that, negligence being admitted, the plaintiff was entitled to judgment.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Lord ALVERSTONE, L.C.J.—In my opinion the decisions of the Court of Appeal are too strong to allow of our accepting the argument for the plaintiff. It might have been open to the courts to decide otherwise originally, and it is possibly still open to the House of Lords so to decide. But it has long been held in decisions binding on this court that there is no limit on the conditions that may be imposed with reference to passenger traffic by railways. The cases with reference to carriage by sea depend on other considerations. If the matter were absolutely *res integra*, a good deal might be said in favour of the view that words not pointing to negligence of the company ought not to be held to cover negligence. But the judgments of the Court of Appeal are conclusive on this point. In *Le Blanche* v. *London and North-Western Railway* Baron Cleasby thought that even the conditions in that case were sufficient to enable the court to enter judgment for the defendants; but the other members of the court thought that the words—which are not in the condition in the present case—that "every attention will be paid to ensure punctuality as far as possible" made the case one in which the plaintiff might be able to succeed, and one in which there might, therefore, be a new trial. In *McCartan* v. *North-Eastern Railway*, where those words were absent, judgment was entered for the defendants. And in *Le Blanche* v. *London and North-Western Railway* Mellish, L.J., and other members of the court pointed out that had the words in question been absent in that case, the result would have been different. It is quite impossible that such learned judges should have delivered the judgments they did if they had not thought that such a condition as that in the present case would cover negligence. The appeal must therefore be allowed, but in view of the importance of the case leave to appeal will be given.

LAWRANCE, J., concurred.

Solicitors, *Woodcock, Ryland, & Co.*, for *C. Moorhouse*, Manchester; *Preston, Stow, & Preston*, for *J. C. Waddington*, Burnley.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 23.

ROBERTSON (*Appellant*) v. KING (*Respondent*) (*a.*)

Local government—Working classes—Dwelling-houses—Closing order—Housing of the Working Classes Act, 1890 (53 & 54 *Vict. c.* 70), *ss.* 29, 32 (2).

Where proceedings under section 32 *of the Housing of the Working Classes Act*, 1890, *are taken by the local authority against the owner of any dwelling-house for closing of the same, on the ground that it is unfit for human habitation, the fact that such dwelling-house has already been voluntarily closed by the owner to human habitation, and has been kept so closed, is no objection to a closing order being made.*

Section 29, *which defines "dwelling-house" as "any inhabited building," was not intended to negative the natural meaning of sections* 32 *and* 33.

This was a case stated for the opinion of the court by E. M. E Welby, Esq., stipendiary magistrate for Sheffield.

Application was made to the magistrate by the appellant, John Robertson, the medical officer of health for the city of Sheffield, under section 32 of Housing of the Working Classes Act, 1890, for a closing order in respect of three dwelling-houses on the ground that they were in a state so injurious to health as to be unfit for human habitation.

The respondent, Elizabeth King, was the owner of the premises.

At the hearing it appeared that the houses were old buildings, and for a long period after they were built had been occupied and inhabited as dwelling-houses, but that at the date of the complaint they were unfit for human habitation within the meaning of the Act inasmuch as they were in a dirty and ruinous and dilapidated state, and some filthy and other accumulations on the premises had very probably become a nuisance for which proceedings under the Public Health Act might be taken.

It appeared, further, that the late owner of the houses had more than five years ago closed them to all purposes of human habitation, and that they had never since been used for or reopened to such purposes by him or anyone else.

It appeared, further, that the respondent had only recently come into possession of the premises, and that she had no intention of having them used for human habitation as they then were, but it did not appear whether any intention had been formed or not as to allowing them to remain as they were or of rendering them fit for human habitation, if they could so be made, or of demolishing them and putting new dwelling-houses or other buildings on the site or turning them to other purposes.

At the hearing it was argued that by section 32 (2) proceedings may be taken for the express purpose of causing dwelling-houses to be closed, whether the same be occupied or not, and that the subsequent proceedings set out in sections 32, 33, 34, &c., cannot be put in force unless there has been a closing order.

The learned magistrate refused to make a closing order. He considered that the premises had been a long while ago closed to human habitation, as much as they would be by a closing order and had been so kept ever since; and that they had therefore been closed as to being dwelling-houses as defined by section 29 of the Act, and had been voluntarily put where a closing order would put them, and had been kept so closed ever since; and that whatever nuisance or other like proceedings their owner might be liable to there was a want of foundation for a closing order when the premises had been voluntarily closed to such use and kept so. If the owner had in some way caused or allowed the premises to be reopened for purposes of human habitation a closing order might be made whether they were occupied or not; but the owner had not done so; and an application to close them might be made as soon as there was something to show that they were held open to human occupation, whether they were occupied or not. He accordingly refused to make an order.

Against this decision the appellant stated the following grounds of objection: That the premises were dwelling-houses within the meaning of the Housing of the Working Classes Act, 1890; that section 29, defining a dwelling-house as any inhabited building, provided that such definition shall apply "unless the context otherwise requires," that under section 32 (2) the context otherwise required and provides that the provisions of section 32 shall apply whether the premises are occupied or not; that the buildings were unoccupied dwelling-houses, and that there was no evidence of permanent abandonment of the buildings as dwelling-houses, inasmuch as they had not been adapted for any other purpose and might at small cost and in the course of a day or two be made fit for human habitation.

The question for the decision of the court was

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

whether under the circumstances the closing order applied for should have been refused or granted.

R. Browne, K.C., appeared for the appellant.

No one appeared on behalf of the respondent.

Lord ALVERSTONE, L.C.J.—I think the learned stipendiary ought to have made the order in this case. Without in any way straining the words of the Act, I think that the real object of these sections is to be carried out; and the object obviously is that if the owner, on notice being given him, does not put the house into a proper condition, certain consequences shall follow. As I understand the very lengthy reasoning of the learned stipendiary he thought that because for five and a-half years the owner had neglected to let these houses, so that they were obviously unfit for habitation, and were not in a habitable condition, therefore they were not inhabited buildings within the meaning of section 29.

I think that section 29 was not intended to negative the natural meaning of sections 32 and 33. That non-inhabitancy is not an objection to the order is absolutely clear because the words are "whether occupied or not," and the moment you get that, you have to ask yourself—how long must it have been unoccupied. I think, as Mr. Browne very frankly said, he could not tell, on the face of the learned stipendiary's reasons, what he would have said supposing the house had been unoccupied for six months. I think, although the houses are in that condition, they are houses; they are dwelling-houses, *primâ facie*; and I do not think that the statement, "dwelling-house shall mean an inhabited building," taken with the context and the other sections, makes it necessary for us to limit the words to inhabited dwelling-houses. Under the circumstances I think the fact that they have been for five and a-half years not occupied is no objection in law to the learned magistrate's order being made. As I pointed out just now, no harm is done because the owner of the property, if he does not want the houses pulled down, can make them fit. Then, of course, the closing order, which only closes them until they are fit, practically will have no operation against him. I think that this appeal should be allowed.

LAWRANCE, J.—I am of the same opinion.

Appeal allowed.

Solicitor, *H. Sayer*, Sheffield.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 22, 23.

THE KING *v.* NORFOLK COUNTY COUNCIL.
Ex parte GREEN. (*a.*)

Local government—Right of way—Obstruction to—Duty of district council to take legal proceedings for protection of public right of way—Transfer of duty to county council—Local Government Act, 1894 (56 & 57 *Vict c.* 73), *s.* 26, *sub-sections* 1, 3, 4.

In an action by the owners of an estate against private persons for an alleged trespass in removing certain obstacles, erected by the plaintiffs, to an alleged public right of way over such estate, the county council, where the parish council have appealed under section 26 *of the Local Government Act*, 1894, *to the rural district council for assistance in protecting such right of way, and the rural district council have refused or failed to take any proceedings in consequence, are authorized under such section, on petition by the parish council, to pass a resolution that the powers and duties conferred upon the rural district council by such section shall be transferred to the county council, and that the county council shall contribute towards the costs of the defendants in the action.*

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

In this case a rule *nisi* for a *certiorari* had been obtained calling upon the county council of the county of Norfolk to show cause why a certain order or resolution passed by them on the 13th of October, 1900, with reference to an action then pending in the Chancery Division, in which Sir Edward Green, Bart., and Edward Lycett Green were plaintiffs, and Charles Ellis and William French were defendants, should not be quashed.

From the pleadings in the action it appeared that the plaintiffs were respectively tenant in possession and owner of the Ken Hill estate in the parish of Snettisham, in the county of Norfolk.

A part of the estate consisted of enclosed woods and coverts and lands and marshes.

On the 15th of October, 1899, the defendants, in the assertion of an alleged highway through the woods and coverts and over the land and marshes, demolished the fences and barriers which had been erected by the plaintiffs and removed a notice board warning the public that there was no public footpath.

The plaintiffs claimed damages for the trespass and a declaration as to the alleged right of way.

The Snettisham Parish Council appealed to the Docking Rural District Council to assist them in maintaining the right of the villagers to the footpath.

The district council, not having sufficient funds, and being unable to make a special rate, refused to do so, whereupon the parish council appealed to the county council to protect the right of the parishioners, and at a meeting of that council on the 13th day of October, 1900, it was resolved:

"That the powers and duties of the Docking Rural District Council under section 26 of the Local Government Act, 1894, in respect of the alleged unlawful obstruction of a public right of way along the Ken Hill footpath, in the parish of Snettisham, be transferred to the county council; and that the county council do contribute towards the defendants' costs of the action pending in the Chancery Division in this matter."

It was now sought to quash the above resolution upon the ground that it was illegal and not authorized by section 26 of the above Act.

It was agreed that the court should now deal with the matter upon the basis that the resolution was an order such as could be removed by *certiorari* under section 80 of the Local Government Act, 1888.

The Local Government Act, 1894, provides as follows: Section 26 (1), "That it shall be the duty of every district council to protect all public rights of way, and to prevent so far as possible the stopping or obstruction of any such right of way. . . ."

(2) "A district council may, with the consent of the county council for the county within which any common land is situate, aid persons in maintaining rights of common where, in the opinion of the council, the extinction of such rights would be prejudical to the inhabitants of the district. . . ."

(3) "A district council may for the purpose of carrying into effect this section institute or defend any legal proceedings, and generally take such steps as they deem expedient."

(4) "Where a parish council have represented to the district council that any public right of way within the district or an adjoining district . . .

has been unlawfully stopped or obstructed . . . it shall be the duty of the district council, unless satisfied that the allegations of such representation are incorrect, to take proper proceedings accordingly; and if the district council refuse or fail to take any proceedings in consequence of such representation, the parish council may petition the county council . . . and if that council so resolve the powers and duties of the district council under this section shall be transferred to the county council."

C. A. Russell, K.C. (*Fleetwood Pritchard* with him), showed cause on behalf of the county council.—The only point is whether the resolution of the county council was *ultra vires* or not. The position of the county council is defined by section 26, sub-section 4, of the Local Government Act, 1894, and the council in acting as they did were acting within their legal rights under that sub-section. There is no authority for the proposition that they were acting illegally. The district council on inquiry was in favour of taking steps, but the question of funds arose, and that body found they could not make a special rate and therefore they could not support the defendants in the action. The county council cannot perform their duty in this case except by aiding the defendants. The rule should therefore be dismissed.

Rawlinson, K.C. (*C. Gurdon* with him), showed cause on behalf of the defendants in the Chancery action.

R. A. M'Call, K.C. and *F. K. North* (*C. H. Swanton* with them), in support of the rule.—The rule should be made absolute. The Legislature has not authorized the county council to spend the county money in aiding defendants in such a case as the present one. The ratepayers' money would be spent in litigation over which they have no control. Sub-section 2 of section 26 only gives the district council a permissive power. If the contention on behalf of the county council is correct a local body will never fight a right of way case but always leave it to the county council to do so.

Lord ALVERSTONE, L.C.J.—This question is not altogether free from doubt, but, in my opinion, we cannot make this rule absolute. Section 26, sub-section 1, imposes upon every district council the duty of protecting all public rights of way, and preventing, as far as is possible, the stopping or obstruction of any such right of way. Sub-section 3 provides that "a district council may, for the purpose of carrying into effect this section, institute or defend any legal proceedings, and generally take such steps as they deem expedient." Now, it is, of course, possible to construe those words as only meaning instituting any proceeding in their own name or defending any legal proceedings brought against them, but I think that would be putting too narrow a construction on them. In the first place there are many proceedings which, instituted on behalf of public bodies, may have to be taken in the name of the Attorney-General, and, with regard to defending these, it seems there are many cases in which it is quite as probable the action will be brought against a private individual or a servant of a district council as against a district council.

In my opinion a district council may, in discharge of their duty to prevent an obstruction to a public right of way, defend legal proceedings brought against their surveyor who has been instructed by them to pull down the obstruction.

Now, in the present case, before the council are assumed to have intervened at all, an action is brought against two private persons who had pulled down an obstruction, and it is suggested, though the suggestion does not appear to be justified, that these two persons would not be able to pay the costs. It is possible that the plaintiffs might not have security for their costs, but they have brought their action against the persons who pulled down the obstruction and there is nothing in the Act that gives to these particular plaintiffs the benefit of any security for costs that might be payable by the defendants.

Assuming in the present case that the district council had been minded to take up the defence, I think that they could have done so under sub-sections 1 and 3.

It is quite true that when you look at sub-section 4 it is seen that the draughtsman has not exactly followed the same language as is employed in the previous sub-sections; for instance, sub-section 4 does not refer to "steps" or "duty," it simply speaks of the district council taking "proper proceedings accordingly," and when the district council refuses or fails to take any such proceedings "the parish council may petition the county council for the county within which the way or waste is situate, and if that council so resolve the powers and duties of the district council under this section shall be transferred to the county council."

This does not seem to me to be a case where the intention of the section is such as to enable us to draw any conclusion between the exact language of these sub-sections respectively. I think that on the petition of the parish council the county council have all the powers and duties of the district council, and that being so, having regard to what I have said as to sub-sections 1 and 3, the county council can defend such an action brought against the surveyor of the other authority or defend such an action brought against other persons if they think it a proper action to be defended.

It was suggested to us that if the language of sub-section 4 is contrasted with that of sub-section 2 then there is only a permissive power to aid people in maintaining rights of common, which would lead in that case to possible contribution by the county council. That may be so, but I think we ought not to limit the powers under the section by finding that the councils have only a permissive duty to assist such persons, and that to do so would be dangerous, as we think there is a general duty put, first, upon the district council, and then upon the county council in their place, to defend a right of way and to defend proceedings taken against other persons in respect of such right and to assist such persons. I cannot say the case is free from difficulty, but, on the whole, I think it is not sufficiently clear to enable us to make the rule absolute.

LAWRANCE, J.—I agree.

Rule discharged with costs.

Solicitors, *Sharpe, Parker, & Co.*, for *Foster*, Norwich; *Church, Rendell, & Co.*, for *Parsons*, Lynn; *Burton, Yeates, & Hart*, for *Beloe & Beloe*, Lynn.

Court of Appeal.

From Q. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Romer, L.JJ.) May 23.

MILMAN v. LANE. (a.)

Will—Construction—Devise of term to persons in succession—Remainder to "the heirs and assigns of the survivor."

A testator by his will devised certain lands to certain persons in succession for the term of ninety-nine years if they should so long live, and from and after the determination of the last of the said terms or the death of the survivor, "to the heirs and assigns of the survivor of them for ever."

Held, upon the construction of the will as a whole, that the limitation to the heirs and assigns of the survivor should be read as one to the heirs of the survivor and their assigns, and not to the heirs or appointees of the survivor; and that, therefore, the heir of the survivor was entitled to the land as against a person who had purchased the land in fee simple from the survivor in his lifetime.

Appeal by the defendant from the judgment of Lawrance, J.

The action was brought by Amelia Milman against William Lane to recover possession of a farm called Ranscombe.

The testator, John Vicary, by his will dated the 27th of December, 1830, devised the farm in question to the use of his nephew Edward Milman and his assigns for a term of ninety-nine years if he should so long live, and after the determination of that estate in trust for such one or more of the son or sons of Edward Milman as he should appoint, and in default of appointment to the use of the heirs of the body of Edward Milman, and in default of such issue male then to the use of the testator's nephew William Milman for ninety-nine years if he should so long live, then to the use of the four sons of William Milman in succession for ninety-nine years if each should so long live, and from and after the determination of the last-mentioned term and estate or the death of the survivor of them the said William Milman and his four sons, then upon trust to and for the use of the heirs and assigns of the survivor of them for ever.

The testator's will was proved on the 5th of November, 1831.

The testator's nephew Edward Milman died on the 10th of April, 1849, a bachelor.

The testator's nephew William Milman and his four sons all survived the testator, one of the sons, Richard Milman, being the survivor, and he died on the 29th of December, 1899, without issue, leaving the plaintiff his heiress at law surviving him.

During his lifetime Richard Milman had sold and conveyed the farm in question in fee simple to the defendant.

The question in controversy between the parties was whether the plaintiff, as heiress of Richard Milman, or the defendant, as purchaser from him, had the better title; in other words, What was the effect of a devise to "the heirs and assigns" of a named person to whom no particular freehold estate was limited?

Lawrance, J., held that upon the construction of the will as a whole the word "assigns" had no conveyancing meaning, and that the heiress of the survivor took the land as a *persona designata*. He accordingly gave judgment for the plaintiff.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

The defendant appealed.

Warmington, K.C., J. A. Foote, K.C., and *Duke, K.C.*, for the defendant.

R. F. Norton, K.C., M. W. McKellar, and *Alfred Loosemore*, for the plaintiff.

Cur. adv. vult.

May 23.—ROMER, L.J., read the judgment of the court as follows: The question for our decision on this appeal concerns the effect of the ultimate devise in the will of John Vicary of his Ranscombe estate, after the determination of the terms of ninety-nine years previously created in favour of the testator's nephew William Milman and the nephew's four sons respectively. This ultimate devise is to the use of the heirs and assigns of the survivor of the four sons. It is to be observed that in the devise the estates granted are legal, and further, that, as none of the sons took any prior estate except in respect of his term of ninety-nine years, the rule in *Shelley's case*, 1 Co. Rep. 93b, does not apply. And it cannot be validly urged, and, indeed, it is not contended on behalf of the appellant, that the ultimate gift can be read as one to the survivor and his heirs and assigns. In other words, it is beyond dispute that the heirs of the survivor take by way of direct gift, and the only question is what is the effect under the circumstances of the addition of the words "and assigns" in the legal remainder granted to the heirs and assigns of the survivor. The question is one strictly of real property law. The appellant asks the court to hold that the remainder is to be read as a gift to such uses as the survivor shall appoint, and, in default of appointment, or so far as no such appointment shall extend, to the use of the heirs of the survivor. It appears to us that this is asking the court to imply overmuch by reason of the employment of the words "and assigns" in the legal limitation in question. In the first place the appellant asks us to change the word "assigns" into the word "appointees." Having got so far, he is next embarrassed by the word "and," which is used in the limitation, for there would be considerable difficulty in determining the effect of a legal remainder to the heirs and appointees of a person as *persona designata*. He, therefore, next asks us to read "or" for "and," and to treat the limitation as one to the use of the heirs or appointees of the survivor. And then he says the way is comparatively easy to read the gift as one to the appointees or heirs, and as consequently meaning, when fully expanded, the limitation he is contending for. We do not see our way to support this contention. It is important to notice that the word "assigns" cannot have its strict legal meaning given to it in the limitation, unless it is attached to the word "heirs," so as to mean their assigns; for the survivor of the four sons had no estate in him which he could "assign," except his term of ninety-nine years. So that in this limitation one has to recognize that the testator, by using the word "assigns," could not, in the ordinary legal sense, have meant the assigns of the survivor. This being so, and knowing how often in conveyancing the word "assigns" is unnecessarily used as a word of limitation to show power of alienation and nothing more, we think it will be doing far less violence to the words used by the testator to construe the limitation to the heirs and assigns of the survivor as being one to the heirs of the survivor and their assigns. And we think that in the absence in the will of anything to show that a contrary view should be taken, such a gift as we are dealing with ought to be so construed. In the present case not only is there nothing in the will to support the contrary view, but

there is much to support the view we have expressed. For we find constantly in this will the word "assigns" put in unnecessarily, having no conveyancing virtue at all, and as merely declaratory of a power of alienation in a donee which he would have without it. And, further, with reference to the appellant's contention that in the particular limitation in question the testator meant, by using the word "assigns," to give the survivor of the four sons a power of appointment, we find that, while elsewhere throughout his will he constantly uses the word assigns as a mere conveyancing word and never as meaning "appointees," where he does wish to give a power of appointment he knows how to do it in proper terms and in a proper way: see, for example, the power of appointment given in regard to this Ranscombe property to his nephew Edward Milman to appoint in favour of his sons. And, lastly, it is worthy of observation that this will is obviously a conveyancer's will, and is not the personal product of a testator ignorant of law and using untechnical terms or obviously using terms which have a technical meaning in an untechnical sense.

It remains to add a few words upon the authorities bearing on the point. In the case of *Tapner* v. *Merlott*, Willes, 177, there is a *dictum* of Willes, C.J., to the effect that, in such a devise as we have here, the court might possibly imply a power of appointment by the use of the word "assigns." But the point does not appear to have been argued before the learned judge, and we gather that he was not expressing any concluded view, but was merely stating an idea that had occurred to him which might possibly be well founded. But in the case of *Quested* v. *Michell*, 3 W. R. 435, 24 L. J. Ch. 722, Kindersley, V.C., did undoubtedly, though under special circumstances, hold that a gift in a will of a share of a testator's real and personal estate after the death of a previous equitable devisee for life to her heirs, executors, administrators, and assigns had the effect as to the real estate of giving a power of appointment to her with remainder to her heirs in default of appointment. But we think that that decision depended upon the particular circumstances which that very learned and careful judge had before him. The will in that case is fully set out in the report in 3 W. R., at p. 435, and, when that will is considered, it will be seen that there were circumstances which would or might lead to the view that the testator in that particular case did intend the equitable tenant for life to have absolute dominion over her share subject only to her not being allowed to anticipate the income of her share during her life. The will was dealing with six shares—two were given to devisees absolutely, one was given to a man for life, and then to his children absolutely, and the other three shares were given for the benefit of three ladies respectively, who were restrained from anticipating the income of their shares. As to these last-mentioned three shares it was clear that the ladies took an absolute interest in the personalty subject to their not anticipating the life income, and it might well be supposed that the testator intended them to have a corresponding dominion over the realty, though, as pointed out by the Vice-Chancellor in the report of the case in 24 L. J. Ch. 722, a legal inference to that effect could not be drawn merely from the fact of the realty and personalty being dealt with together by the testator. The decision of the Vice-Chancellor was treated as turning on the special circumstances of the will before him in the subsequent case of *Brookman* v. *Smith*, 19 W. R. 1029, L. R. 6 Ex. 291. In that case the Court of Exchequer did in fact decide (whether it was necessary for them to do so or not) that a limitation in a settlement after the death of a lady to the use of the heirs and assigns of that lady as if she had died sole and unmarried did not give her a power of appointment. No doubt that case turned to a great extent on the use of the words "as if she had died sole and unmarried." But *Quested* v. *Michell* was distinguished on the ground above-mentioned, and *Brookman* v. *Smith* is an authority to show that there is no rule that a remainder given to the heirs and assigns of a person who is dead when the remainder takes effect must, in order to give special meaning to the word "assigns," be held to give that person a power of appointment; and it is noticeable that in his argument and reply in that case Mr. Waley said that *Quested* v. *Michell* appears to have been decided with reference to the very peculiar provisions of the will, and is a case which is not supported by other authorities, and is inconsistent with the view generally adopted in practice of an ultimate limitation to "heirs and assigns." Coming from such a source, that observation is not without weight. The other authorities cited in the course of the argument do not appear to be sufficiently pertinent to the case to require special mention. On the authorities as they stand we think that it is open to us to decide, and that it is right that we should decide, the present case in the manner already indicated. We agree in the judgment of Lawrance, J., and think that this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Maddisons*, for *R. F. Lobsemore*, Tiverton.

Solicitors for the defendants, *Guscotte, Wadham, & Bradbury*, for *Sparkes, Pope, & Thomas*, Crediton.

From Q. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Romer, L.JJ.) } May 10.

DAUNCEY v. HOLLOWAY. (a.)

Libel — Slander — Words spoken of a solicitor imputing insolvency—"Money scrivener"—Imputation not upon him in his business—Words not per se *actionable—No action lies in absence of proof of special damage.*

Words imputing to a solicitor that he had "gone for thousands" and had "lost thousands," in the absence of proof of special damage, held not capable of bearing a meaning defamatory to the plaintiff in relation to his business or profession as a solicitor; and that there was, therefore, no case to go to the jury.

Action to recover damages for slander.

The plaintiff was a solicitor in practice, and in his statement of claim he alleged that he was carrying on the business or profession of a solicitor, and in the course of that business or profession he was in the habit of receiving moneys in trust for or on behalf of clients for investment and otherwise, and that the words complained of were spoken "in relation to his said business or profession, and the carrying on and conducting thereof by him, and in his capacity as a solicitor."

The words complained of were spoken by the defendant in the course of conversation with two persons whom he met in the street, and were: "They tell me he (the plaintiff) is gone for thousands instead of hundreds this time"; and "Miss A. told me Mr. Dauncey has lost thousands."

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The plaintiff alleged that those words meant that he was insolvent, and would be unable to pay his clients the moneys received or held by him in trust for and on behalf of them, and that he was unfit to carry on the said business or profession, and to receive or hold moneys in trust for or on behalf of clients.

The action was tried before Wright, J., with a jury at Gloucester Assizes.

The plaintiff gave evidence that he was practising as a solicitor, and that his business mainly consisted of conveyancing; that he had been receiving trust moneys from his clients, and moneys on purchases and sales from them; and that he found mortgages for them and put their money out for them.

Evidence was also given that the defendant spoke the words complained of in the course of conversation with two persons whom he happened to meet in the street. The words were quite untrue, and were not justified in any way. No special damage was proved.

The sole question, therefore, was whether the words were actionable *per se*, as spoken of the plaintiff in relation to his said business or profession.

At the trial the plaintiff's counsel likened his client's particular class of business to the ancient calling of a "money scrivener," and contended that spoken of him as such, the words were *per se* actionable.

On the part of the defendant (who did not allege the truth of the words imputed to him) it was denied that the statements were actionable *per se*.

The learned judge held that the words complained of were not capable of bearing a meaning defamatory to the plaintiff in relation to his business or profession, and accordingly directed a verdict and judgment to be entered for the defendant.

The plaintiff applied for a new trial.

A. H. Spokes, for the plaintiff.—It is for the jury to say whether the words complained of were spoken of the plaintiff in his character of a solicitor—in respect of his profession or business as such. If they held they were, then the words would be actionable *per se*, and no special damage need be proved in order to maintain this action, as the learned judge wrongly ruled when, in effect, he non-suited the plaintiff: *Doyley* v. *Roberts*, 3 Bing. N. C. 835. Such words spoken of a money scrivener would clearly be actionable *per se*: 1 Rolle's Abr., p. 59, Com. Dig., action upon the case for defamation, D. 25. Mr. Dauncey gave evidence at the trial that his business consisted principally in receiving clients' money for investment, and he said he therefore carried on business similar to that of a money scrivener, and that no special damage need be proved in order to maintain the action. The test is whether the words are likely to affect a man's credit: *Whittington* v. *Gladwin*, 5 B. & C. 180. If necessary I should be prepared to contend that such words spoken of any solicitor would be actionable, but it is sufficient for me to submit that in the case of this solicitor, carrying on the particular class of business that he does, the words are *per se* actionable. A "money scrivener" is defined in Stroud's Judicial Dictionary at p. 704 as "A person to whom property is intrusted for the purpose of lending it out to others at a profit payable to his principal, but also at a commission or bonus for himself, whereby he seeks wholly or in part to gain his livelihood." In Wharton's Law Lexicon the definition of the word given is this: "When a solicitor is the general depository of money of his client and other persons who employ him, not simply in his character of solicitor, but as a money agent, to invest their money on security at his discretion, allowing him procuration fees for any sum laid out on bond or mortgage, as well as a fee or charge for preparing the deeds, such a course of dealing is substantially the business of scrivener." The words here impute insolvency to the plaintiff and must affect his credit, and therefore a new trial should be directed.

A. T. Lawrence, K.C., and *Stuart Bevan*, for the defendant.—The defendant, who does not allege the truth of the words imputed to him, submits that the words complained of are not actionable *per se*. They do not impute dishonesty or professional misconduct or anything else which must *ex necessitate* be a slander on the person referred to. They were not spoken of the plaintiff in his character as a solicitor, nor in relation to his business or profession as such. In the absence of special damage the words must touch the solicitor in his profession. There is no evidence that the plaintiff carried on the business that a money scrivener formerly did. A scrivener invested money belonging to his clients in his own name. The plaintiff cannot contend that it was part of his business to do that. When looked at reasonably there is nothing in the words imputing personal unfitness on the part of the plaintiff to conduct the ordinary business of a solicitor, in the course of which he would no doubt often receive money from clients to invest for them. But he offers no evidence that, like a scrivener, clients had been in the habit of intrusting money to him before he had a security ready to invest it in. Therefore he offers no evidence that his business was substantially different to that carried on by any other solicitor, and there being nothing to connect the imputation with his professional conduct, in the absence of special damage no action will lie: *Ayre* v. *Craven*, 2 A. & E. 2; *Gallwey* v. *Marshall*, 2 W. R. 106, 9 Ex. Ch. 294; *Brayne* v. *Cooper*, 5 M. & W. 249.

A. L. SMITH, M.R.—I entirely agree with the judgment which Wright, J., delivered in this case, and with the reasons there given for it. That learned judge, whose decision we are asked to overrule, held that the words "They tell me he (the plaintiff) has gone for thousands not hundreds this time," and "I am told Mr. Dauncey has lost thousands" spoken of this solicitor, in the absence of proof of special damage, were not actionable. I cannot bring myself to hold that those words were capable of conveying an imputation upon the plaintiff in his character of solicitor, for they were not spoken of him in relation to his business or profession as such. My brother Wright came to the conclusion that the words were not capable of conveying an imputation of unfitness in the plaintiff to carry on business as a solicitor, and I am unable to see that the learned judge was wrong in so holding. I cannot, sitting here, say that the words were capable of conveying an imputation upon the plaintiff *quâ* solicitor, and he has not proved special damage and does not therefore bring himself within the class of cases referred to in the text-books cited to us. The words complained of were uttered in the street by the defendant in conversation with persons whom he met casually. They did not *per se* convey an imputation upon the plaintiff of any impropriety or unfitness in the conduct of his business, or that he was not able to carry on his business properly. The only imputation was that he had lost thousands or gone for thousands. In my opinion it would be unreasonable to say that those words impute a want of capacity in the plaintiff to carry on his business of a solicitor. For these reasons I think the judgment of Wright, J., should be affirmed, and this appeal dismissed with costs.

VAUGHAN WILLIAMS, L.J.—I agree. I only desire to add this—that when long years ago our ancestors

they would have been entitled to examine the books and for that purpose to have employed a competent agent. Therefore it seems to me that it is an expression of opinion of the Vice-Chancellor in a case outside litigation. But, secondly, even if it is limited to litigation, I do not myself see that that is a very significant observation in this case, for what is the meaning of granting it in litigation? The courts have got to make up their minds whether or not it is a case in which the party asking it should have inspection. That is the point that has got to be decided. When we have once arrived at the conclusion that he ought to have inspection then we are in the same position as we are now, unless the partnership deed or the nature of the conditions negative it. We are in the position that the person asking for it has a right of inspection. That is all that is decided in the litigation. Having decided that he has a right to inspection, how is it effectively to be given? There is none the less the necessity for it being effective if it is taken under a private agreement than there would be if it is given as the result of litigation. The question is, how is the inspection to be effective? It is nothing to tell me that in *Brown* v. *Perkins* the parties were in litigation as a reason why the plaintiffs should not get inspection under a private agreement unless something can be pointed to that excludes the right to it. When once you have construed the private agreement and desire to give effective inspection, then you give it exactly on the same principle and by the same standard as in the other case. Now that case appears to me to be a decision in favour of the view that I take. But there is also another case which seems to me an authority; although not decided actually in a partnership, it seems to me an *a fortiori* case. That is the case of *Dadswell* v. *Jacobs*. The head-note is this: "A firm of merchants residing abroad brought an action against their agent in this country claiming production of the documents relating to their business to a person appointed by them for that purpose. The defendant put in a defence stating that the person appointed by the plaintiff was a clerk in a rival and unfriendly house of business, for which reason he objected to produce the documents to him, but that he was willing to produce them to any proper person. The plaintiff moved under ord. 25, r. 4, to strike out the defence. Held (affirming the decision of Chitty, J.), that although a principal had a general right to the production of documents in the hands of his agent to any person appointed by him, he cannot insist on their being produced to an improper person and therefore the defence disclosed a reasonable answer to the claim." On p. 281 (34 Ch. D.) Cotton, L.J., says: "The plaintiffs are abroad, and of course it was the duty of the defendant, as agent, to produce to the principals any accounts that were kept for them, and where the principal is abroad, in my opinion the agent is bound to produce to any properly appointed agent of the principal any books of account kept for the principal." It is said here that in this case it is a case of partners, and that in the case I am citing, it is a case of agency, but partnership is only one division of the law of agency. A partner is a principal but he is also an agent. If the right to inspection by agents exists in the case between principal and agent it seems to me *a fortiori* that it ought to exist in the case where the relation is not that of principal and agent but where each for certain purposes is a principal. Therefore it seems to me that that is an authority in the absence of any special agreement at all, that out of the relation of principal and agent arises the right to inspection and that inspection can be carried out where the circumstances justify it by means of an agent. In this case one of the parties seeking inspection happens to be abroad, but being abroad is only one particular circumstance showing that that means of inspection is the only effective means. It does not exhaust all the cases in which inspection may be offered to the inspecting agent. Then we find on p. 286 what Lindley, L.J., says. He says: "No doubt the principal is entitled to come and see the books if he likes, and he is entitled to have a copy of them sent by the agent at the principal's expense. There is no controversy about that, and I am not at all prepared to deny his right to have the books inspected by a person whom the court thinks is a proper person in case of dispute on that point." So that although he had no absolute and unqualified right to have the books inspected by anyone he liked, which was not set up in the action, the court, holding that he had not that right, held that he had the qualified right of inspection by somebody else, provided that person was one to whom no reasonable objection could be taken. I should have said earlier that the contention of the defendants appears to me to be still more difficult to support in view of the fact that they have to concede that these persons who in their view are debarred from inspecting by a third person have the right to sit from day to day in the office of the managing partner and make full copies of all the books, and when they have done that to hand it over to the very person to whom the right of inspection is denied. That they have to concede, and conceding that they say the plaintiffs may do in that roundabout fashion something that might cause greater mischief than if it was done in a simple fashion. The principle upon which this right rests has been also discussed in other cases, and it has been distinctly stated where the question has been whether the right to inspect involves the right to take copies, that that is implied. That has been held to be implied in the right to inspect, and why? Because the inspection is not effective in the sense in which it was intended to be effective unless it carries with it as a corollary that incidental right. In fact it is put nowhere more fully than in *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, where Stirling, L.J., refers to the leading case, *Mutter* v. *Eastern and Midland Railway Co.* The point in that case is stated in the head-note: "The right of a member or creditor of a company to inspect the register of mortgages under section 43 of the Companies Act, 1862, includes a right to take copies of the register." The learned judge there cites from Lindley, L.J., in *Mutter* v. *Eastern and Midland Railway Co.*: "Parliament having conferred the right to inspect, the court ought not so to construe the statute as to render the right conferred illusory, and if the court were to hold that in such a case as the present the right to inspect existed, but the right to take copies did not, the court would in effect be rendering the statute of no avail." Now that I think is very material upon this point. The right in that case, although conferred by an Act of Parliament which was limited merely to inspection, carried with it the means to render it effectual. Why is that principle not to be applied in the case before us? It seems to me that these cases are direct authority that it can be and ought to be unless there is something in the nature of the partnership which negatives the right. Otherwise you have got to read into the enabling provisions of the articles some disabling exclusion of a particular mode of availing themselves of the right conferred. So also with the decision of Hall, V.C., which has been referred to in *In re Credit Co.*, where he held that the solicitor of a member of a company was entitled to inspect under section 43 of the Companies Act,

although that right in terms was given by the section only to creditors and members. He says: "As regards the register of mortgages I am of opinion that there has been a refusal by the company to allow a shareholder to inspect it, though it has been contended that there was no refusal to him but only to his solicitors. I consider that the refusal was to produce to the applicant, and that there was no ground for that refusal." That, again, is simply an affirmation of the same principle as that which Stirling, L.J., followed in the case I have referred to. It is said that these cases have no bearing on the discussion, because they are cases of shareholders and cases of statutory enactments, and so forth. It seems to me, for the reasons I have given, that they are directly in point as to what is to be implied by a permission to inspect. How much does that cover? The decisions are that it covers everything to make it effective. That is the principle followed, and the only way those cases can be distinguished is not merely by saying that those are company cases and these are partnership cases. They would not be effectually distinguished except by pointing to some difference between the two. That comes to this, that you have got to get out of the fact that this is a partnership case, that therefore there is an exclusion. I have pointed out twice that if I did not get the exclusion out of the condition of the partnership, those cases are direct authority to show that the permission to a man to do something which he cannot do effectually without an agent to help him, carries with it the right to employ such an agent.

Now I do not think I need go into the other authorities that have been referred to in more detail. One case was, no doubt, very properly called to my attention by Mr. Cave. That is the case of the *West Devon Great Consols Mine Co.*, in which without argument—without the point having been discussed at all or considered by Baggallay, L.J., who gave the judgment—Cotton, L.J., did consider that the right of a shareholder in such a company to inspection was personal to himself. Whatever the true view may be, the decision of Cotton, L.J., on the special terms regulating the right of shareholders in that case was a decision without the assistance of any argument or discussion during the case, and therefore that certainly does not appear to be an authority in point nor does it appear to me to be an authority that outweighs those decisions on fact and on principle which I have already referred to. Then it is said that there is a *dictum* of the President of the court in the Scotch case of *Cameron* v. *M'Murray*, decided I think as far back as 1855, but that *dictum* when read in its context does not appear to me to be an authority against the defendants at all. I do not know whether it is as exactly and precisely stated in point of language as one could wish, but it seems to me to be merely an affirmation of that limitation which it is conceded must exist upon the right of a partner demanding inspection. It is nothing more than an affirmation that the right of a partner to inspect by anybody else does not affect the obligation of not allowing a stranger to inspect to whose intervention objection could reasonably be taken. I think the right of inspection by an agent is limited to some person to whom no reasonable objection can be taken, and I doubt very much whether the learned President, in uttering the *dictum* which has been referred to, meant anything more than that. The actual decision in the case was that inspection was given and given by means of an agent in the litigation.

There is one more observation I desire to make, and that is that it has been urged in argument that a different standard is to be applied in litigation as compared to the standard to be applied without litigation. I put it to Mr. Cave, who argued extremely well for his client, what is the principle lying at the bottom of the distinction between the cases? One likes to get at the bottom of a principle to see what the real meaning is, and Mr. Cave said it is that suggested by Cotton, L.J., in the case referred to—that is to say, where it is outside litigation the court can have no control over the person who inspects—and therefore, although the right to inspect by a third party might not exist outside litigation, it may well be held to exist in litigation because the court can exercise control over the actual person inspecting. Be it so. How does that apply to this case? The court at this moment has got seisin of the whole position, and it is in a position to impose terms upon the person inspecting. Clearly the court has that power, and it is accepted by the plaintiffs, and they are ready to accept the limitations sought to be put upon them. Therefore, even if this were to be tried by the standard which the respondents contend for, and that standard was somewhat different from what it would be if there were no litigation, we are in a position to give the rights which can only be obtained by litigation and to impose the limitations which can be imposed only as the result of litigation. I have gone into the question at some length because unquestionably it is a case, as has been pointed out, of very considerable importance, and in my opinion it is a case in which I think we must accept the responsibility of dealing, not only with the particular provision in these articles, but incidentally and because they are practically to the same effect with the construction of the section of the Partnership Act. Therefore, considering this matter, and going through the authorities as I have done, I am of opinion that the judgment of the learned judge cannot be supported.

STIRLING, L.J.—I entirely agree with the conclusion my learned brother has arrived at, and with the reasons which he has given, but as the point which we have got to consider is one of considerable importance, and also as we are differing from the judgment given in the court below, I should like to add a very few words to show that I have given the matter my serious consideration. Now, the contention on behalf of the respondents, the defendants in the action, is that the rights of access to inspection of, and the right of copying partnership documents, which are conferred by sub-section 9, section 24, of the Partnership Act, 1890, and are also conferred by article 16 of the articles of partnership which we have got to deal with in the present case, are exercisable only by the partners personally and are not exercisable by them through agents. There I take leave to observe that the general rule of law is that whatever a person who is *sui juris* can do personally he can also do through his agent. That is the general rule. No doubt there are some exceptions. The reason of the rule may be stated in a few words in two sentences which I will read from a well-known treatise on agency—viz., that of Story. The learned author says on p. 2: "In the expanded intercourse of modern society it is easy to perceive that the exigencies of trade and commerce, the urgent pressure of professional, official, and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various and remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life must require the aid, assistance, and labours of many persons in addition to the immediate superintendence of him whose rights and interests are to be directly affected by the results. Hence the general maxim of

our laws, subject only to a few exceptions above hinted at, is that whatever a man *sui juris* may do of himself he may do by another." That principle has been adopted by the English courts in many cases, as a good illustration of which I may refer to the decision of the Court of Appeal in *In re Whitley Partners*, 34 W. R. 505. That case has no direct bearing upon the present, and I refer to it merely as an illustration of the way in which the principle has been applied by the English courts. There the head-note is: "C. verbally authorized O. to sign on his behalf the memorandum of association of a company. O. accordingly signed the name of C. to the memorandum without his own name appearing. The company being in course of winding up C. was put on the list and applied to have his name removed on the ground that he had never signed the memorandum nor agreed to take shares. Held, that, there being nothing in the Companies Act, 1862, to show that the Legislature intended anything special as to the mode of signature of the memorandum, the ordinary rule applied that signature by an agent is sufficient." I agree that where the right which is going to be exercised is conferred by some written instrument, either by a statute incorporated in the general partnership contract, or by the articles of partnership, it may be upon the true construction of the document from the context that the intention of the parties was that inspection should be personal; but unless you find something of that kind in the document itself you have no right to say that although an agent is not specially mentioned the exercise of the right by the agent is excluded. We come, therefore, to the consideration of the Partnership Act and of the articles of partnership with which we have to deal, with this view in our minds, that *primâ facie* whatever rights are given to the two parties are, unless there is something to be found in the Act limiting them, capable of being exercised by agents. If we look at the present deed of partnership, it does seem to me that it is one in which the reasons pointed out by Storey in that passage which I have read are very applicable indeed. The general scheme of this partnership was that the management of it should be placed in the hands of the defendants in this action as managing partners, who should have the direct control of the partnership and assets and books. Now the other partners I see by the description of them which appears in the articles of partnership are, first, a clergyman who is resident in Canada; secondly, two gentlemen of the name of Bevan who are surgeons at Monmouth; and the next is a lady described as a spinster; and those persons have conferred upon them under the Act and by virtue of the clause to which reference has been made rights of access to and examination of, and the right of taking copies of and extracts from, any of the books and partnership documents. All the plaintiffs to whom I have referred are, in the strict sense of the word, laymen as regards those matters. The whole control and management of the business is in the hands of the defendants as the managing partners, and I can hardly conceive but that if those rights are meant to be seriously used at all it is a case in which recourse must be had to the advice and assistance of experts with a view to the proper and beneficial use of the right conferred. That right was conferred for a purpose — namely, that they might be enabled to make themselves acquainted with the affairs of the partnership, and might be enabled to use the information which they have thus acquired, not, of course, to the detriment of the partnership or of their fellow-partners, but certainly with a view, so long as the rights of the firm in general or the rights of the partners are not infringed upon, of making a proper use and having the beneficial use and enjoyment of their own property. But it must be remembered throughout that these books and documents, like the rest of the partnership property, are just as much the books and papers of the plaintiffs as they are the books and papers of the defendants. Now do we find anything in the Act or in the deed which excludes the right of a partner to avail himself of the assistance of an agent in examining the books and taking copies of them? I confess I cannot find anything. If we look at article 16 itself it begins in this way: "Proper books of account shall be kept by the managing partners for the time being, in which all transactions relating to the partnership business shall be duly entered." That throws the duty of keeping the books on the managing partners. Were they bound to keep those books themselves, to make entries in them with their own hands? No one supposes anything of the kind. It is quite obvious that the managing partners may rightly and properly employ clerks and other persons to make up the books properly. Then let us proceed to see what is the right which is conferred upon the other partners. "Each of the partners shall have free access to and liberty to examine and copy or take extracts from any of the books and writings of the partnership at all reasonable times." Can it be contended that he who is desirous to avail himself of this right is bound himself to go and sit in the counting-house of the firm and make the copies and extracts which he desires to make with his own hands. I confess to me that seems to be quite unreasonable, and it seems to me that he may for the purposes of making these extracts and copies, just as the managing partners may for the purpose of making up the books, employ a proper clerk or other person to do the work. We then come to the question whether the right of access is to be limited to the partner personally, and the right of examination is to be limited to the partner personally. I confess I cannot see why it should be so. It is said that the idea of a third person being introduced is contrary to the nature of confidence which exists in every partnership relation. There is no doubt it is, but I cannot see that that prevents a partner for a proper purpose from acquiring the necessary information in order that he may exercise his own right properly. I cannot see that if a clergyman, or a surgeon, or other person, desires, as he is entitled to, to obtain full information as to the transactions of a large brewery in which he is engaged he is to be entirely devoid of all assistance, and, indeed, when the defendants are driven to the last stand they do not so contend, because it is admitted—or, at least, I have heard no argument to the contrary, and I do not think it was contended otherwise—that if the partner succeeded in getting from the books the information which he desires to acquire by his agent, he could immediately go to his agent from whom he wished to get confidential advice and submit the extracts and copies which he had himself procured to be made and get his confidential advice upon them. Now I think that the right which the partner has to employ an agent must, no doubt, be limited. The case of *Dadswell* v. *Jacobs*, which has already been referred to, is a decision of the Court of Appeal, but it does not follow that because a partner has a right to avail himself of the services of an agent he may choose as that agent any person he pleases. This agent must be a person to whom no reasonable objection could be taken, and, further, the agent must, I think, be one who is willing to put himself upon terms not to use the information which he acquires otherwise than properly. I believe that limitation rests on the partner himself, as was pointed out in

the case of *Trego* v. *Hunt*, I believe by nearly every judge who dealt with it, but very clearly by Lord Davey in the House of Lords, who says, "The notice of motion asks that the defendant might be restrained from making any copy or extract from the books of the partnership for any purpose other than the business of the partnership. In my opinion that relief so asked was inconsistent. As well under the general law as under the express provisions of the articles of partnership the defendant was entitled during the partnership to have access to the books, and to make copies thereof or extracts therefrom. It is conceivable that, had the defendant proposed to use that information for purposes injurious or hostile to the interest of the firm, he might be restrained from so doing, but in such a case he would not be obtaining information properly, and the use which the partner proposed to make of it would be restrained." Therefore the partner who obtains information is bound to abstain from using it for an improper purpose. Equally the agent whom he employs in order to procure the information is under an obligation to abstain from using it for an improper purpose. In the present case the plaintiffs have nominated a gentleman to whom no objection is offered on the part of the defendants, and that gentleman is willing to give an undertaking that the knowledge which he acquires shall not be used for any purpose other than giving confidential advice to his employers with regard to their interests. It seems to me that the only possible injury to the defendants which they can suggest in their affidavits is protected against by an undertaking given in that form, and under these circumstances it seems to me that upon that undertaking being given there ought to be an injunction in the terms which we are asked for.

Appeal allowed.

Solicitors, *Andrew, Wood, & Purves*, for *Powell & Hughes*, Brynmawr; *Le Brasseur & Oakley*, for *Le Brasseur & Bowen*, Newport, Mon.

From Q. B. Div.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) — Feb. 1.

MAYOR, &c., OF WOLVERHAMPTON v. EMMONS. (a.)

Contract — Contract to erect houses — Breach — Specific performance.

The defendant covenanted to erect certain houses on a piece of land sold to him for that purpose by the mayor and corporation of W., who sought to have houses erected on this site in order to increase the rateable value of that part of the town.

In an action to enforce specific performance of the covenant to build, with an alternative claim for damages for the non-performance of the covenant, the special jury assessed the damages at £50; and the learned judge entered judgment for the plaintiffs for specific performance.

Held, that, this being a case in which the loss arising to the plaintiffs from the land remaining vacant could not be estimated in damages, specific performance of the covenant to build had rightly been granted.

Per Romer, L.J.—*As a general rule the court will not grant specific performance of a building contract; but there is an exception to that rule where it is established* (1) *that the building work to be done is defined;* (2) *the plaintiff has a substantial interest in having the contract specifically performed which cannot be adequately compensated by damages; and* (3) *the defendant has, by reason of the contract, obtained possession of the land on which the building is to be erected.*

Application by the defendant Samuel Emmons for judgment or a new trial in an action tried before Wills, J., and a special jury at Birmingham Assizes.

The action was brought for specific performance of a covenant to build, or in the alternative for damages for breach of that covenant.

The short facts admitted or proved were these: By an indenture dated the 31st of July, 1897, between the plaintiffs, the Corporation of Wolverhampton, and the defendant, the plaintiffs conveyed to the defendant a piece of land fronting Canal-street, on the outskirts of the borough of Wolverhampton, and by the same indenture the defendant covenanted with the plaintiffs that he would commence to erect upon the land within twelve calendar months from the 25th of May, 1897, a new building or new buildings of a minimum height of 35ft. from the pavement to the eves or parapet, and not more than the height regulated by the bye-laws for the time being in force in the borough, and would complete the same ready for occupation within two years from the date aforesaid. The defendant submitted plans for eight houses, and they were accepted. He also cleared the land of the old buildings, but considering that in view of the overbuilt condition of the neighbourhood it would be impossible for him to make a profit out of his intended scheme, he decided not to build. The plaintiffs thereupon brought this action to enforce the covenant, and the defendant pleaded this was not a case in which the court would grant specific performance, and he paid the sum of 40s. into court as sufficient to satisfy the plaintiffs' claim for damages.

At the trial Wills, J., decided that the corporation could maintain this action for specific performance, but, in case the Court of Appeal should be of the contrary opinion, he asked the jury to say the amount of damages to which they thought the plaintiffs were entitled.

The jury returned a verdict for £50.

The learned judge entered judgment for specific performance, and the defendant appealed.

Jelf, K.C., and *Disturnal*, for the defendant.—This is not a case where the court ought to order specific performance, for the covenant, even if read with the subsequent agreement to build, is in too vague terms. It is well settled law that the court will not make a decree for specific performance of a building contract except in cases, perhaps, where there is no alternative remedy for the breach complained of. In a note to *Pembroke* v. *Thorpe*, 3 Swanst. 437, a number of cases are cited for and against the proposition that a specific performance may be decreed of a covenant to build. Here the jury, after considering all the circumstances of the case, have found that £50 is the measure of the damage suffered by the plaintiffs. The defendant is willing to pay that sum, but to build as proposed on the site would mean throwing away several thousand pounds, and the judgment directing specific performance ought on that ground not to stand. *Webb* v. *The Direct London and Portsmouth Railway Co.*, 1 De G. M. & G. 521, is a case in point. There specific performance was refused on the ground that such a decree would produce more injustice than justice. That test has been often adopted by the courts when deciding whether a decree should be granted or refused. Further, it has never been the practice of the court (except in very exceptional cases) to grant specific performance of a covenant to

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

build: see Fry on Specific Performance (3rd ed.), p. 44; *South Wales Railway Co.* v. *Wythes*, 3 W. R 3, 1 K. & J. 126; *Greenhill* v. *Isle of Wight (Newport Junction) Railway Co.*, 19 W. R. 345. Apart from the subsequent agreement contained in the letter of the 5th of July, 1899, the covenant sought to be enforced could not have been the subject of a decree. It was simply to erect a new building or new buildings. Nothing was said as to the style or as to the material. It is clear from the statement of claim that it is this vague covenant that the plaintiffs seek to enforce.

A. T. Lawrence, K.C., and *R. J. Lawrence*, for the plaintiffs.—The judgment of Wills, J., directing specific performance is one that on the facts could properly have been given. In *Mayor, &c., of London* v. *Southgate*, 17 W. R. 197, 38 L. J. Ch. 141, which was decided since Lord Cairns' Act (21 & 22 Vict. c. 27), it was held that the court had power to order the specific performance of a covenant to grant and accept a lease and gave damages for the non-building of a house: see also *Asylum for Female Orphans* v. *Waterlow*, 16 W. R. 1102. Assuming that the covenant to build as it stood in the indenture of the 31st of July, 1897, was too indefinite in terms, although the new building or new buildings were to be erected to the satisfaction of the plaintiffs' surveyor, yet the defendant having carried in plans which were approved cannot now be heard to say that the terms of the covenant are any longer in doubt. The covenant to build according to plans that have been agreed to is a definite contract and is capable of being enforced just as any other contract to which the doctrine of specific performance can be applied. The mere fact that the judge left to the jury the question of damages does not disentitle the plaintiffs from relying on their right to a decree for specific performance. Moreover, the quantum of damages was wholly inadequate, and cannot be regarded in the light of an alternative remedy for the admitted breach.

Jelf, K.C., replied.

A. L. SMITH, M.R.—In this case the defendant, being minded to speculate in land and building, bought a piece of land in the town of Wolverhampton from the corporation for £1,000. The conveyance contained a covenant by the defendant that he would erect a new building or new buildings thereon within a certain period, but he failed to perform this obligation. He, however, obtained from the corporation further time on making promises to carry out his contract. There was correspondence, and by a letter of the 5th of July, 1889, the defendant undertook, that if further time was allowed him he would build eight houses within two months. That letter, coupled with certain plans to which it referred, was said by the plaintiffs to constitute a definite and unambiguous agreement, and one which the court, in the events that have happened, had power to order specific performance of. But still the defendant did not carry out his undertaking, and in March, 1900, the plaintiffs issued the writ in this action claiming specific performance, and, in the alternative, damages. The action should have been brought in the Chancery Division, and, in addition to that blunder, there followed another by the plaintiffs—namely, they asked in their statement of claim for the specific performance of the indefinite covenant contained in the indenture of the 31st of July, 1897. It was hopeless to ask for the specific performance of that covenant. At the trial Wills, J., saw that that covenant was too ambiguous for the plaintiffs to be entitled to an order for its specific performance, but in the course of the evidence it came out that a subsequent contract had been entered into between the parties which was sufficiently definite—the contract, I mean, contained in the letter of the 5th of July, 1899—and the learned judge allowed the case to proceed on the basis that that was the contract which the plaintiffs desired to have enforced. For greater caution, however, he took, and I think rightly, the opinion of the jury on the question of damages, and they assessed the damages at £50. He did not order judgment to be entered for the £50, because the plaintiffs had not in substance asked for damages, but had only made the claim for damages a subsidiary point. The defendant complained that the contract was so vague that this was not a case where the court could say exactly what the duty was that was cast upon him, and therefore could not decree its specific performance. But was that really so? When the plans and the two contracts are looked at together, it is perfectly clear that the kind of houses which the defendant was expected to erect were specifically defined. That being so, the contract to build was a specific unambiguous agreement. Then there arose a second consideration: Was the carrying out of this specific unambiguous agreement to build one of importance to the plaintiffs, with whom the agreement was made, over and above mere money damages? The evidence showed that it was. The plaintiffs desired to have buildings erected in that part of the town in order to raise the rateable value of that part of the borough. Wills, J., was fully aware of this, and feeling that the corporation would be but poorly compensated for the breach of the contract by £50 damages, made an order only for specific performance. I agree with Wills, J., in thinking that the loss arising to the plaintiffs from the land remaining vacant could not be estimated in damages and for the reasons I have stated, that this is a case in which the Court of Chancery would have ordered specific performance of the contract, and therefore that the judgment of Wills, J., was right and should be affirmed.

COLLINS, L.J.—I am of the same opinion. I confess I have always felt some difficulty in understanding on what general principle the courts of equity have in some cases granted and in others refused specific performance of a a contract to build. Probably the reason is that there is no one principle underlying all the cases, and that the attitude of the courts towards the question has varied at different times. In the case we are now considering I agree, and for the reasons already stated, that the order for specific performance should be affirmed. I think it is quite clear that no adequate compensation in money could be made to the plaintiffs for non-performance.

ROMER, L.J.—I also have felt some doubts as to the principle to be applied to such a question as is now before us; but the conclusion I have come to here is that the judgment of Wills, J., ought not to be disturbed. And for this reason. It is clear that the plaintiffs have not lost any right to specific performance which they would otherwise have had by reason of the conduct of the trial. It is clear that all through they were insisting on their right to specific performance. The order as drawn up should be amended, in my opinion, in some particulars, and I propose to state shortly the alterations which, with the consent of my learned brothers, I think should be made in it. [The learned judge having read the order as he thought it ought to read, continued:] It is quite clear from the cases cited in Fry on Specific Performance (3rd ed.), pp. 45 *et seq.*, that as a general rule the court has not thought fit to grant specific performance of a building contract. But there are certain recognized exceptions to that rule, and whenever the plaintiffs seeking specific perform-

ance of a building contract can show that they come within the exceptions the court has invariably made an order. Now what are those exceptions? I again quote from Fry's admirable work. The plaintiffs to succeed must establish first that the building work was defined—that is to say, that the nature of it was so definitely ascertained that the court might know with certainty what was the work agreed to be done. Secondly, they must show that they had a substantial interest in having the contract specifically performed, and that that was an interest which could not be adequately compensated by damages. In short, that they had open to them no other remedy; and, thirdly, they must prove that the defendant had by reason of the contract obtained possession of the land on which the building was to be erected and so put it out of their power to build. I think in this instance all these three requisites are satisfied, and the plaintiffs having come within the exception to the general rule have a right to have the order for specific performance in their favour affirmed.

Jelf, K.C., asked that the time within which the buildings were to be completed should be extended, and that there should be no order as to costs, the court having modified the order as drawn up in the court below.

Appeal dismissed. No order as to costs.

Solicitors for the defendant, *R. A. Willcock & Taylor*, Wolverhampton.

Solicitor for the plaintiffs, *Horatio Brevitt*, Town Clerk, Wolverhampton.

High Court of Justice.

Chan. Div. Kekewich, J. — June 6.

In re SHARMAN.
WRIGHT *v.* SHARMAN. (*a.*)

Will—Residue—Bequest of residue of personal estate after payment thereout of all testamentary expenses—Estate duty on real estate.

A direction in a will that all testamentary expenses shall be paid out of the residuary personalty does not include the payment of estate duty in respect of the realty.

Originating summons.

John Sharman by his will, dated the 22nd of December, 1899, devised his real estate to his trustees upon trust to pay the rents and profits to George Sharman for life, and after giving certain legacies bequeathed all the residue of his personal estate "after payment thereout of all my just debts, funeral and testamentary expenses" in trust for the persons therein named.

The testator died on the 18th of April, 1900. The summons raised the question whether the estate duty payable, on the decease of the testator, in respect of his real estate, ought to be paid out of the residuary personal estate or ought to be borne by the real estate.

Northcote; Mossop; Borthwick; Dunham and *Hole Bethell* for the various parties.

KEKEWICH, J., said: The question is whether the expression testamentary expenses includes estate duty on real estate. If the testamentary expenses include estate duty on real estate then this duty ought to be paid out of the residuary personalty. In *In re Clemow*, 48 W. R. 541, [1900] 2 Ch. 182, the only question that arose was inrespect of personal estate, and as to estate duty which it was necessary for the executors to pay in order to obtain probate. Again in *In re Treasure*, 48 W. R. 696, [1900] 2 Ch. 648, only personal estate was in question. It is not necessary for the executors to pay the duty on the real estate. They may pay it if they like, but as the duty is made a first charge upon the property they can obtain probate without paying it. The point must have been considered by Joyce, J., in *In re Jolley*, 17 Times L. R. 244, though he seems to have been dealing with the particular facts of that case. So far as it is an authority, it is in favour of the real property bearing its own duty notwithstanding a direction concerning testamentary expenses. Another point taken is, that since the Land Transfer Act, 1897, the real estate passes to the executors as such, and that therefore, the case not coming within section 9 of the Finance Act, 1894, the executors are liable to pay the duty upon it. As to that I simply follow the decision of Buckley, J., in *In re Palmer*, (1900) W. N. 9. I accept the law as I find it stated by him and follow it without question. The duty must therefore be borne by the real estate.

Solicitors, *Oldman, Clabburn, & Co.*, for *Willders & Son*, Holbeach.

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

Chan. Div. Byrne, J. — Jan. 28.

In re EDMONSTONE.
BEVAN *v.* EDMONSTONE. (*a.*)

Power—Appointment—Power exercisable by deed or writing duly executed or by will—Testamentary documents not admitted to probate—Exercise of power.

A power of appointment exercisable by deed or writing duly executed or by will is not validly exercised by testamentary documents executed by the donee, but attested by one witness only, and containing no reference to the power or to the property subject to it.

This was a summons taken out by the surviving trustee of the will, dated the 13th of August, 1840, of Neil Benjamin Edmonstone (who died the 4th of May, 1841) for the determination (*inter alia*) of the question whether certain paper writings in the handwriting of the late Anne Craigie Edmonstone, a daughter of the testator, or any and which of them operated as valid appointments or a valid appointment of the sum of £7,000 or the investments representing it (part of the testator's estate) under any of the powers for that purpose conferred upon the said Anne Craigie Edmonstone by the said will.

The testator bequeathed the net residue of his personal estate in trust for his three sons and six daughters in equal shares, and as regards each of his unmarried daughters (of whom Anne Craigie Edmonstone was one) declared trusts of £7,000, part of the share of residue so bequeathed to her. Under these trusts £7,000 and the investments representing it, was to be held in trust for each daughter for her life, and after her death, unmarried or leaving no child who attained a vested interest, in trust for such person or persons and in such manner in all respects as she should if unmarried by any deed or writing with or without power of revocation, or by will or codicil to be by her respectively duly executed from time to time, or at any time, direct or appoint, give or dispose of

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

the same; and in default of and subject to any appointment, in trust for her sisters or sister living at her decease.

Anne Craigie Edmonstone died a spinster and intestate on the 12th of December, 1899, leaving personal estate of the net value of about £12,000; the £7,000 subject to the power being then represented by investments to the value of about £9,000. She had never exercised the power unless by certain paper writings in her handwriting found among her papers after her death. These paper writings were three in number, and two papers were further annexed to the first paper; but only this paper and one of the papers annexed to it were signed by Miss Edmondstone. Each signature was attested by one witness, one of these witnesses being a clergyman. The first paper contained various pecuniary gifts to relatives and others, each made in the words "I leave"; and concluded with the words "I wish my nephews W. H. Edmonstone and Marmaduke E. Browne to carry out my instructions." The papers annexed to it contained certain alterations in these gifts, and the words "my nephew N. B. Edmonstone to be residuary legatee. I believe there is not money enough to carry out these instructions." The second and third papers (unsigned) contained further gifts made in the same way; and altogether the first paper and those annexed to it purported to dispose of £14,380, and the second paper of £7,400. None of the papers contained any reference to the power or the fund subject to it. There being some doubt, whether all the parties interested were before the court, it was agreed that the question should be determined as between the testator's estate and Mr. N. B. Edmonstone as a beneficiary under the first paper.

Levett, K.C., and *B. B. Swan*, for the trustee of the will.

Mulligan, K.C., and *Robertson*, for Mr. N. B. Edmonstone.—The phrase "residuary legatee" refers to the residue of the £7,000, not of Miss Edmonstone's own estate, and "I leave" means only "I give at my death." The court will not construe the documents as a will and so render them a nullity, since they could not be admitted to probate. Miss Edmonstone must be taken to have known that they were inadmissible, and accordingly she must have intended them to operate on the settled fund, since there was no other property on which they could operate.

They cited Farwell on Powers (2nd. ed.), p. 176; and *Denn* v. *Roake*, 6 Bing. 475; *Brodrick* v. *Brown*, 1 K. & J. 328, 3 W. R. Ch. Dig. 54; *Proby* v. *Landor*, 9 W. R. 47, 28 Beav. 504; *In re Morgan*, 7 Ir. Ch. Rep. 18; and *Hales* v. *Margerum*, 3 Ves. 299.

Norton, K.C., and *John Henderson*, for the parties entitled in default of appointment.—The documents are testamentary in character and, accordingly, the court is not at liberty to look at them. But if they are not testamentary, they are inoperative as an execution of the power, since they refer neither to the power nor to the property.

They referred to the above cases and to the Wills Act, 1837, s. 10.

Mulligan, K.C., replied.

BYRNE, J., after stating the facts, continued: Everything in these documents point to their being intended as a will, on the face of it, except the fact that they are not properly attested. The expressions "I leave" and "my nephew to be residuary legatee," and the alterations which the lady has made in her original gifts, all lead me to the conclusion that the documents are an intended will, or instructions for one, and the request to the nephews to carry out her instructions seems to me an informal appointment of executors. And I may observe that no evidence has been called as to the circumstances under which the documents were executed. But even if they are to be looked at as writings, and not as testamentary documents, I am not satisfied that Miss Edmonstone intended them to operate as an execution of the power, since they contain no reference to the power or to the property subject to it, and all the cases have decided that one or other of these references is necessary unless there is no other property on which the provision made by the donee of the power can operate. But here it seems clear that the lady did not intend her dispositions to operate on the settled fund only, since she disposed of over £20,000, the fund amounting only to £9,000. To hold this a valid appointment would be going far beyond anything laid down in any of the cases, and I cannot do it. I must hold that none of the documents operated as a valid appointment of any part of the fund in favour of Mr. N. B. Edmonstone.

Solicitors, *Bevan & King; Frere & Co.*

Chan. Div. }
Wright, J. } May 15.

In re CRICHTON'S OIL CO. (LIMITED). (*a.*)

Company — Winding up — Assets — Distribution — Previous loss of capital — Last year's profits — No dividend declared — Preferred and ordinary shareholders — Articles.

Where, on a limited company going into liquidation, there is standing to the credit of its revenue account a sum representing undivided net profits,

Held, that such sum, though it might have been made available for dividend to preference shareholders, in spite of a previously existing debit for loss of capital, was not to be applied as dividend if, prior to the liquidation, no dividend had been recommended by the directors or declared by the company in accordance with the articles.

This was a summons by the voluntary liquidators of the above company asking that it might be determined whether a sum of £1,675, being the amount of the profit made by the said company in the year ending the the 31st of March, 1900, ought (notwithstanding the previously existing debit to profit and loss) to be distributed in the liquidation as dividend among the preference shareholders of the company.

The capital of the company was divided into preference and ordinary shares, and by the memorandum it was declared that the preference shares should "confer on the holders a right to a fixed accumulative preferential dividend of 5 per cent. per annum on the capital paid up thereon subject to the provisions of the company's articles of association."

By clause 6 (*b*) of the articles it was provided "that in the event of the winding up of the company, the surplus assets shall be distributed between the holders of preference and ordinary shares according to the amount paid up thereon."

Clause 103 (14) gave the directors power to set aside a reserve fund with a proviso that so much only of the reserve fund as represented profits should be applicable to the payment of dividends.

Clause 108 was as follows: "The profits of the company from time to time available for dividend shall, subject to the provisions hereinbefore contained be applicable: First, to the payment of the fixed

(*a.*) Reported by W. MORRIS CARTER, Esq., Barrister-at-Law.

cumulative preferential dividends on the preference shares in the original capital. Secondly, the surplus shall be applicable to the payment of dividends on the other shares in proportion to the capital paid up thereon, but the whole or any part thereof may be carried to reserve or otherwise dealt with as the directors with the sanction of the company in general meeting may from time to time determine.

"Clause 110.—The company in general meeting may declare a dividend to be paid to the members.

"Clause 111.—No larger dividend shall be declared than is recommended by the directors, but the company in general meeting may declare a smaller dividend.

"Clause 112.—No dividend shall be payable except out of the profits arising from the business of the company.

"Clause 139.—If the company shall be wound up, and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets, shall, subject to clause 6 (*b*), be distributed so that as nearly as may be the losses shall be borne by contributories in proportion to the capital paid up or which ought to have been paid up on the shares in respect of which they are contributories at the commencement of the winding up."

All the preference and ordinary shares which were issued were fully paid up.

In July, 1900, the company passed resolutions sanctioning an agreement for the sale of the assets of the company and for voluntary winding up of the company, and in August, 1900, a contract was entered into with an agent for a new company for the sale of the assets of the company, "exclusive of any undivided net profits of the business appearing in the balance-sheet for the year ending the 31st of March, 1900." Such profits amounted to the said sum of £1,675. Dividends on the preference shares had been paid up to the 31st of March, 1896, but from that date, no profits having been made until 1900, no dividends were declared. The books of the company showed a debit of over £4,000 for losses in previous years.

The amount produced by the sale was insufficient to pay the shareholders the amount of capital paid up on the shares.

A. R. Kirby, for the voluntary liquidator, asked for the direction of the court.

A. Dunham for the preference shareholders, contended that the fund in question should be employed in paying all arrears of dividend to the preference shareholders. A company is not called on to recoup capital lost in previous years out of subsequent profits, it may declare a dividend out of such profits: *In re National Bank of Wales*, 48 W. R. 99, [1899] 2 Ch. 629, and *Bishop* v. *Smyrna and Cassaba Railway Co.*, 43 W. R. 647, [1895] 2 Ch. 265. [WRIGHT, J.—The mere fact of losses on previous years does not interfere with declaring profits on another year, but it may be quite different if the company has established another practice of not paying dividends in such a case.] No such practice has been established here.

F. Cassel, for the ordinary shareholders, argued that (1) there had been no recommendation or declaration of dividend by the directors or shareholders in accordance with the articles, and therefore the fund could not be employed in paying such dividend. Article 108 merely said profits "shall be applicable" not "shall be applied"; and (2) that there was no case yet in which it had been held that, while there was a debit in the accounts of the company, the profits of a particular year could be applied as dividend in the winding up of the company. Prior to the winding up the company could have declared a dividend, but it had not done so, and the court would now look to the whole profits and loss of the company and would not throw all the losses unfairly on capital.

He referred to *In re Odessa Waterworks Co.*, (1897) W. N. 167.

Dunham, in reply, said that the case of *In re Odessa Waterworks Co.* was essentially different, as there the surplus assets arose in the winding up as a result of a sale taking place in the winding up, here they arose prior to that event; moreover the language in the two cases was different.

WRIGHT, J.—The question in this case is, whether this fund, the profits of one year's trading, is shown to be profits belonging to the preference shareholders? It is for the preference shareholders to make out that this fund is available for dividend, and this they have failed to do. Here there has been no declaration of dividend by the company nor even a recommendation of dividend by the directors, and it has not been considered whether the whole or any part of the £1,675 shall be carried to the reserve fund, or how the debit on the profit and loss account shall be dealt with. It is most improbable that the entire £1,675 would have been treated as dividend if the company had continued to carry on its business. I think it was necessary to show not only that the £1,675 might have been, but that it actually was, made available for dividend, and as this has not been shown the claim of the preference shareholders therefore fails.

Solicitors, *Ashurst, Morris, Crisp, & Co.*, for *Stanton, Atkinson, & Hudson*, Newcastle-upon-Tyne; *George Reader & Co.*, for *Hoyle, Shipley, & Hoyle*, Newcastle-upon-Tyne.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 9.

SQUIRE (*Appellant*) v. BAYER & CO. (*Respondents*) (*a*.)

Master and servant—Factory—Fine for breach of rule as to good order and decorum—Truck Act, 1896 (59 & 60 *Vict. c.* 44), *s.* 1, *sub-section* 1 (b) (c).

The respondents, who were corset manufacturers, and were the occupiers of a factory within the meaning of the Factory Acts, 1878 *to* 1895, *entered into a contract with a girl, Helen Robbins, and employed her as a machinist in their factory. The following rule* (inter alia) *formed part of the contract: "All workers shall observe good order and decorum while in the factory, and shall not do anything which may interfere with the proper and orderly conduct of the business thereof, or of any department thereof, and shall in all respects obey the lawful commands of the general manager, forewoman, or superintendent of their respective departments. A fine of sixpence (or less, at the discretion of the manager) shall be paid by each worker who shall be guilty of any infringement of this rule."*

The employees were, if they wished, allowed to have their dinners in the workroom. On one occasion the clerk in charge of the factory heard a considerable noise in the workroom, and on going there discovered disorder, the girl Robbins playing a small harp and the other girls dancing. For this disorder Robbins and some of the others were fined the sum of twopence each.

The appellant, an inspector of factories, thereupon by

(*a*.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

an information made complaint that the respondents had committed breaches of section 1, *sub-section* 1 (b) *and* (c), *of the Truck Act*, 1896, *on the ground that the said rule did not specify the acts or omissions in respect of which a fine might be imposed, and that the fine imposed was not in respect of some act or omission within the meaning of sub-section* 1 (c).

The justices found that good order and decorum were not observed, and that dancing and disorder were likely to cause loss or damage to the respondents, and that the said rule constituted a reasonable contract, and complied with section 1, *sub-section* 1 (b) *and* (c), *of the said Act, and they accordingly dismissed the information. On appeal by the inspector of factories,*

The court held that the justices had decided rightly; the rule was good and was not too general, and there had been such a breach thereof as justified a fine being imposed. The words "good order and decorum" must be construed with reference to the special circumstances under which a particular business is carried on, having regard to the place in which any alleged disorder takes place.

This was a case stated by the justices for the city and county of Bristol for the opinion of the court on an information by Rose E. Squire, an inspector of factories and workshops, who alleged that the respondents had committed breaches of sub-section (1) (*b*) and (*c*) of section 1 of the Truck Act, 1896.

The information complained that on the 13th of November, 1900, the respondents, being employers within the Truck Act, 1896, unlawfully did make a contract with Helen Louisa Robbins for a deduction for or in respect of a fine of sixpence or less, from the sum contracted to be paid by them to her contrary to section 1, sub-section 1, of the aforesaid Act, in that the contract did not specify the acts or omissions in respect of which the fine might be imposed, and that the said fine was not in respect of some act or omission which caused or was likely to cause damage or loss to the said employers or interruption or hindrance to their business.

The following facts were proved or admitted before the justices:

The appellant was one of H.M. inspectors of factories.

The respondents were corset manufacturers, and were the occupiers of the Victoria Works, Roman's-road, Easton, Bristol, which said works were a factory within the meaning of the Factory and Workshop Acts, 1878 to 1895.

The document called Rules, and forming part of this case, was produced by the respondents as containing the terms of the contract between them and their employees, amongst which rules was the following provision: "All workers shall observe good order and decorum while in the factory, and shall not do anything which may interfere with the proper and orderly conduct of the business thereof, or of any department thereof; and shall in all respects obey the lawful commands of the general manager, forewoman, or superintendent of their respective departments. A fine of sixpence (or less at the discretion of the manager) shall be paid by each worker who shall be guilty of any infringement of this rule."

In November, 1900, the respondents made a contract with Helen Louisa Robbins (being a workman within the meaning of the said Act), upon the terms mentioned in the said document, and employed her as one of their machinists, the hours of work being from 8 a.m. to 7 p.m.

The respondents granted to their employees the privilege of having their dinners in the workroom of the factory between 1 p.m. and 2 p.m., but the said employees were not obliged to have their dinners in the said factory and could dine at home, or elsewhere, if they so wished. It was proved that the rules of the factory were in force as well during the dinner hour as at other times, and this was known to the employees. On one day in November, after the date of the aforesaid contract, during the dinner hour, Miss Knight (a clerk), who was then in charge of the factory, but whose room was immediately underneath that in which the employees were having dinner, heard a considerable noise and commotion going on in this room. On going there she discovered disorder, the said Helen Louisa Robbins playing a small harp, to the music of which several of the other girls were dancing, singing, and clapping their hands.

Miss Knight, in the course of her duty, reported this disorder, and Robbins and some of the others taking part in it were fined the sum of twopence each.

The girl Robbins stated before the justices that she had not been informed that it was wrong to dance and sing during the dinner hour, and that she was not aware there was any harm in it, but it was proved that a copy of the rules, before referred to, was posted in this workroom and other copies at other places in the factory, and Robbins admitted that she and the other girls would not have done what they did if Miss Knight had been present.

It was proved that the disorder and dancing caused considerable dust, and that dust would cause injury to the machines at which the employees worked, as well as to the material served out to them to work upon.

It was further proved that no fines were deducted from the wages of the employees, but a fine book was kept and once a week the said employees were asked to pay such fines after they had received their wages in full, and a receipt was given for such fine, and the following is a copy of the receipt given to Robbins:—

"The sum of 2d. has this day been received from Robbins in respect of a fine for making noise during dinner hour.—Dated this 10th day of November, 1900."

Upon the above facts the appellent contended: (*a*) That the said rule did not specify the acts or omissions in respect of which a fine might be imposed; (*b*) that the fine imposed under the said rule was not in respect of some act or omission within the meaning of sub-section 1 (*c*) of the 1st section of the Truck Act.

The respondents on the other hand contended that the words of the said rule sufficiently specified the acts and omissions in respect of which a fine might be imposed, and that the fine, in fact, inflicted was in respect of an act which caused or was likely to cause damage or loss to the respondents, or interruption or hindrance to their business.

The justices found as a fact, upon the evidence adduced before them that good order and decorum were not observed, and that dancing and disorder were likely to cause damage or loss to the respondent employers, and injury to the discipline to be enforced in a factory of this description.

They also found, as a fact, that the said rule (which was the only one in dispute) constituted a reasonable contract between the respondents and their employees for securing good order and decorum in the factory and complied with sub-section 1 (*b*) and (*c*) of the 1st section of the said Act, and they accordingly dismissed the information.

The question for the opinion of the court was whether on the facts above stated the justices came to a right conclusion. If they were wrong this case was to be remitted to them with such directions as the court might think fit to give.

Sir R. B. Finlay, A.G. (*H. Sutton* with him), for the

appellant.—The magistrates should have convicted the respondents. A rule which says "all workers shall observe good order and decorum while in the factory" is not a sufficient specification of the acts or omissions in respect of which a fine may be imposed so as to satisfy sub-section 1 (*b*), the whole object of which is that specific notice shall be given to the employees of the particular offences for which they will be fined. The rule is much too vague and general. There is no notice that the employees are not to dance or play music. Further, what the girl Robbins did cannot fairly be called a breach of good order and decorum.

Foote. K.C. (*Douglas Metcalfe* with him), for the respondents.—If the contention that this rule is too vague be correct, it would follow that it would be necessary to specify all possible acts of disorder. That would be impracticable and unreasonable. General terms must be used. It would be very difficult to say what the words "good order" and "decorum" mean. They must be construed with reference to the special circumstances of each case and the business being carried on.

Sir R. B. Finlay, A.G., replied.

Lord ALVERSTONE, L.C.J.—The case is not free from difficulty, but in my opinion we cannot say the magistrates have come to a wrong decision.

We have to consider, firstly, whether this rule is a good one, and secondly, whether there was such a breach thereof as would justify a fine being imposed, having regard to the terms of the statute. Now, by section 1, sub-section 1, there must be a contract which shall specify the acts and omissions in respect of which the fine is imposed, and the fine must be in respect of some act or omission which causes or is likely to cause damage or loss to the employer. Under sub-section 2 all deductions are to be made in pursuance of such a contract, and particulars in writing showing the acts or omissions in respect of which the fine is imposed are to be given to the workman. In this case the magistrates have found that there was during the dinner hour disorder and dancing—but "disorder" is the word to which I call attention—in the factory workroom; that to the knowledge of the employees the rules were in force as well during the dinner hour as at other times, and that the disorder was discovered and reported by the clerk in the course of her duties. It has been pressed upon us, and we must consider the matter, that a rule which says "all workers shall observe good order and decorum while in the factory" is not a sufficient specification of the acts or omissions in respect of which a fine can be imposed. Now, as there are so many different factories and so many different kinds of businesses, good order and decorum must be something with reference to the particular character of the business carried on and the particular privileges which are given to the workpeople. I think that it would be going too far to say that a rule imposing a fine for breach of good order and decorum is too general. I agree that in one sense the rule does not specify a particular act or omission, but I do think that the words "good order and decorum" are words which have to be construed with reference to the circumstances under which the business is carried on. Speaking for myself I think it is a sufficient compliance with the Act to say, "We shall impose a fine if while in the factory you do not observe good order and decorum."

It was next contended by the Attorney-General that there is no evidence of anything done by Robbins which could fairly be called a non-observance of good order and decorum. As to that I think these facts stated by the magistrates prevent that point from really being raised, and in face of these facts I think we cannot take the isolated act of the girl who provided the music, however innocent that act may have been in itself, and say that that particular act was not part of the disorder which the magistrates found to have taken place.

I think we cannot say that what was done was not a breach of good order and decorum, having regard to the privileges which were allowed to these workpeople and the position they occupied in the factory. I do not think we ought to entirely shut out of consideration the fact that they were allowed to have their meals in the factory workroom, where there were machinery and materials, and it is with reference to that that I say one must consider whether there has been a breach of the rule having regard to the place in which the act which the magistrates have found to be disorderly took place. For these reasons I think that the decision of the magistrates should be affirmed.

LAWRANCE, J.—I am of the same opinion.

Appeal dismissed with costs.

Solicitor for appellant, *Solicitor to the Treasury.*

Solicitors for respondents, *G. Reader & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 7.

IGOE v. SHANN. (*a*.)

Licensing law—Licence, lapse of—Value of house—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.

A licence for the sale of beer had been held for a house from a date before the 10*th of August*, 1872, *continuously down to the* 10*th of October*, 1886, *when it expired, the tenant's application for a renewal having been refused in September. On the* 12*th of October*, 1886, *a new tenant applied to the justices in special session for a transfer of the licence under* 9 *Geo.* 4, *c.* 61, *s.* 14.

Held, that, notwithstanding the licence had changed hands, and there had been a break in the continuity of the licence since the 10*th of August*, 1872, *the justices could not refuse to renew the licence on the ground only that the house was not of the annual value required by section* 45 *of the Licensing Act*, 1872, *in the case of premises not licensed at the time of the passing of the Act.*

Case stated by the justices for the county of Lancaster sitting in quarter session.

On the 21st of September, 1900, the respondents, who were the licensing justices for the city and county of Manchester, refused to renew to the appellant a licence to sell beer by retail to be consumed on or off the premises in a house known as the Council Inn, Council-street, Hulme, in the city of Manchester.

On the 23rd of October, 1900, the appellant appealed to the court of quarter sessions, who dismissed the appeal subject to this case for the opinion of the High Court of Justice.

The appellant was the tenant and occupier of the Council Inn, and was licensed in respect thereof for the sale of beer by retail to be consumed on or off the premises.

On the 9th of August, 1900, notice of objection to the renewal of the appellant's licence was served upon him, the grounds of which objection were, *inter alia*, that the premises were not of the necessary annual value.

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

The justices refused the renewal upon the ground raised by the objection.

The Council Inn was originally licensed for the sale of beer by retail to be consumed on or off the premises in the year 1868, and the licence was continuously renewed down to the year 1886.

At the general annual licensing meeting for the city held in August, 1886, the renewal of the licence to Edwin Wade, the then licensee, was objected to and the consideration of the objection adjourned until some day in September of that year, when the renewal of the licence was refused. He continued to carry on business and to sell beer by retail in the house until the 8th of October, 1886, upon which day he yielded up possession thereof to Jane Jackson, who became the new tenant and occupier thereof, but did not then obtain any licence or transfer of a licence to continue the business.

The licence for the current year expired in the course of law on the 10th of October, 1886. Jane Jackson commenced to carry on business and to sell beer by retail thereon on the 8th of October, 1886, but not under a justice's licence, and she continued to do so.

On the 12th of October, 1886, Jane Jackson applied to the justices in special session for the grant of a licence to her, which was granted, and the said licence was thenceforward continuously renewed until the 21st of September, 1900.

The annual value of the premises on the 21st of September, 1900, exceeded £15, but was less than £30.

The premises were situate within the city of Manchester, the population of which, according to the last Parliamentary census, exceeded 100,000.

It was contended before the court of quarter sessions on behalf of the appellant that, inasmuch as the house was on the 10th of August, 1872, licensed for the sale of intoxicating liquors for consumption thereupon, the qualification in respect of annual value prescribed by section 45 of the Licensing Act, 1872—namely, £30—did not apply thereto, but that the qualification in respect of the annual value which did apply thereto was that prescribed by 3 & 4 Vict. c. 61, s. 1—namely, £15.

It was contended on behalf of the respondents that the licence held in respect of the house at the time of the passing of the Licensing Act, 1872, having lapsed in 1886, the house thereupon ceased to be qualified to receive any other or new licence except upon the conditions as to annual value required by the Licensing Act, 1872, s. 45, and that upon the true construction of that section the conditions therein prescribed as to annual value applied to all licensed premises of which the licence had not been in existence continuously from the 10th of August, 1872, down to the application for the renewal thereof, or to which a licence other than that existing on the 10th of August, 1872, had been granted since that date.

The court of quarter sessions decided that the value qualification prescribed by section 45 of the Licensing Act, 1872, did apply to the house and dismissed the appeal upon the ground that the house was not of the necessary annual value as required by the last-mentioned statute.

Section 45 enacts as follows: "Premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer or wine for consumption thereupon is attached, shall not be subject to any of the provisions now in force prescribing a certain rent or value or rating as a qualification for receiving any such licence. Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied: (*a*) The premises . . . shall be of not less than the following value: If situate . . . within the limits of a town containing a population of not less than 100,000 inhabitants, fifty pounds per annum; or if the licence do not authorize the sale of spirits, thirty pounds per annum. . . ."

Joseph Walton, K.C. (*Randolph* with him), for the appellant.—Section 45 is a disqualifying section, and it only disqualifies premises which were not licensed at the date of the passing of the Act. The section divides premises into three classes—the first are beerhouses or houses licensed under the Wine and Beerhouse Act, which were so licensed at the time of the passing of the Act. With regard to these there are certain statutory requirements as to value. The second class are alehouses, or houses licensed under the Alehouse Act, 1828, which were so licensed at the time of the passing of the Act. With regard to these the section says that there shall be no requirement as to value. Then there is the third class of houses not licensed at the time of the passing of the Act, and with regard to such houses requirements as to value are made. It is said against us that because there was a break in the continuity of the licence of two days, the house passed into the third category. But the section says nothing about a break of continuity, all it says is that a house not licensed at the time of the passing of the Act shall be liable to the disqualifications therein stated. This house was licensed at the time of the passing of the Act, and it is therefore not subject to the disqualification. [Lord ALVERSTONE, L.C.J.—Suppose that the licence of a house licensed in 1872 were dropped for, say, six years, could a person get a licence notwithstanding the annual value was below what was required by section 45?] Yes, the contention must go that length; but it must be remembered that the justices have a general discretion, though, in the present case, the house being an 1869 house, that discretion was limited.

Byrne, for the respondent.—Section 45 was intended to save houses licensed before 1872 only so long as the licence continued to exist, and to exist in the same hands. The licence attached, in the present case, to the premises did not continue to exist. It perished, and there was a new licence in 1886. In *Freer* v. *Murray*, [1894] A. C. 576, it was held that a break in the continuity of a licence deprived a house of the privilege conferred by section 18 of the Wine and Beerhouse Act, 1869. So here the privilege conferred by section 45 was lost by the licence running out.

Lord ALVERSTONE, L.C.J.—The only question we have to decide in this case is this: whether in a case where premises have been licensed substantially continuously from the year 1868 an objector who gives notice against a renewal under section 42 of the Licensing Act, 1872, can raise the objection that the premises are not of the annual value required by section 45 of the Act. We must take it that with regard to the premises in question there was a break of two days in the continuity of the licence, and I assume for the purpose of my judgment that Mrs. Jackson got a new licence in respect of the premises on the 12th of October, 1886. She has had that licence down to 1900, when the justices refused to grant her a renewal.

If Mr. Byrne is right in saying that since the licence has ceased to be renewed to the same licensee then the premises in respect of which the licence was granted became new premises for the purpose of

licensing, then his argument would be well founded. But we have to consider what the statute says.

The language of section 45 is not difficult, but it does require some intelligence to construe it. For reasons which it is not for us to consider, the Legislature have thought fit to draw a distinction between the class of premises which were licensed under the Beerhouse Acts at the time of the passing of the Act and the class which were not. Accordingly the section provides that "premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act, 1869, authorizing the sale of beer and wine for consumption thereupon is attached shall not be subject to any of the provisions now in force." It was a curious way of doing it. They might have saved the existing provisions with regard to existing premises, but they thought they had done it by saying that houses which have got no licence under the Acts mentioned shall not be subject to the existing conditions. Then they went on to deal with the other class which were made subject to the new conditions, and the section proceeds: "Premises not at the time of the passing of this Act licensed for the sale of intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied," and then the conditions are set out. The section is put in an awkward way, but, in my opinion, the reasonable construction as applied to the present case is that in order to authorize the justices to give effect to the objection raised against the renewal of the licence the house must come within the second paragraph of section 45—that is to say, it must be "premises which were not at the time of the passing of this Act licensed for the sale of any intoxicating liquor." The premises in question were not within those words—that is to say, they were licensed at the time of the passing of the Act. The objection, therefore, fails, and the refusal by the justices to grant the renewal upon the grounds of that objection must be reversed. If the renewal is refused it must be upon the general grounds of the magistrates' discretion.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitors for the appellant, *Hockin & Co.*

Solicitors for the respondent, *Cobbett, Wheeler, & Cobbett*, Manchester.

Court of Appeal.

App. Bankruptcy. (Rigby, Collins, and Romer, L.JJ.) June 7.

In re BASTABLE.
Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Vendor and purchaser—Contract for sale—Leaseholds—Disclaimer of contract—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.

A trustee in bankruptcy cannot disclaim a contract for the sale of leaseholds entered into by the bankrupt before the bankruptcy unless he also disclaims the leaseholds.

This was an appeal from a decision of the Divisional Court (Wright and Darling, JJ.), reversing a decision of the Wandsworth County Court.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

It appeared that on the 5th of June, 1900, the debtor entered into an agreement in writing with one Silverstone for the sale to the latter of certain leaseholds at Richmond for the sum of £390 subject to a mortgage for £300 at 4 per cent. and to a ground-rent of £7 10s. per annum.

A deposit of £50 was paid to the vendor, and the date fixed for completion of the purchase was the 1st of August, 1900.

On the 21st of August the vendor was adjudicated bankrupt, and a trustee in bankruptcy appointed.

Certain correspondence then passed between the solicitors for the trustee in bankruptcy and the solicitors for the purchaser, from which it appeared that the solicitors for the trustee offered to complete the purchase on payment of the balance of the purchase-money—namely, £40.

On the other hand, the solicitors for the purchaser insisted that the trustee in bankruptcy must, before completion, first clear up all outgoings then due—such as, for instance, ground-rent.

This the trustee in bankruptcy refused to do, and on the 22nd of December, 1900, the trustee, by writing under his hand, disclaimed the contract for sale, which he purported to do by virtue of the power conferred by section 55 of the Bankruptcy Act, 1883, but he did not disclaim the lease.

The purchaser thereupon gave notice of motion to the county court for a declaration that the contract for sale was valid and binding, and that the disclaimer was void.

The county court judge dismissed the motion.

On appeal to the Divisional Court that court held that the contract for sale was valid and binding, and that the instrument purporting to disclaim the contract was void.

From this decision the trustee now appealed.

Muir Mackenzie and *Whately*, for the trustee.

Lord Coleridge, K.C., Bovill Smith, and *H. J. Turrell*, for the purchaser.

COLLINS, L.J., said he thought that section 55 of the Bankruptcy Act, 1883, was never intended to apply to such a case as this. It was intended to enable a trustee in bankruptcy to get rid of a burden, but it was not intended to revest in him property which had already vested in a third person. The provisions of the section all seemed to point to the cardinal idea of getting rid of onerous property. In the present case there was no such burden, the only suggestion being that the bankrupt's estate would be better with the leasehold property than without it. That did not appear to come within the section. But the matter did not stop there. This was leasehold property and the trustee might under the section have a right to disclaim the lease. But he was not willing to do that. He sought to disclaim the contract for sale while adhering to the lease. It did not appear to his lordship that such a contract was within the section. Moreover this was real estate and the effect of the disclaimer would be to take away from the purchaser something which had already vested in him. An Act of Parliament might of course have enacted that this should be done. But section 55 was passed in view of the well-established principles of the law of bankruptcy, which were thus stated by James, L.J., in *Ex parte Holthausen*, L. R. 9 Ch. App. 722, p. 726: "The law of England is that with certain exceptions the trustee in bankruptcy is bound by all the equities which affect a bankrupt or a liquidating debtor—that is to say, if a bankrupt or liquidating debtor under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency, enters into a contract with

respect to his real estate for a valuable consideration, that contract binds his trustee in bankruptcy as much as it binds himself . . . In this country in an English bankruptcy the trustee stands exactly in the same position as the bankrupt himself stands in, and therefore his trustee is bound to perform the contract in exactly the same way as he himself was bound to perform it." It did not seem to his lordship that section 55 had operated so as to alter those rights or to take away from a third person an equitable right in land which he had acquired from the bankrupt before the bankruptcy. In his lordship's opinion section 55 did not apply to the present case and the decision of the Divisional Court was right.

ROMER, L.J., agreed. It was contended on behalf of the trustee that if a vendor of land became bankrupt before the completion of the sale the trustee in bankruptcy without disclaiming the bankrupt's interest in the land could by disclaiming the contract for sale alone, place himself in the position of owner of the land freed from any interest of the purchaser, leaving him only the remedy of proving in the bankruptcy for damages. That would be a very serious contention if it could be maintained, for in every case in which property had greatly increased in value after the contract of sale and, before the bankruptcy the purchaser would be deprived of all interest in the property and would be left with only the right to a dividend. It could not be that that was the intention of the Act, and when section 55 was examined it was clear that it had no such operation. A purchaser of land had not a mere money interest, he had an equitable interest in the land itself. His interest was an interest in land. It was assignable and in case of his death would pass to his heir. That interest would remain whatever might be the effect of a disclaimer of the contract for sale by the trustee in the bankruptcy of the vendor. Assuming that the contract could be disclaimed as a separate property distinct from the land, what would be the effect? The bankrupt's estate was under the contract entitled to receive the balance of the purchase-money on a conveyance of the property, and the sole effect of the disclaimer would be to prevent the trustee from afterwards insisting that the purchaser was bound to pay the balance of his purchase-money. It might possibly have this further effect—if the vendor had contracted to do acts which would involve the expenditure of money it would relieve the estate from that payment. But it would operate as a disclaimer of any right to call on the purchaser to pay any money under the contract. It could not operate to destroy an interest in the property which had vested in the purchaser before the bankruptcy. The disclaimer would not take away the purchaser's equitable interest in the land, but he would have that interest free from liability to pay the balance of the purchase-money. That being so, what was the position of the purchaser? He had an equitable interest in the property, subject to the mortgage, and the trustee had vested in him something in the nature of a legal estate. In such a case it was in accordance with the common practice of the Court of Bankruptcy to say to the trustee that he must convey his legal estate to the purchaser on payment of the balance of the purchase-money unless he chose to disclaim the lease. That was in substance what the Divisional Court had done, though their order would require some modification in form. This would not affect the costs of the appeal, which must be paid by the trustee. His lordship, speaking for himself, added an expression of regret that appeals were constantly brought in bankruptcy matters in cases in which no real interest was involved, the amount at stake being utterly disproportioned to the costs incurred.

RIGBY, L.J., expressed his concurrence in the judgments of the other members of the court.

Appeal dismissed.

Solicitors, *Ward, Perks, & McKay; Seeley & Son.*

Appeal.
(A. L. Smith, M.R., and Collins and Romer, L.JJ.) March 26.

WHITEHEAD *v.* READER. (*a.*)

Master and servant—Employers' liability—Accident—Compensation — Course of the employment — Disobedience to master's orders—Workmen's Compensation Act, 1897 (60 & 61 *Vict.* c. 37), *s.* 1.

A workman was employed as a carpenter, part of his duty being to sharpen his tools at a grindstone, which was worked by means of a leather band passed over shafting connected with an engine. While sharpening his tools the band slipped off the stone. In trying to replace it he was caught by it and injured. He had been told not to touch the machinery, and in trying to replace the band he was acting contrary to his orders. The county court judge having awarded him compensation under the Workmen's Compensation Act, 1897,

Held, that, in the circumstances, it could not be said as a matter of law that the accident did not arise out of and in the course of the employment.

Appeal from the award of the judge of the Coventry County Court under the Workmen's Compensation Act, 1897.

The county court judge's notes stated that the applicant for compensation was a carpenter, who at the time of the accident was in the employment of Reader.

The applicant was sharpening one of his tools on a grindstone. The grindstone was worked by a leather band, which passed over shafting connected with a gas engine.

On the occasion in question the band slipped off the stone.

The applicant, in trying to replace the band, was caught by it, and was injured.

The applicant had orders not to touch the machinery, and, in trying to replace the band as he did, he was acting contrary to his orders.

It was objected that the accident did not arise out of and in the course of his employment, upon the authority of *Lowe* v. *Pearson*, 47 W. R. 193, [1899] 1 Q. B. 261.

The county court judge held that *Lowe* v. *Pearson* did not apply, and he overruled the objection.

It was admitted that for the present the applicant was totally incapacitated, and the county court judge awarded him 12s. 6d. per week, being one-half of his average weekly earnings.

The employer appealed.

T. W. Chitty, for the employer. — The accident did not arise out of and in the course of the workman's employment. The man was expressly told not to touch the machinery. His employment was strictly confined to carpentering work, with the consequent duty of sharpening his tools from time to time. He had no business to do the engineer's work and replace the band on the shafting. That was the

(*a.*) Reported by W. F. BARRY, Esq., Barrister-Law.

engineer's business, with which the applicant had nothing to do. It was wholly outside his employment: *Lowe* v. *Pearson*, 47 W. R. 193, [1899] 1 Q. B. 261. There was no question of an act done upon an emergency such as in *Rees* v. *Thomas*, 47 W. R. 504, [1899] 1 Q. B. 1015. The employer, therefore, is not liable to pay compensation.

Montague Lush, for the workman.—It is not every act of disobedience to a master's orders that will take the act out of the scope of the employment. Disobedience to an order may be serious and wilful misconduct within section 1, sub-section 2 (*c*), of the Workmen's Compensation Act, 1897, which will prevent the workman from claiming compensation, but here the county court judge has not found that. Again, the act may be of such a kind as to be clearly outside the scope of the employment, as was the case in *Lowe* v. *Pearson*. Here that is not the case. Part of the man's employment was to work at the grindstone, and it was incidental to that work that he attempted to replace the band. It was a question of fact for the county court judge, and the judge has found the fact in favour of the workman by holding that *Lowe* v. *Pearson* did not apply, and by awarding compensation.

He referred to *McNicholas* v. *Dawson & Son*, 47 W. R 500, [1899] 1 Q. B. 773.

T. W. Chitty replied.

Cur. adv. vult.

March 26.—A. L. SMITH, M.R.—This is an appeal by a master in proceedings taken by a workman to assess compensation under the Workmen's Compensation Act, 1897. The learned county court judge has awarded him 12s. 6d. a week, and the master appeals upon the ground that the injury did not arise out of and in the course of the man's employment. That is the only point. From the judge's notes, which alone we are able to get and which are a *résumé* of the case and not notes of the evidence of the individual witnesses, these appear to be the facts. The workman was employed on a factory within the meaning of the Act, and as part of such employment he had to grind his tools at a grindstone which was being rotated by a band driven by steam power. Whilst he was so employed the band slipped off and the man endeavoured to adjust it, and whilst so doing he was injured. That the injury *primâ facie* arose out of and in the course of his employment is to me clear, but the man had been told not to touch the machinery and it is said that this causes the injury not to have arisen out of and in the course of his employment. Does disobedience to this order cause the man not to have been injured in the course of his employment? I think not. It cannot be said that every disobedience to an order terminates a man's employment. Disobedience may or may not give a defence to a master under the clause relating to serious and wilful misconduct. The learned county court judge was right in holding that the case of *Lowe* v. *Pearson* has no application to the present case. That was not a case of any employment at machinery at all. It was a case in which a boy was employed in a pottery to make clay balls, and to take them when made to a woman, who was working at a machine driven by steam. That was his sole employment. The balls were then moulded by the woman at the machine. It was no part of the boy's duty to interfere with the machinery in any way, and he was expressly told not to do so. He attempted to clean a part of the machine, and in doing so he was injured. In interfering with the machine he clearly went outside his employment and in addition he disobeyed the express orders of his master. In the present case the workman's course of employment was to grind tools at the grindstone, and, though he was told not to touch the machinery, still he was acting in the course of his employment when, in trying to adjust the band after it came off, he was injured. In my opinion the county court judge was right in coming to the conclusion in favour of the workman, and the appeal must be dismissed.

COLLINS, L.J.—I am of the same opinion. I have had considerable difficulty in arriving at an accurate conclusion as to what are the findings in fact of the county court judge. At first I thought by one of his findings that the order of the master had defined the sphere of the workman's employment, and limited it solely to the comparatively unskilled work of sharpening his tools, excluding from his employment any interference with the machinery which actuated the grindstone upon which he was engaged at work. But when one looks at the judge's notes as a whole, remembering, as the Master of the Rolls has pointed out, that they are not a detailed statement of the evidence, but merely a short *résumé* of the facts, it seems to me that it would be wrong to say that the county court judge has found as a fact that the two spheres of employment—namely, the more or less unskilled joiner's work of sharpening tools, and the skilled work of managing the machinery—were separated by the master's orders. No doubt it is not every breach of a master's orders which will terminate a servant's employment so as to excuse the master from the consequences of the servant's act in breach of his orders, but nevertheless it is in the last resort an order emanating from the master which defines and limits the employment of every servant. A breach by the servant of such an order would render the act of the servant one outside the scope of the employment. But it is not true to say that every breach of the master's order will take the act outside the employment. One must look at the order of the master to see whether it was such an order as laid down the limit of the employment. It is clearly competent to the master to define and limit the sphere of his servant's employment, and if the servant acting within that sphere violates the order of the master, the latter will be responsible. If, however, the servant goes out of the sphere of his employment as so defined and limited, and acts in the other sphere, which is outside his employment, the act of the servant in that other sphere cannot render the master liable either to the servant under the Workmen's Compensation Act, 1897, or to third parties at common law. Take the case of *Beard* v. *London General Omnibus Co.*, 48 W. R. 658, [1900] 2 Q. B. 530, where the conductor of an omnibus took upon himself to drive the omnibus. That was a breach of his master's orders. Why? Because his employment was limited to acting as conductor of the omnibus, and it was no part of his duty to act as driver, an employment for which he might have been quite unfitted. So in the present case, if the two spheres of employment had been distinctly separated and defined—namely, the grinding of the tools, and the skilled labour of managing the machinery—and the applicant's employment had been limited to the mere grinding of the tools, and if, while acting in breach of the order, limiting his employment, he had met with the accident, he would not have been acting in the course of his employment. But the county court judge has come to the conclusion that the accident to the workman arose in the course of his employment, and he couples that with a finding of fact which does not necessarily show that the workman had gone out of his employment when he met with the accident. The county court judge has not

given us sufficient materials upon which we can say that he was wrong in law, and therefore upon the materials before us we are not in position to differ from the conclusion at which he has arrived.

ROMER, L.J., read the following judgment: I also think that we ought not to differ from the county court judge in this case. He appears to have found that the accident arose out of and in the course of the workman's employment, and that in disregarding the master's orders not to touch the machinery he was not guilty of serious and wilful misconduct. The evidence taken in the county court is not before us, and the appellant is not able to furnish us with any notes of the evidence. That being so, we have to depend upon the meagre notes of some findings supplied by the judge. From these it does not appear that the decision of the judge cannot be or ought not to be supported. At the time of the accident the workman was employed on his master's business. He was not idling or doing something which was clearly beyond the scope of his employment. To make the grindstone work, and so be able to sharpen his tools, the carpenter may well be said to have been about his master's business when he tried to replace the band, and that on the impulse of the moment he should have forgotten the order as to not touching the machinery is not unnatural, and may well be regarded as a venial act and not as being wilful misconduct on his part. I am not able to gather from the facts of the case that the replacing of the band was an act on the workman's part so remote from his ordinary duties that it could not be fairly said to be one arising out of and in the course of his employment. It is not the case of a workman, whose duties in no way bring him into contact with his master's machinery, officiously or for his own purposes meddling with that machinery contrary to orders, and so being injured. The principle upon which cases like *Lowe* v. *Pearson* were decided has no application to the present case.

Appeal dismissed.

Solicitors for the applicant, *Maddocks & Colson*, for *H. Maddocks*, Coventry.

Solicitors for the employer, *Sharpe, Parker, & Co.*, for *Hughes & Masser*, Coventry.

High Court of Justice.

Chan. Div. } Farwell, J. } May 10, 11, 13-16.

BURROWS v. LANG. (a.)

Easement—Watercourse—Pond—Uninterrupted flow——Right to water cattle—Prescription—"Temporary"—"Precarious"—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.

Of two properties which were in one ownership for fifty years prior to 1886, *a farm property was conveyed to the plaintiff in* 1886 *and a mill property to the defendant at a subsequent date. An ancient pond, filled from a brook by an artificial watercourse, and habitually used by cattle, was on the defendant's property, but for fifty-five years abutted on the plaintiff's property, whence his cattle drank from it.*

In an action by the plaintiff claiming that the watercourse was a continuous easement necessary and convenient for the use of his property; that he had a right to compel the defendant to keep the pond full with a constant and undiminished supply, or at least a right to water his cattle at the pond whenever there was water therein; and that, in the absence of express words in his deed of conveyance, these rights passed under section 6 *of the Conveyancing Act*, 1881,

Held, that, in such a case all the circumstances must be considered (Birmingham Banking Co. *v.* Ross, 36 *W. R.* 914, 38 *Ch. D.* 295); *that there was no easement here which could pass, nor one by way of prescription by reason of the nature of the works; and that the artificial watercourse having been made for one property only, and no leakage by trampling of cattle in the pond having been intended by the vendors of the property, it was not to be inferred from the particular facts of the user that there was a grant of water which conferred either any right to compel such a continuance of the flow as, apart from the rights of lower riparian proprietors, would impose a serious burden on the defendant, or any right to an easement of such a "precarious" character as an easement to water cattle at the pond when and as often as it might be full, such an easement being unknown to the law, and therefore incapable of passing under the general words of section* 6 *of the Conveyancing Act*, 1881.

Hanna *v.* Pollock, [1898] 2 *Ir. Rep.* 532, [1900] 2 *Ir. Rep.* 664, *and* McEvoy *v.* Great Northern Railway Co., [1900] 2 *Ir. Rep.* 325, *discussed.*

Watts *v.* Kelson, 19 *W. R.* 338, *L. R.* 6 *Ch. App.* 166, *distinguished.*

Action with witnesses.

The plaintiff, William Burrows, was the owner in fee simple of the Cwm Farm in the parish of Shirenewton, Monmouth, and the defendant, William Shaxson Lang, was the owner of the Lower Cwm Mill and certain adjacent lands, adjoining the plaintiff's property.

Many years ago the water from a stream known as the Castroggy brook was diverted and led through an open duct or watercourse into a pond (hereinafter called the pond at A), the duct and pond being on what was now the defendant's property, but the pond abutting on the plaintiff's land for a distance of about 55 yards.

In 1884 the contractor making the Severn Tunnel, with the assent of all parties interested, laid earthenware pipes in the course of the duct to within about 50 yards of the pond, in which pipes the water had since run.

There was a sluice at the point where the diversion of the water was made from the main stream, and the water from the pond at A could be drawn off by means of a bye-wash before it reached the mill.

If not so drawn off, the water ran through a pipe into the mill pond below and thence over the water-wheel into the mill-race and rejoined the main stream by means of a culvert.

For many years prior to 1886 the ownership of the mill property and the farm property was one and the same, but in that year the latter was conveyed to the plaintiff, and subsequently the former to the defendant.

The plaintiff alleged that the pond at A had for over a century been used by the occupiers of the Cwm Farm for the purpose of watering cattle, and claimed that the watercourse was a continuous easement necessary and convenient for the use of his property, and that the rights to have an uninterrupted flow of water down the watercourse and to water his cattle at the pond at A passed by the conveyance by virtue of the general words in section 6 of the Conveyancing Act, 1881, and were now vested in him.

The defendant denied the existence of any such rights and had in fact prior to action brought placed

(a.) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

a fence round the pond at A on the boundary of his property, thereby preventing the access of the plaintiff to the pond.

The defendant also alleged that he had the right to obstruct the flow of water from the main stream into the pond.

The plaintiff accordingly claimed an injunction to restrain the defendant from obstructing the flow of water from the Castroggy brook into the watercourse and pond at A so as to interfere with the plaintiff's easement or otherwise to interfere with the right of the plaintiff or his tenant of watering cattle in the said pond and otherwise using the water for the purposes of the Cwm Farm, and for an order on the defendent to remove all obstructions placed by him or by his order in or across the said watercourse which prevented water from the Castroggy brook flowing into the said pond; and further claimed damages.

J. G. Butcher, K.C. (*Stewart Smith* with him), for the plaintiff.—The plaintiff has the right to compel the defendant to keep the pond full from the brook with a constant and undiminished supply of water, or at least the right to water his cattle whenever there is water in the pond; such a right would pass under section 6 of the Conveyancing Act, 1881.

W. H. Upjohn, K.C. (*F. Hoare Colt* with him), for the defendant.—The plaintiff is not entitled to the continued supply of the water, for the mill-race was constructed only for a temporary use: *Arkwright* v. *Gell*, 5 M. & W. 203; *Wood* v. *Waud*, 3 Exch. 748; *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, 4 App. Cas. 121, 27 W. R. Dig. 228. Further, an easement to enjoy whatever flow there may happen to be is an easement unknown to the law, being precarious. [FARWELL, J., referred to *Hanna* v. *Pollock*, [1898] 2 Ir. Rep. 532, 549, [1900] 2 Ir. Rep. 664, at p. 671, and *McEvoy* v. *Great Northern Railway Co.*, [1900] 2 Ir. Rep. 325.] See also *Birmingham Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295; *Greatrex* v. *Hayward*, 8 Exch. 291; *Mason* v. *Shrewsbury and Hereford Railway Co.*, 20 W. R. 14, L. R. 6 Q. B. 578.

Butcher, K.C., in reply.—The watercourse here was not temporary, as in the two Irish cases referred to, but was made before living memory. The evidence suggests at least an inference that the pond was not constructed merely for the convenience of the mill owner. In 1881 the cattle in the orchard enjoyed a right *de facto* to drink at the pond, which right passed to the plaintiff on his admission under section 6 of the Conveyancing Act, 1881. The present case is governed by *Watts* v. *Kelson*, 19 W. R. 338, L. R. 6 Ch. App. 166.

FARWELL, J., after stating the facts of the case, continued as follows: There is no evidence before me to show what was the nature of the ownership of the mill and the farm at the date when this duct and mill pond were constructed. The duct and mill pond are entirely on the property of the mill and abut on the farm property on one portion of one side of the pond only. There has been a considerable dispute between the parties as to the rights of this particular piece of land. In 1886 the plaintiff purchased the property from the common predecessor in title, Mr. Cox. It was copyhold property, and he took an admission on the 7th of October, 1886; his conveyance contains no express words relating to any rights of water, but he relies upon the general words in the Conveyancing Act as giving him the right which he claims in this action. Various disputes have arisen before this between this plaintiff and the defendant in respect of this property, which seems to me to be wholly out of proportion to the amount in costs which they have spent upon it. Now, there has been a great deal of conflicting evidence as to what was the nature of the user of the water by the farm and the occupiers thereof in 1886. The first point that I have to determine, therefore, is whether there was any easement, privilege, right, or advantage enjoyed with the farm under the conveyance in 1886 which would pass under the words. I find as a fact that there was a watering place—that is to say, a place at which the cattle habitually went to water, at the spot named, and (as I find) on each side of it a little way up the stream and a little way down to the pond, but not extending beyond the piece of land which was in dispute in a county court action unsuccessfully brought by the present plaintiff. The defendant, who purchased in 1893, but had, as I understand, contracted to purchase before the county court action, obtained the conveyance and the piece of land first-mentioned with this watering place, which was then on it. Therefore I find as a fact that there was no actual watering place upon the plaintiff's property at the time of the conveyance to him. I find also that in consequence of the natural formation of the ground cattle in his orchard could and occasionally did drink from the banks of the orchard in his possession out of the mill pond which abutted on it. I doubt if they could have done it except in cases when the pond was full or reasonably full. But inasmuch as it was often full when the mill was being worked I have no doubt they did in fact drink there, and particularly at the small portion just close to the boundary; but there was no defined watering place upon the orchard. I find also this fact, that the stream leading the water from the sluice point into the mill pond was originally an open stream. In 1884, in consequence of the works for the formation of the Severn Tunnel and the pumping operations which were necessary to keep that tunnel from being flooded, this particular tract of country was very largely drained, and it being naturally of a fissiporous character water escaped more readily after 1884 than before. In consequence of the complaints and difficulties with regard to water escaping in 1884 the contractor for the Severn Tunnel, at the request of or under compulsion from the common proprietor or common owner, put pipes down through part of the mill lands and mended one or two places where there were holes through which the water could have escaped. Therefore at the time of the conveyance in 1886 I have got this fact, that the water is led through pipes entirely on the defendant's land into a stream which then opened out leading into the pond, all of it of a nature likely to generate fissures through which the water would escape. The pond is one which requires, and has for some time past been undergoing puddling in order to make it watertight. There is evidence to show, and I hold it to be a fact, that cattle trampling in the bed of a puddled pond such as this would be likely to do it considerable damage. The right of the defendant to divert the water from the natural stream and use it for mill purposes is subject, of course, to the rights of the lower proprietors to have the water returned to the natural stream practically undiminished, at any rate undiminished to an extent sufficient to injure them. The defendant certainly could not lawfully divert the water and allow it to run into the mill pond and then escape by open fissures, which were open by reason of his not keeping them mended, so as to be lost to the natural stream altogether. It has also been proved to my satisfaction that the water is of great value to the lower riparian proprietors and to the district generally.

The question that has been argued is whether

first of all, the plaintiff has got a right to compel the flow of water into the mill pond so as to get the benefit of watering his cattle and drawing water from the orchard. Secondly, it has been argued that if he has not got that larger right, he has got at any rate the right to take water for the purposes of his cattle and otherwise from the orchard if and so far as there should be any water in the mill pond. The question in this case appears to me to be one of construction of the general words in the Conveyancing Act. I have no evidence to show the circumstances under which the particular stream was made, nor do I think it is material, because, for at any rate fifty odd years prior to 1886, both properties were in the same hands and belonged to the same person and therefore no rights could arise. What I have to find is whether there was anything which could pass such rights under the general words in the Conveyancing Act as enjoyed with the orchard at the time of the conveyance. As regards that, I have the assistance of Cotton, L.J.'s, exposition of the Act in the case which has been referred to of the *Birmingham Bank* v. *Ross*. It is not sufficient simply to point to the state of nature and say "There is a stream; I must of course have the right to dip into it and to draw from it because it abuts on my land." Other considerations arise. If the stream is a natural stream there is the right to have as a riparian proprietor the flow of the water with the incidental rights of taking water subject to the rights of the lower riparian proprietors. If it is an artificial stream other considerations arise. I think the remark of Cotton, L.J., in that case is useful as an authority because it shows to my mind that I have to consider those circumstances and that it is not enough for the plaintiff merely to point to the state of the land and say "I must have got it because it stands so to the site; and it is obvious when you go upon the land." That case before the Court of Appeal was a question of lights. There was there apparently the right to light over a particular piece of land, and if you had simply looked at the land you would have said that was so, but the decision was, taking the head-note: "The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee," and the Lord Justice says at p. 307: "I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it within the meaning of this section. The light did in fact at the time come over that building; but it came over it under such circumstances as to show that there could be no expectation of its continuance."

That appears to me to render it proper for me to consider this case in the same mode as I should have had to consider it if it had been a question of the Prescription Act or of implying a lost grant. Now, with regard to that the law is to some extent settled. I take it as stated in the Privy Council case of *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk*, where at 4 App. Cas., p. 126, the common law cases are conveniently referred to. Sir Montague Smith, who was a very eminent common lawyer, himself said: "There is no doubt that the right to the water of a river flowing in a natural channel through a man's lands, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle." I venture to add to that—the right to water flowing through an artificial watercourse constructed on the man's own land passing by his neighbour's land does not rest on the same principle as that of water flowing in a natural channel by another man's land. I take the statement of the principle from Parke, B., in *Greatrex* v. *Hayward*: "The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created." Applying that to the present case by the light of the case before Cotton, L.J. (*Birmingham Bank* v. *Ross*), it appears to me that what I have to consider is whether, having regard to the fact that this an artificial watercourse through porous land, rendering repairs necessary from time to time, and made solely for the use of the mill and used entirely for mill purposes (except so far as it may have been used at the old watering-place, which, as I have already mentioned, has not passed to the plaintiff at all) I can infer from that, that there was an intention to grant the right to compel the miller to continue to send down the water whether he wanted it or whether he did not, although he might have given up the mill altogether, and although he might not think it worth while to keep the pond watertight. Am I to infer from these facts that the grant of water conferred any such right? If I am regarding this as going to a question of prescription, then I have to consider whether the artificial watercourse was made for a temporary purpose or not. Mr. Butcher has pressed upon me that this was not a temporary purpose. Well, that depends on the meaning of the word "temporary." The case of *Arkwright* v. *Gell* was the case of water pumped from mines and flowing over another man's land. That had gone on for sixty years. "Temporary," therefore, does not mean merely that it happens to last, in fact, for a few years, but to my mind it means for a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end and is not meant to be equivalent to a grant in fee. For example, if a man pumps water from his mines for the purpose of drying his mines, that is temporary in the way that it is limited by the working of the mines. If a man makes through his own land a duct leading water to the mill pond for the use of his own mill on his own land, to my mind that is temporary in the sense that it is limited to the period for which he uses the mill. In both cases, in my judgment, it is temporary within the meaning of the authorities; it is not meant to be a new formation, an alteration of the face of nature to remain *in perpetuum*, but it is an alteration temporary in the sense that it is for the purpose of and co-extensive with the carrying on of a particular business (in this case the business of a miller). Therefore I think that it is, within the authorities, for the purpose of a temporary business. Now there is this to be said, Mr. Butcher argued that this case is to be distinguished from the case of water pumped over another man's land because he says this does not go over the plaintiff's land at all but abuts upon it. To my mind that is a distinction which is against him. One can well understand that the court might the more readily presume an agreement between the parties if the one of them pumped water out of his own land for his own convenience, and the other accepted it and allowed it to run over his land for his own convenience. It might have been very possibly considered, if there were evidence to show it (one could readily, or, at any rate, more readily, come to the conclusion), that there was an arrangement that the exit of the water should be for the mutual benefit of both. No such consideration arises when you have simply the water brought by the man entirely over his own land, and not in any way affecting or going over the land of his neighbour. Nothing moves from the neighbour by way of consideration. This is pointed out by

Palles, C.B., in the case of *McEvoy* v. *Great Northern Railway Co.*, [1900] 2 Ir. Rep. I will begin at p. 333: "It is settled law that the rights to the water flowing in an artificial water-course constructed by a particular person upon his own land and for his own benefit are not regulated by the law applicable to natural water-courses, but are to be ascertained by a view of the purpose for which the original structure was built." He then refers to the various English authorities, and to one Irish case, and he says: "I hold that as a general rule circumstances which are sufficient to create an easement in favour of a particular person do not necessarily subject the land of that person to the servitude of continuing to maintain in existence, for the benefit of the servient tenement, the works constructed by him for the purpose only of that easement. In other words the existence of an easement does not carry with it any presumption of the creation or existence of a counter-easement in the owner of the servient tenement against the owner of the dominant tenement. Certain circumstances may give rise to such counter-easement. The circumstance that part of the works executed on the lands of another are such as to require the consent of the owner of the servient tenement may in certain circumstances tend to do so, especially in cases in which the easement has been acquired by prescription, and in which the circumstances of the original structure, or its subsequent use, indicate an intention that it was constructed for the benefit of both tenements. But no case of this exceptional class has any application to the present; for here all the works were on the defendant's own land; the consent of those from whom the plaintiff claims was not necessary for their legality; and the only inference capable of being drawn is, as I have already said, that they were constructed for the sole benefit of the railway company." It appears to me that I cannot draw in a case like the present any presumption from the fact that the water abuts on the plaintiff's land, that the water was intended to be for his benefit and not for the benefit of the mill, in order to work which it was originally laid there. I hold, therefore, that no right has been shewn to compel the continuance of this flow of water, and I would pause there to point out the very serious consequences that would result from my holding the contrary. In the first place it would impose upon the miller the burden of having to keep the hatch in repair, and of keeping a man to let it up or down, because he certainly could not be justified in my mind in always letting it down without reference to the fact whether he wanted water for his mill or whether he did not—running the risk of its being lost in transit to the detriment of the lower riparian proprietors. Therefore it certainly would entail on him the liability of keeping in repair the channel and the whole of the mill pond bottom and the other works which lie between the mill pond and the exit into the Castroggy brook, because he is liable to the lower riparian proprietors for diverting the water from the brook from its natural course, and is bound to return it to them without undue diminution so that they suffer no loss. If he allowed the mill pond to get out of repair so that the water escaped, he would be answerable to those persons lower down. If the plaintiff has the right that he claims, I do not see how he can prevent his cattle from to some extent trampling on the puddled bottom of the brook in order to drink. It would be exceedingly difficult, and there would be the continual risk of some leakage being caused by such trampling; and the servitude that I should be imposing on the defendant would be of a very onerous nature. It seems to me to be inconceivable that any such burden could have been intended to have been undertaken by the vendors at the date when they made this grant, which contains no express reference whatever to the water at all; it is only by implication of law and the statutory provision in the Conveyancing Act. It seems to me inconceivable that they could have intended to undertake any such burden, and perhaps from this point of view there may be something in the plea which Mr. Colt has put in his pleadings, that they were trustees. It certainly would have been a most extraordinary liability for them to have undertaken the burden of keeping this mill pond and duct in proper repair.

Then it is said — and as regards this point I should have been glad if I could have seen my way to help the plaintiff—assuming that there is no right to have the water to continue to flow, there is the right to take water if and when it shall be there. To my mind that is a right which is inconsistent with the very idea of the nature of the easement of watering—the easement which is claimed. There is some authority on this point which bears out my own view. An easement, as stated by Lord Coke, taking it from the common law and quoting Bracton, must be *nec per vim nec clam nec precario*. What is "precarious"? That which depends not on right but on the will of another person. As Bracton puts it: "*Precaria fuerit et de gratia, quae tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus.*" That is to say, if the man can *tempestive* or *intempestive*—whether the claimant of the easement likes it or whether he does not—put a stop to it, then there is no easement, because it negatives the idea of an easement altogether. The right to have the water flow I have already negatived. Then can the defendant claim any right to water, which is what he claims, when he has no right to compel any water at all to be let down? So far as I know this particular point has not arisen at all except so far as it is determined in the Irish case which was referred to. It is touched on in *Hanna* v. *Pollock*, where at [1900] 2 Ir. Rep., p. 671 there is a passage from the judgment of Fitzgibbon, L.J., which seems to me to be material on this subject: "The whole doctrine of presumed grant rest upon the desire of the law to create a legal foundation for the long continued enjoyment, as of right, of advantages which are *primâ facie* inexplicable in the absence of legal title. In a case such as this, where the grant is admittedly a fiction, it is all the more incumbent on the judge to see before the question is left to the jury that the circumstances and character of the user import that it has been as of right. It appears to me, in the present case, that the evidence is inconsistent with right, and that the user is consistent only with permission to enjoy what the supposed grantor did not want, if and so long as that user might be consistent with the rights of third parties, and also with the grantor's right to use his own property from time to time in a reasonable manner. Such a user never could have been as of right in its inception; it could never acquire during its continuance any higher than a permissive character, and it therefore never could be, or become, a foundation for the presumption of a grant"; and Walker, L.J., I think, uses words to the the same effect at p. 690. That, to my mind, is a very clear exposition of the law and accords with my own view that you cannot create a new burden which is something short of an easement, but which is so far as I know hitherto unknown to the law—that is to say, an easement which shall be *nec per vim nec clam* but *precario*. To my mind there is no such right known to the law. But then Mr. Butcher says that section 6 of the Conveyancing Act contains divers other

words besides "water and water courses" — for example, "liberties, privileges, easements, rights, and advantages whatsoever" to be enjoyed with the land. The words are satisfied by giving him that which was enjoyed with the land—namely, what Fitzgibbon, L.J., has just called the permissive user so long as the miller did not choose to stop it. That right he gets, but to say that those words create any new right hitherto unknown to the law is what I have never before heard suggested, and I certainly am not going to be the first to hold it. If the right is one which is not known to the law, it appears to me it cannot pass under the general words.

The only other point I think I need refer to is this, that Mr. Butcher relied on *Watts* v. *Kelson*. Of course I should be bound to follow *Watts* v. *Kelson* if it was a decision in point, but to my mind it has really nothing whatever to do with it, because the whole of the basis on which I rest my judgment was absent in that case. There was no question there of an artificial watercourse having been made for one property only. The artificial watercourse in that case was made for the express purpose of providing both the properties with water. The question was never argued there at all; the point did not rise. The only point argued there was whether, admitting that there was no easement in the proper sense of the law but that which would by its nature have been an easement if there had not been common ownership, did that pass by the grant, and it was held that it did. In the present case that is entirely excluded, because I hold there is no easement which could pass, nor one by prescription in the present case by reason of the nature of the works. The result is that the plaintiff's case wholly fails and, I can do nothing but dismiss it with costs.

Solicitors, *T. White & Sons*, for *J. C. Llewellin*, Newport, Mon.; *Warriner & Co.*, for *Davis, Lloyds, & Wilson*, Newport, Mon.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Phillimore, JJ.) May 13.

WRATHERITT *v.* CAUTLAY. (*a*.)

Metropolis—Public health—Houses let in lodgings—Bye-laws—Artizans dwellings—Public Health (London) Act, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 94.

A building was divided into a number of separate two-roomed and one-roomed tenements, each of which were occupied by a separate family. The passages and staircases were used in common, and there was a water-closet, sink, water-tap, and dust shoot for the use in common of each set of three or four tenements. There was a front door at the entrance of the building, but there was no means of fastening it beyond a Norfolk latch. The landlord did not live on the premises, but a caretaker lived on the ground floor, who attended to minor repairs and cleaned the common passages, staircases, and water-closets.

Held, that the building was not a house let in lodgings or occupied by members of more than one family within the meaning of section 94 *of the Public Health (London) Act*, 1891, *or of bye-laws made thereunder.*

Case stated by a metropolitan police magistrate.

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

A summons and complaint were preferred by the respondent, an officer of the Vestry of St. George the Martyr, Southwark, against the appellant under bye-laws made by the vestry with respect to houses let in lodgings or occupied by members of more than one family in pursuance of the Public Health (London) Act, 1891, s. 94, charging that the appellant failed to furnish to the sanitary authority after notice a true statement of particulars with respect to a lodging-house, No. 2 Block, Artizans'-dwellings, Gun-street, of which he was the landlord, contrary to the bye-laws.

The following facts were proved:

Artizans'-dwellings, Gun-street, consisted of two blocks of buildings the front of which abutted on Gun-street and the backs on Silex-street, in the parish of St. George the Martyr.

No. 2 Block was entered directly from Gun-street by a single entrance. There was a front door to the entrance, but no means of fastening the same beyond a Norfolk latch. The figure "2" was affixed to the transom of the door-frame. The entrance passage branched into two passages about the centre of the building, and there were two double-roomed tenements and one single-roomed tenement on each outer side of the passage and one single-roomed tenement between the two single branch passages. This was the arrangement on each of the four first floors.

Each of the two-roomed tenements and the single-roomed tenements was let to a separate family. Thus No. 1, two rooms, was occupied by a man, wife, and four children, and No. 2, two rooms, by a man, wife, and three children. The two-roomed tenements were let at a weekly rent of 5s. and 6s. 6d. per week, and the single-roomed tenements at 4s. per week.

At the back end of each passage on each of the floors there was a water-closet, sink, water-tap, and dust-shoot opening. On the south side this convenience served for the use in common of four tenements, and on the north side for the use in common of three tenements. The staircase and passages were used in common.

The tenements were generally occupied by a class of people who are not cleanly in their habits.

The landlord did not live on the premises. A caretaker lived on the ground floor who attended to minor repairs. He had no power to let the premises, but he received deposits from tenants and without the authority of the landlord had let four tenements, furnished, at 7s. per week. He also cleaned the common passages and staircases and the water-closets.

The names of the occupiers of the various tenements in the building appeared on the rate-book and each of the tenements was rated separately, but the landlord compounded for the rates.

The magistrate held that the building was not a lodging-house within the meaning of the bye-laws and dismissed the summons.

Section 94 of the Public Health (London) Act, 1891, enacts as follows:

"(1) Every sanitary authority shall make and enforce such bye-laws as are requisite for the following matters—that is to say, (*a*) For fixing the number of persons who may occupy a house or part of a house which is let in lodgings or occupied by members of more than one family, and for the separation of the sexes in a house so let or occupied; (*b*) for the registration of houses so let or occupied; (*c*) for the inspection of such houses; (*d*) for enforcing drainage of such houses, and for promoting cleanliness and ventilation in such houses; (*e*) for the cleansing and lime-washing at stated times of the premises; (*f*) for the taking of precautions in case of any infectious disease.

"(2) This section shall not apply to common lodging-houses within the Common Lodging Houses Act, 1851, or any Act amending the same."

In the bye-laws made by the Vestry of St. George the Martyr, lodging-house is defined as "a house, or part of a house, let in lodgings or occupied by members of more than one family."

Macmorran, K.C. (*Corrie Grant* with him), for the appellant.—The whole building is a lodging-house within the definition of lodging-house in the bye-laws; for it is a house which is let in lodgings, and is occupied by members of more than one family. The term "house" applies to a building which is let out in suites or flats which have no means of communication with each other except by a common passage and staircase, and not to the suites and flats themselves. See *Attorney-General* v. *The Mutual Tontine Westminster Chambers Association*, 24 W. R. 996, 1 Ex. D. 469, where such a building was held to be a house for the purposes of the inhabited house duty: see also *Kimber* v. *Admans*, 48 W. R. 322, [1900] 1 Ch. 412, and *Grant* v. *Langston*, [1900] A. C. 383, 48 W. R. Dig. 75. Section 141 of the statute, where "master" is defined, recognizes that a house may be let out in separate tenements. The object of section 94 is to provide for sanitary supervision. It is more consonant with that object to hold that "house" applies to the whole building than to hold that it applies to the separate tenement. If the building is a "house" within the Act and the bye-laws, it is clear that it was let in lodgings: *Roots* v. *Beaumont*, 51 J. P. 197.

C. A. Russell, K.C. (*C. J. B. Hurst* with him), for the respondent. If the bye-laws go beyond the section they are *ultra vires*. It is clear that what is meant by the section is that you are to look at the particular tenement and see if that tenement is occupied by members of more than one family, and it cannot be taken to apply to a building containing a number of tenements each of which is occupied by a separate family.

Lord ALVERSTONE, L.C.J.—None of the cases which have been cited and which give to the word "house" a particular meaning as it is used in a particular statute help us in this case. In order to construe the term in the statute before us it is necessary to look at the object which that statute had in view. The object was to control the number of people who occupy a tenement which could fairly be described as a separate house. That that is intended is shown by the use of the words "part of a house." I think you must find a house which is either itself let in lodgings or a part of a house which is let in lodgings. The building in question is, in my opinion, a collection of houses, for there is no front door, properly speaking, to the building, but there are common passages and staircases on to which open the front doors of the various tenements. If any one of those houses or tenements were let in lodgings then, no doubt, that particular tenement would be within the Act, but it is going too far to say that because there are in a building separate tenements separately occupied such building is a house let in lodgings or occupied by members of more than one family within the meaning of section 94 of the Public Health (London) Act, 1891.

LAWRANCE and PHILLIMORE, JJ., concurred.

Appeal dismissed.

Solicitor for the appellant, *J. A. Johnson*.

Solicitors for the respondent, *Field, Roscoe, & Co.*, for *Medwin & Co.*, Horsham.

K. B. Div.
(Kennedy and Phillimore, JJ.) May 9.

HAMILTON-RUSSELL v. COMMISSIONERS OF INLAND REVENUE. (*a.*)

Inland Revenue—Stamp duty—Settlement—Instrument of appointment—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 6, *sub-sections* 1, 2; *First Schedule*, "*Settlement*"—*Exemption.*

By a deed of settlement dated the 26th of June, 1895, *the settlor granted to trustees certain funds, and by a deed dated the 12th of December*, 1896, *certain other funds, upon trust for his five children, but so nevertheless that the share of each child should be held by the trustees upon trust to pay the income thereof to such child during his or her life, and after his or her death upon trust for such one or more of the others as such child should by will appoint, and in default of appointment for the other children in equal shares. It was further provided in the deed that the trustees should have power, on or subsequent to the marriage of any of the children, to revoke the trusts of the settlement and to declare, as they thought fit, new trusts by way of resettlement for the benefit of such child, or any wife or husband of such child, or such child's children or remoter issue, or the next-of-kin of such child, but not in favour of any other person or persons, and to transfer the funds to the trustees of such resettlement. These deeds were stamped with* ad valorem *duty as settlements.*

By two deeds both dated the 10th of April, 1899, *the trustees of the settlements of the 26th of June*, 1895, *and the 12th of December*, 1896, *revoked the trusts of those settlements so far as they concerned the share of C. E. H. R., one of the children, who was then about to be married, and declared that such share should, from and after the solemnization of the intended marriage, be held upon trust to pay the income thereof to C. E. H. R. during his life, and after his decease to transfer such share to the trustees of the marriage settlement of C. E. H. R., to be held by them upon the trusts declared in the marriage settlement. Each of these deeds were stamped with a duty of ten shillings.*

By the marriage settlement, a deed of even date with the two last-mentioned deeds, it was provided that after the death of C. E. H. R. the trustees of the settlement should stand possessed of his share of the funds comprised in the settlements of the 26th of June, 1895, *and the 12th of December*, 1896, *upon the trusts of the settlement, which were, as regards the husband's fund, to pay the income to the intended wife during her life, and after her death upon trust for the children or remoter issue of the intended marriage as the intending husband and wife jointly, or the survivor of them, should appoint, and in default of appointment in trust for the children in equal shares.*

Held, that the marriage settlement was not, as regards the share of C. E. H. R. in the funds comprised in the settlements of the 26th of June, 1895, *and the 12th of December*, 1896, *exempt from the payment of settlement duty, either under the exemption under the heading "Settlement" in the schedule to the Stamp Act*, 1891, *or under section* 106, *sub-sections* 1 *or* 2, *of the Act.*

Case stated by Commissioners of Inland Revenue.

On the 3rd of May, 1899, three unstamped deeds were presented to the Commissioners of Inland Revenue for the opinion of the Commissioners as to the stamp duty with which each of them was chargeable.

The instruments were described as deeds of revocation and a marriage settlement. Each of the deeds was dated the 10th of April, 1899, and it is with

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

regard to the stamp duty assessed on the marriage settlement that this case was stated.

By a settlement made on the 28th of June, 1895, between the Right Honourable Gustavus Russell, Viscount Boyne, of the one part, and the Right Honourable Katharine Frances Viscountess Boyne (his wife) and certain trustees of the other part, after reciting that Lord Boyne was desirous of making an immediate provision for his five children, and for that purpose had transferred into the joint names of the trustees the investments mentioned in the schedule to the deed to be held by them upon certain trusts, it was agreed and declared that the trustees should stand possessed of the investments mentioned in the schedule as from the 1st of July, 1895, upon trust for the said five children in equal shares, but so, nevertheless, that the one-fifth share of each such child (thereinafter referred to as such child's settled share) should be held by the trustees upon the trusts and subject to certain powers and provisions therein declared.

The trusts of this settlement of 1895 provided that the trustees should pay the income of each such child's settled share to such child during his or her life, and that after his or her death such child's settled share should be held upon trust for all or such one or more the others of the said five children in such manner and if more than one in such shares as such child should by will or codicil appoint, and that in default of appointment such child's settled share should accrue to and be held in trust for the others of the said five children then living in equal shares.

The settlement contained a proviso as follows: "Provided always that it shall be lawful for the trustees or trustee in their, his, or her absolute discretion at the request of any of the said five children either in contemplation of marriage or subsequently to marriage to revoke the trusts hereinbefore declared concerning such child's settled share and by way of resettlement to declare such new or other trusts of and concerning the same as the trustees or trustee may think fit for the benefit of all or any to the exclusion of the others or other of the following persons—namely, such child or any wife or husband of such child, or such child's children or remoter issue or the next-of-kin of such child, but not in favour of any other person or persons, and on any such resettlement such child's settled share may be transferred to trustees appointed by any such resettlement.

By another settlement made on the 12th day of December, 1896, between the parties to the settlement of 1895, similar trusts were declared and provision made with regard to a further sum of money, the only difference being that the payment of the income was delayed in the case of certain of the children. There were the same provisions in the case of the death of any child and the same power of revocation.

The settlements of 1895 and 1896 were stamped respectively with *ad valorem* duty at the rate of five shillings for every £100 of the amount or value of the property settled, and with the adjudication stamp, and no question arose as to the duty paid thereon.

By a deed of revocation dated the 10th of April, 1899, and made between the trustees of the two settlements of 1895 and 1896 of the first part and the Honourable Claud Eustace Hamilton-Russell, one of the five children mentioned in the settlements of the 28th of June, 1895, and the 12th of December, 1896, of the second part, and trustees of the third part, after reciting that a marriage was intended to be solemnised between the said Claud Eustace Hamilton-Russell and Maria Lindsay Wood, and that it had been agreed that the one-fifth share of the said Claud Eustace Hamilton-Russell of and in the trust funds in the settlement of 1895 comprised and thereby settled should be to the extent and in the manner thereinafter expressed resettled under the power in that behalf given to the trustees by that settlement, it was witnessed that the trustees thereby revoked the trusts by the settlement of 1895 declared concerning the said one-fifth share of the said Claud Eustace Hamilton-Russell, and by way of resettlement did thereby declare that the said one-fifth share of the trust funds in the settlement of 1895 comprised and thereby settled should from and after the solemnization of the said intended marriage be held upon trust to pay the income thereof to the said Claud Eustace Hamilton-Russell during his life, and after his decease to pay or transfer at such time and in such manner as was thereinafter agreed and declared the capital of the said one-fifth share of the investment for the time being representing the same to the trustees of a deed of even date being the settlement to be made in contemplation of the said intended marriage to be held by such trustees upon the trusts and with and subject to the powers and provisions declared and contained concerning the same in the same marriage settlement.

By another deed of revocation, also dated the 10th of April, 1899, and made between the same persons as were parties to the deed of revocation already referred to, the trustees revoked the trusts of the settlement of 1896 concerning the one-fifth share of the said Claud Eustace Hamilton-Russell, and made provisions in similar terms to those contained in the last-mentioned deed of revocation.

Each of the two deeds of revocation was stamped with the duty of ten shillings according to the assessment of the commissioners and with the adjudication stamp, and no question arose as to the duty paid thereon.

By another deed, also dated the 10th of April 1899 (the marriage settlement in question), made between the Honourable Claud Eustace Hamilton-Russell of the first part, Maria Lindsay Wood of the second part, Sir Lindsay Wood of the third part, and the marriage settlement trustees of the fourth part, after reciting (1) the intended marriage between the said Claud Eustace Hamilton-Russell and the said Maria Lindsay Wood; (2) the two settlements of 1895 and 1896 which they related respectively to the funds specified in the first and second schedules to the marriage settlement and the two deeds of revocation above-mentioned; (3) the transfer to the marriage settlement trustees of the stocks specified in the third schedule thereto; and the agreement for making the settlement thereinafter contained, it was witnessed and declared that the marriage settlement trustees should stand possessed of the stocks specified in the third schedule thereto (the wife's trust fund) upon the trusts therein declared, and that after the death of the intended husband the trustees should stand possessed of the one-fifth share of the funds comprised in and settled by the settlements of 1895 and 1896 (the husband's trust fund) upon trusts also thereinafter declared.

The trusts under the marriage settlement of the husband's trust fund were to pay the annual income thereof to the intended wife during her life and during every coverture for her separate use and without power of anticipation, and after her death in trust for all or such one or more exclusively of the other or other of the children or remoter issue of the intended marriage at such time and in such shares and generally in such manner as the intended husband and the intended wife should jointly appoint, and in default of and subject to any such appointment then the survivor should appoint, and in default of and subject to any such appointment in trust for the child, one, or all the children equally, if more than one

the intended marriage who, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry under it.

The trusts under the marriage settlement of the wife's fund were to pay the annual income thereof to the intended wife during her life for her separate use and during any coverture without power of anticipation and after her death if the intended husband should survive her to pay to him during the remainder of his life if surviving the annual income of one-half of the same trust fund. After the death of the intended wife and subject to the life interest given to the intended husband in one-half of the wife's trust fund the trustees or trustee were to stand possessed of the wife's trust fund in trust for all or such one or more exclusively of the children or remoter issue of the intended marriage at such time and in such shares generally as the intended husband and intended wife should jointly appoint. The provisions in case of a default of appointment were similar to those provided with regard to the husband's fund.

The marriage settlement also contained a declaration that if there should be no child of the intended marriage who, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry, then subject to the trusts and powers therein declared and contained or by law vested in the trustees the trustees should stand possessed of the husband's trust fund upon such trusts as the intended husband should by will appoint, and of the wife's trust fund in trust for Sir Lindsay Wood.

The commissioners expressed the opinion that *ad valorem* duty was payable upon the marriage settlement under the head "Settlement" in the first schedule to the Stamp Act, 1871, upon the amount or value of all the property thereby settled, including the husband's fund, and assessed the *ad valorem* duty accordingly.

The appellant acquiesced in the assessment of *ad valorem* duty in respect of the wife's trust fund, but did not admit that the duty was payable upon the husband's trust fund, and relied in respect of that fund upon the terms of the exemption under the head "Settlement" which is in favour of an "Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, where duty has been duly paid in respect of the same property upon the settlement creating the power of the grant of representation of any will or testamentary instrument creating the power."

Ingpen, K.C. (*Dunham* with him), for the appellant.—*Ad valorem* duty having been paid on the original settlement, no duty is payable on the marriage settlement which, in regard to the husband's funds, is simply a deed annexed to the settlement, and is exempt under section 106, sub-sections 1 and 2, of the Stamp Act, 1871.

Sir R. B. Finlay, A.G. (*S. A. T. Rowlatt* with him), for the commissioners.—The instrument is a settlement and is liable to stamp duty as such.

KENNEDY, J.—It is said, as I understand the argument presented on behalf of the appellant, that this marriage settlement ought to be treated in reference to the husband's trust fund as coming under the exemption, because what is done in that deed is merely a setting out by reference that which in point of law was effectually done as a valid appointment by the deed of even date to which the trustees of the fund so appointed were parties, and that the marriage settlement ought to be treated simply as what we may call an annexe in respect of the husband's trust funds to the deed of even date. It is said, in fact, that nothing is really done by the marriage settlement—that it is a reference, the effectual appointment being made by the deed of even date, called the deed of revocation and new appointment, which there is no claim to tax. I cannot agree with that contention. The document is described on the face of it as a marriage settlement, and a marriage settlement it is, and it does more in regard to these very funds than merely serve as what one may call the descriptive portion to be attached to an earlier deed. It is a marriage settlement by which the various parties to that deed, including the husband and wife and the trustees of the marriage settlement, do in fact validly agree to the disposition. If this had been merely a deed between the same parties as the deeds of revocation and new appointment of the same date, and not supplementary in the sense of effectually supplementing, but merely setting out, as a book might set out, the powers and provisions declared in the earlier deeds, then I think there would have been a good deal to be said for the appellant's contention. But it is not so. It is an effectual document as a settlement. It is a necessary supplement for the purpose not merely of setting out these additional or descriptive provisions as to how the power of appointment is to be exercised, but it is also an agreement between the parties by way of settlement affirming and giving a real legal effect to that which could no doubt be done by the previous deed. I hold that this is not within the exemption a mere instrument appointing the "property in favour of persons specially named or described as the objects of a power of appointment where the duty has been duly paid in respect of the same property upon the settlement creating the power or the grant of representation of any will or testamentary instrument creating the power," but that it is a settlement not within that exemption, and therefore one upon which in respect of the husband's property the stamp must be the *ad valorem* stamp required by the Act.

PHILLIMORE, J.—I agree. The question here relates to the liability to *ad valorem* duty of an instrument under seal, which on the face of it purports to be a settlement, and therefore *primâ facie* would be liable to settlement duty. Three grounds have been given why it should be exempt. The first was that taken before the commissioners, that it was exempt as being within the exemption clause in the schedule to the Stamp Act as an instrument or appointment made under the powers given by the original settlement. I agree with the proposition that an instrument of appointment is none the less within that exemption when it purports (using ordinary language) to resettle the property appointed. I agree also with the proposition that, primarily speaking, every instrument of appointment under a particular power varies the trusts of the settlement, and must therefore be regarded as a resettlement and is exempt by the express words of the Stamp Act, and none the less exempt because it does not simply appoint to one object of the power but limits the appointment to various objects and powers. That is a very good reason why the instrument which has been called a deed of revocation and new appointment has not been held liable and is not now sought to be made liable to settlement duty; but the instrument with which we have to deal is not that instrument but a later one.

Now I accept the words of my learned brother. This is not a mere annexe or schedule. It carries the matter further. It is a necessary complement to the

earlier deed, and as such necessary complement it acts by virtue of being a settlement, and therefore I think it is liable to duty.

It is worthy, I think, of notice that there are additional parties to this last instrument; but quite apart from that it is not a mere annexe but is a completion and further execution of the scheme and as such an execution by way of settlement and is therefore liable to duty.

The third point is worthy of consideration. It is this; that inasmuch as the two deeds of revocation and new appointment were sufficiently stamped because they came within the exemption, the other complementary document did not require a stamp. The answer, I think, is this. The exemption goes no further than it says. The deeds of revocation and new appointment are only sufficiently stamped because they are exempt from the settlement stamp. They are not sufficiently stamped as settlements. Then when we come to look at the last document, if it is liable to settlement duty, it must pay the duty none the less because the others have escaped taxation. I agree that our judgment must be for the Crown.

Judgment for the Crown.

Solicitors for the appellants, *Tarry, Sherlock, & King.*

Solicitor for the commissioners, *Solicitor of Inland Revenue.*

K. B. Div. (Channell, J.) } May 7.

ST. JAMES'S HALL CO. *v.* THE LONDON COUNTY COUNCIL. (*a.*)

Metropolis—Building—Prevention of danger from fire—Music-hall licensed prior to 1878—*Powers of London County Council to require alterations—Second exercise of power—Metropolis Management and Building Act,* 1878 (41 & 42 *Vict. c.* 32), *s.* 11.

When the London County Council or their predecessors, the Metropolitan Board, have exercised the powers conferred on them by section 11 *of the Metropolis Management and Building Act,* 1878, *for the prevention of danger from fire in theatres, music-halls, and other public buildings which had been licensed for the first time prior to* 1878, *by requiring alterations to be made in a building, and such requirements have been duly complied with, they cannot again exercise the powers of the section by requiring further alterations, unless, in the meantime, the owner has so altered the building as in the opinion of the council to increase the danger from fire.*

Trial of action without a jury.

The action was brought for a declaration that a notice served upon the plaintiffs by the defendants under section 11 of the Metropolis Management and Building Act, 1878, was *ultra vires,* and for an injunction.

The facts and arguments appear sufficiently from the judgment.

Avory, K.C., and *Garland,* for the plaintiffs.

Daldy, for the defendants.

Cur. adv. vult.

CHANNELL, J.—This action, tried before me without a jury, was brought to obtain a decision upon the true interpretation of section 11 of the Metropolis Management and Building Act, 1878, which section gave to the Metropolitan Board (and now the London County Council, their successors) certain powers for the prevention of danger from fire in music-halls which had been licensed for the first time prior to 1878. The Metropolitan Board exercised those powers in 1885 in reference to the St. James's Hall, and the plaintiff company, the owners of that hall, contend that the powers of the section must be exercised once for all. The defendants have served another notice purporting to be under the powers of the section, and the plaintiffs bring this action for a declaration that the notice is *ultra vires* and for an injunction. The plaintiffs have obtained an interlocutory injunction restraining the defendants from acting upon the notice until the trial, and I have now to say whether the plaintiffs' view of the section is right. If it is, there is no dispute that the plaintiffs are entitled to the declaration and, if they require it, to an injunction. The facts are that in 1885 the Metropolitan Board, proposing to proceed under the section, prepared a draft notice of their requirements. This draft notice was the subject of negotiation between Mr. Walter Emden (who then, as now, was the architect of the plaintiffs) on the one hand and the architect of the board on the other. The result was that modifications of what was first proposed by the board were agreed to, and those modifications were embodied in the formal notice which was served and dated on the 10th of August, 1885. The works in that notice were done by the plaintiffs at a cost, it is said, of upwards of £7,000. There was no appeal as the works had been agreed, but the result seems to me to be the same in substance as if there had been an appeal against the original proposals of the board and the award had been that the works which, in fact, were in the notice of the 10th of August, 1885, should be done. At any rate it is not disputed that there was an exercise of the compulsory powers of the section. The original proposal of the board included the pulling down of an existing staircase and the re-erection of a better staircase at the same place. The modifications agreed on included the pulling down of that staircase, but it was agreed that it should not be re-erected, the necessary accommodation being provided elsewhere. One of the things which the county council now direct is the erection of a staircase at the same spot. I do not myself regard that fact as very important, but the change of view which has apparently taken place is an illustration of the mischief of holding that the powers of the section may be exercised from time to time whenever "it appears" to the fluctuating body that there is danger, for it certainly would be hard on the owner of the building if, as soon as he has complied with the requisition of the board, he is liable to be ordered to pull down and alter that very work on a change of views of the board, or its architect. Since the works were completed in 1885 the plaintiff company have from time to time, at the suggestion of the county council, voluntarily made some alterations in such matters as the seats in the hall, and otherwise, but they have done so without admitting the right of the defendants to require them to do those or other alterations, and it seems doubtful whether any of them were structural alterations. The London County Council now require, claiming the powers to do so by the 11th section, further works, the cost of which is estimated at upwards of £4,000, and they have obtained (though without prejudice to the question now raised) the leave of the Secretary of State to make the requirement. Under these circumstances it becomes necessary carefully to examine the words of the section. The material parts of the section are as follows:

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

"Whenever it appears to the board that . . . any house, room, or other place of public resort within the metropolis, containing a superficial area for the accommodation of the public of not less than 500 square feet, which was at the time of the passing of this Act authorized to be kept open, and which is kept open, for . . . music . . . under the authority of a licence granted by any court of quarter sessions, is so defective in its structure that special danger from fire may result to the public frequenting the same, then and in every such case the board may, with the consent . . . of her Majesty's principal Secretary of State . . . if in the opinion of the board such structural defects can be remedied at a moderate expenditure, by notice in writing require the owner of such house, room, or other place . . . to make such alterations therein or thereto as may be necessary to remedy such defects, within a reasonable time to be specified in such notice. . . ." There is also a provision for an appeal to an arbitrator appointed by the First Commissioner of Works, who may either confirm the notice with or without modifications, or refuse to confirm it, and whose decision shall be final. There is nothing in the words used which is consistent with the contention of either party. The word "whenever" seems to be as capable of meaning "at whatever time," which is the plaintiffs' contention, as it is of meaning "so often as," which is the defendants' contention. And it is necessary to look at the rest of the section and the context to see which of the two meanings it does bear.

The first observation on the section is that it relates entirely to defects in structure and not to defects arising from want of repair, or from the mode of control or management of the premises, such as keeping doors locked or the like. Further, it only gave power to the board to require alterations which could be effected at a moderate expenditure. The result of that is that, if in 1878 there was a licensed music-hall which was so defective in its structure that special danger from fire arose, and the defects were such that they could not be remedied except at an excessive expenditure, no alterations could be required to be made in that music-hall, and subject to any power the licensing authority might have to refuse to renew the licence the hall must continue with its defects. That being so, it seems clear that the Metropolitan Board could not, in reference to such a hall, divide its requirements and make successive requirements, each of which could be complied with at a moderate expenditure, although the total would be excessive. That goes to show that the powers of the section must be exercised once for all; otherwise, though the expenditure on each of the successive requirements might be moderate, the total might be excessive. Again, when the 12th and 13th sections are looked at, it certainly seems that, if a music-hall first licensed after 1878 complied with the regulations of the board in force at the date it was completed, and got a certificate to that effect, it could not be interfered with. It is unlikely that the existing halls would be put on a worse footing than new halls in this respect, but to this argument it is answered that the old halls can only be interfered with when it appears to the board that there is actual danger, and, further, that they are protected by the power of the Home Secretary to veto the requirement and by the right to require arbitration. These protections are, however, given in respect of the first exercise of the powers, and, therefore, they do not go far to show that there cannot be a second exercise. Further, the condition precedent is not that there should in fact actually be danger, but merely that there should "appear to the board" to be danger, and it is these words that give rise to the question whether the board can change their views. On the whole I have come to the conclusion that the plaintiffs are right in their contention. I think that the board had only power to order alterations if such alterations not only could be done at a moderate cost, but also would when done remedy the defects. It must, therefore, be assumed that, when the works done in pursuance of the former order were completed the defects were remedied, or, at all events, that in the opinon of that board they were remedied. That board could not in the next year have said that they themselves had made a mistake and ought to have ordered something more or something different, and if they could not, neither can the London County Council, who succeed to their rights. The word "whenever" is fully accounted for by its not being intended to compel the Metropolitan Board forthwith on the passing of the Act of 1878 to survey all existing music-halls. They were to exercise the power given whenever they chose, but when they did exercise it their judgment was in my opinion to be subject to the mode of appeal provided in the section, final not only as to the works ordered being required, but also as to the order being sufficient.

I may point out that this view of the section is in accordance with what has been decided in analogous cases in other Acts of Parliament—namely, that a power to a local authority to order structural works (as, for instance, sewers) at the expense of a private owner must be exercised once for all: see *Bonella* v. *Twickenham Local Board*, 36 W. R. 50, 20 Q. B. D. 63; *Hornsey Local Board* v. *Davis*, [1893] 1 Q. B. 756, 41 W. R. Dig. 127. I am, however, not prepared to hold that if the owner of an old music-hall after complying with a requisition under the section were himself to make further structural alterations and the effect of those alterations were to cause, in the opinion of the London County Council, danger from fire they might not then act on the section. That question does not arise now. If the owner of a hall should ever do this, it would probably be held that the hall as so altered was not the old hall which had been licensed prior to 1878, but a new hall coming under section 12, and that it must comply with the existing regulations. If, however, that was not held, it would be in my opinion an open question whether section 11 could not be applied to the case on the ground that although the hall had not lost the protection given by section 11 yet the powers of the board had never been exercised in reference to the defects in question. That case differs entirely from the present. Here undoubtedly the Metropolitan Board did exercise in 1885 the powers of section 11, and, if there are any defects now, they either existed prior to the order of 1885 and ought to have been dealt with, or they were occasioned by the works done in pursuance of that order. In either case the powers under section 11 were, in my opinion, exhausted. I therefore think that the London County Council cannot now exercise the powers. There must be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Howlett & Wilkinson.*

Solicitor for the defendants, *Blaxland.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) May 2.

BARNETT AND ANOTHER v. MAYOR, &c., OF POPLAR. (a.)

Tramways—Contract by road authority to repair road—Liability for non-repair—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55.

By section 28 *of the Tramways Act,* 1870, *the promoters of tramway companies are put under a liability to keep in repair so much of the road on which their tramway is as lies between their rails, together with* 18 *inches on the outside thereof.*

By section 29 *they are entitled to enter into contracts with the road authority with respect to the paving and keeping in repair of the roadway of any road on which their trams run.*

By section 55: "*The promoters or lessees . . . shall be answerable for all accidents, damages, and injuries happening through their act or default, by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies, or bodies collectively and individually . . . from all damages and costs in respect of such accidents, damages, and injuries.*"

Held, that the road authority, when it had contracted with the tramway company to keep in repair that part of the road on which the tramway ran, could be sued for non-repair.

Appeal against a decision of his Honour Judge French, nonsuiting the plaintiffs in an action brought by them against the council of the metropolitan borough of Poplar to recover damages in respect of injury caused to a van coming in contact with one rail of a tramway belonging to the North Metropolitan Tramway Co., which rail stood up, as was alleged, above the level of the street owing to the failure on the part of the defendants or their predecessors to keep the street in proper repair.

The North Metropolitan Tramway Co. had entered into an agreement with the Poplar road authority (the defendants in the county court) under section 29 of the Tramways Act, 1870, for the repair of the roads over which their tramways in the borough of Poplar ran. The county court judge having held that as the defendants were a public authority no action for mere nonfeasance would lie, the plaintiffs appealed.

Abinger, for the appellants.—The defendants, the road authority for the borough, having contracted under section 29 of the Tramways Act, 1870, with the North Metropolitan Tramway Co. to keep in repair the road in question, the tramway company ceased to be answerable for its non-repair, and the road authority became liable to that obligation as fully as the tramway company had been liable previously. That point was actually decided in *Howlitt* v. *Nottingham Tramways Co.*, 32 W. R. 248, 12 Q. B. D. 16. That decision was subsequently approved by the Court of Appeal in *Alldred* v. *West Metropolitan Tramways Co.*, 39 W. R. 609, [1891] 2 Q. B. 398. The plaintiffs, therefore, have a right of action against the defendants, and there should be a new trial.

Chester Jones, for the respondents.—The cases relied on by the appellants merely decide that when a tramway company enters into a contract with the road authority for the repair of the road on which their trams run, their liability for non-repair is gone. They do not lay down the principle that under such a contract the road authority's common law liability is thereby increased, and that as a public body they are to be held liable for acts of nonfeasance. Nothing would alter their common law liability but an express statutory provision: *Municipality of Pictou* v. *Geldert*, 42 W. R. 114, [1893] A. C. 524, and there is no express provision to this effect in the Tramways Act, 1870.

Lord ALVERSTONE, L.C.J.—In this case, speaking for myself, I think the learned county court judge was premature in nonsuiting the plaintiffs. But for the decisions in *Howlitt* v. *Nottingham Tramways Co.* and *Alldred* v. *West Metropolitan Tramways Co.* much could have been said in favour of the view that the action should have been brought against the tramway company. But in *Howlitt* v. *Nottingham Tramways Co.* it was laid down that the liability was transferred from the tramway to the road authority where the road authority had contracted to repair the company's part of the road under section 29 of the Act of 1870. It was said by Mr. Chester Jones that the expressions of the judges on that point were merely *obiter dicta*, because the decision of that question was not necessary for the judgment. I agree. But none the less the question was very material to it, because it would be a very strong thing to say that a liability could be got rid of altogether. At any rate, Lord Coleridge has expressed the opinion that the road authority would under such a contract be liable. Then in *Alldred* v. *West Metropolitan Tramways Co.*, *Howlitt's case*, which I have just referred to, was reviewed by the Court of Appeal. Now, if the Court of Appeal had thought that an action would not lie against the road authority some *dictum* to that effect would surely have been expressed. In my judgment the road authority when by contract it agreed to repair took over from the tramway all liability for non-repair. The action must therefore be retried, and the case sent back for a new trial.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitors, *Frederick George*, Stratford; *C. G. Bradshaw.*

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 25.

WINTER v. BANCKS AND ANOTHER. (a.)

Trover—Conversion—Police constable—Article taken by police from a person accused of theft.

A gig, the property of the plaintiff, disappeared and was found in the possession of B. B. was prosecuted for stealing the gig and was acquitted. The gig had been removed by the police to the police-station. Both the plaintiff and B. demanded possession of the gig from the defendant, who was the sergeant in charge at the police-station. The defendant, acting under instructions from his superior officer, an inspector, refused the demand of the plaintiff and delivered the gig to B.

Held, that the defendant was liable in trover.

Appeal from the Warrington County Court.

The facts and arguments in the case will be found sufficiently stated in the judgment.

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

E. Sutton, for the defendant.

Trevor Lloyd, for the plaintiff.

Cur. adv. vult.

Lord ALVERSTONE, L.C.J.—This is an appeal on the part of the defendant from the judgment of his Honour Judge Gwynne James, who gave judgment for the plaintiff with £4 damages. The action was brought in trover by Mr. Winter to recover the value of a gig alleged to have been converted by the defendants—Bancks and Lings. Judgment was given for the defendant Bancks, but judgment for £4 damages was given against the defendant Lings. It was contended on behalf of the plaintiff that the judge had rightly found that the defendant Lings had been guilty of conversion in having refused to deliver the gig to the plaintiff and in having subsequently delivered it to a man named Broderick. It was contended on behalf of the defendant that he had not been guilty of any act which rendered him liable in the action. The material facts appear to be as follows: On the 17th of May the plaintiff bought a gig at Newton Fair. Subsequently to the purchase the gig disappeared and was afterwards found in the possession of Broderick. Broderick was prosecuted for the larceny at Liverpool Quarter Sessions, and on the 17th of July was acquitted. On the same day Broderick's solicitor wrote to the police officer in charge at Newton-le-Willow police-station, and to all others whom it may concern, a letter demanding possession and return of the gig. On the 18th of July, the next day, the plaintiff's solicitor wrote to the sergeant in charge at Newton-le-Willow police-station claiming that the gig was still the plaintiff's property, and asking that it should not be given up to any other person than the plaintiff. On the 20th Mr. Grundy, the acting superintendent, wrote to the plaintiff's solicitor stating that it had been decided to return the gig to Broderick at twelve on Saturday, the 21st. On the 31st of July the plaintiff's solicitor wrote to Sergeant Bennett, the sergeant in charge at the police-station, giving him notice of his intention to commence an action on behalf of the plaintiff for the recovery of the gig. The only other material facts proved before the learned judge were that on the 18th of July the plaintiff asked the defendant Bancks for the gig and he refused to give it up, and that upon the 21st the plaintiff again asked Bancks and the defendant Sergeant Lings, who was Bancks's superior officer, to deliver to him the gig, and that one of them replied, "No, I am going to give it to Broderick," and that on the same day Bancks by Ling's instructions handed the gig to Broderick. Lings had not been made a defendant when the action was commenced, but he was added as a defendant by consent at the trial as he was Bancks's superior officer. Lings further stated at the trial that in handing the gig over to Broderick he acted under instructions received by telephone from his superior officer, Inspector Grundy. Under these circumstances the learned judge found that after demand by Winter and refusal to comply with it by defendant Lings he (the defendant Lings) handed over the gig to Broderick. No application was made under the first section of the Police Property Act, 1897, either by the plaintiff or the police for an order of a court of summary jurisdiction as to the custody of the gig. The case is undoubtedly near the line. It was contended on behalf of the defendant that there was no conversion by the defendant Lings, that he acted in doing what he did under the instructions of his superior officer, Inspector Grundy, that he did not intend to deprive the plaintiff of the property of the gig, but was simply handing it back to the person from whom it had been taken prior to the hearing of the charge at the quarter sessions. The learned judge found that the gig was in fact the property of the plaintiff, and that as the defendant Lings had taken upon himself to hand the property over, after demand and refusal, he was liable in trover. After careful consideration we have come to the conclusion that the judgment was right. We think it must be taken upon the findings to which we have referred that the defendant Lings was responsible for the custody of the gig and did, in fact, hand it over at a time when it was the plaintiff's property and after the plaintiff had demanded possession. We think the case falls within the principle laid down in the cases of *Fowler* v. *Hollins*, 20 W. R. 868, L. R. 7 Q. B. 616, L. R. 7 H. L. 757, and *Stephens* v. *Elwall*, 4 M. & S. 259, and that the defendant, though acting as a subordinate, is responsible. He was party to a dealing with the plaintiff's property and acted at his peril. We think, therefore, that the judgment should be affirmed and the appeal dismissed with costs.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the defendant,

Solicitor for plaintiff, *William Calley*, for *A. Browne*, Warrington.

C. C. R.
(Lord Alverstone, L.C.J., and Mathew, Lawrance, Bruce, and Ridley, JJ.)

March 30.

REX v. HAMILTON. (*a.*)

Criminal law — Practice — Sentence of hard labour — Common law forgery — "Any cheat or fraud punishable at common law" — Criminal Procedure Act, 1851 (14 & 15 *Vict. c.* 100), *s.* 29.

H. was tried and convicted for the common law misdemeanour of forging and uttering writing with intent to defraud. An order had been made in a county court that he should render an account of the money he had collected and received for one Cobb, which he had fraudulently misappropriated. He delivered papers in which the donors had entered their names and the amounts they had handed him, and he so altered these entries as to make it appear that smaller amounts had been given.

It was not alleged that Cobb had been defrauded or prejudiced, except so far as it appeared that he had been deprived by the prisoner's conduct of the evidence to support his claim. The question reserved was whether there was power to pass a sentence of imprisonment with hard labour.

The Court (Lord Alverstone, L.C.J., *and* Mathew, Lawrance, Bruce, *and* Ridley, JJ.) *held that, as the indictment charged only a common law forgery, without alleging that anyone was thereby defrauded, the case did not come within the Criminal Procedure Act*, 1851, *s.* 29, *by which persons convicted of "any cheat or fraud punishable at common law" may be sentenced to hard labour.*

Case stated by the Common Serjeant of the City of London.

The prisoner, F. T. Hamilton, was tried before him

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

at the Central Criminal Court on the 5th of February on an indictment charging him in four counts with the common law misdemeanour of forging and uttering certain writings with intent to defraud. The prisoner had, in fact, fraudulently misappropriated the greater part of the money he had collected and received for one Cobb.

An order had been previously made in the county court that he should render an account of the money he had so received. He thereupon delivered to the plaintiff's solicitor as true and genuine lists of the amounts received, papers on which the donors had entered their names and the amounts which they had handed him. He had, however, altered the entries made by the donors so as to make it appear that they had given much smaller sums, and so as, in some cases, to conceal their identity.

It was not alleged in the indictment that Cobb had, in fact, been defrauded or prejudiced except so far as it appeared in the third and fourth counts that Cobb was deprived by the prisoner's conduct of the evidence to support his claim.

The prisoner was an old offender, and in the opinion of the Common Serjeant ought to have been sentenced to imprisonment with hard labour under the Criminal Procedure Act, 1851, which provides by section 29 that "whenever any prisoner shall be convicted of any of the offences following as an indictable misdemeanour—that is to say, any cheat or fraud punishable at common law . . . it shall be lawful for the court to sentence the prisoner to be imprisoned for any term now warranted by law, and also to be kept at hard labour during the whole or any part of such term of imprisonment."

The jury having found the prisoner guilty, the Common Serjeant postponed sentence, and committed the prisoner to prison pending the determination of the question whether, as only the intent to defraud was alleged in the indictment, and there was no allegation of actual defrauding, the prisoner could be sentenced under this section to hard labour.

In the first count of the indictment the prisoner was indicted for, on the 8th of January, 1901, unlawfully, falsely, and deceitfully making, forging, and counterfeiting two writings, purporting to be true lists of moneys collected by him for the benefit of John Milbourne Cobb, with intent to defraud.

The second count charged him with unlawfully, falsely, and deceitfully uttering and publishing, as true, two false, forged, and counterfeited writings, purporting to be true lists of moneys collected by him for the benefit of J. M. Cobb with intent to defraud, he at the time he so uttered and published the same well knowing them to be false, forged, and counterfeited.

The third count alleged that the prisoner had collected and received money from subscribers in aid of Cobb, and that afterwards an action was brought on behalf of Cobb against the prisoner in the Brompton County Court for the delivery of an account of the said moneys, in which action Hamilton, by order, delivered to Cobb's solicitor two writings purporting to be subscription lists of moneys received by him; that Hamilton, intending to injure, prejudice, and defraud Cobb, and to deprive him of his just rights in the action, unlawfully, falsely, and deceitfully did forge and utter the said list in certain material particulars with intent to defraud; and the fourth count charged the prisoner with uttering and publishing as true the writings mentioned in the third count with intent to defraud.

No counsel were instructed to appear.

Herman J. Cohen, who had prosecuted at the trial, at the request of Lord Alverstone, stated to the court the case for the prosecution. The prisoner, he submitted, had been brought within section 29 of the Criminal Procedure Act of 1851, although he admitted that forgery at common law, apart from its being a "cheat or a fraud," was not punishable with hard labour. But the publication of forged instruments for the purpose of deceit was in itself a substantive offence indictable at common law.

He cited *Rex.* v. *Minister and Churchwardens of St. Botolph, Bishopsgate*, 1 W. Bl. R. 443; Hawkins' definition of forgery (Hawkins' Pleas of the Crown, ch. 1, p. 51), and Russell on Crimes (6th ed.), vol. 2, p. 467, where it is said that "the cheat or fraud must be effected by some deceitful and illegal practice or token, which affects or may affect the public, in order to be indictable at common law. And it seems also to result that a cheat or fraud in order to be punishable by the common law must be such against which common prudence could not have guarded." See also *Rex.* v. *Govers*, cited in 2 East's Pleas of the Crown, p. 824.

Lord ALVERSTONE, L.C.J.—In deciding this case we must be careful not to forget that it is one of concealing a fraud by forgery, and it is difficult to say that that is a "cheat or a fraud" in itself. We think the prisoner cannot be sentenced to hard labour on the present indictment. He might very well have been prosecuted for cheating, but he was indicted for forgery. At the time the statute was passed the offence of forgery was well known. And as he was indicted for forgery with intent to defraud the question arises whether the offence of which he has been convicted comes within section 29 of 14 & 15 Vict. c. 100. In our opinion it does not, and therefore the Common Serjeant would have been wrong if he had sentenced the prisoner to imprisonment with hard labour upon a conviction on this indictment.

MATHEW, LAWRANCE, BRUCE, and RIDLEY, JJ., concurred.

Case remitted.

Court of Appeal.

From P. D. & A. Div.
(Lord Alverstone, L.C.J., A. L. Smith, M.R., and Romer, L.J.) May 23.

"THE HEATHER BELL." (a.)

Ship—Mortgage—Chartering ship on half profits—Impairing security—Validity of mortgage—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 34.

The mortgagor of a steamship, which was used for tourist and pleasure traffic, chartered her for six weeks in the summer to run from Liverpool to places on the coast of North Wales, the mortgagor to receive one-half of the net profits.

Held, that, though no freight was reserved by the charter-party, the mortgage was not one which impaired the sufficiency of the security, and was therefore valid against the mortgagee.

Judgment of Jeune, P. (ante, *p.* 352), *affirmed.*

Appeal from the judgment of Jeune, P. (reported *ante*, p. 352).

The action was by William Horton to recover damages for the wrongful taking possession by the defendant, William Ward, of the steamship *Heather Bell* at a time when she was under charter to the plaintiff.

The defendant was the registered mortgagee of the ship, and the charter was made by the mortgagors who were in possession.

The facts and arguments are stated in the report below.

Jeune, P., gave judgment for the plaintiff.

The defendant appealed.

W. Robson, K.C., and *Ernest M. Pollock*, for the defendant.

Carver, K.C., and *Leslie Scott*, for the plaintiff.

Lord ALVERSTONE, L.C.J.—It is contended before us that the agreement entered into on the 29th of August between the mortgagors and the plaintiff was invalid as against the mortgagee. We have to consider what are the rights of a mortgagor who is in possession of a ship, and the rights of the mortgagee depending upon the mortgage. I may say that I think no fraud was imputed or could be imputed on the evidence against Mr. Horton, who, as we are told, is a solicitor and a gentleman interested in developing his estate at Rhos by running steamers to bring traffic and tourists from Liverpool during the summer months. In the first place the position of mortgagee and mortgagor is defined by statute. Section 34 of the Merchant Shipping Act, 1894, which is in all respects the same as the section referred to in *Collins* v. *Lamport*, 13 W. R. 283, 34 L. J. Ch. 196, provides that "except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of his mortgage be deemed the owner of the ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner thereof." Now it is obvious that if the owner remains in possession he may enter into contracts in dealing with the ship. When that question came before Lord Westbury in *Collins* v. *Lamport*, the only test which he laid down in his judgment is whether the dealings will materially impair the security of the mortgagee. If not, then they are to stand. When that test was discussed in the House of Lords in *Keith* v. *Burrows*, 25 W. R. 831, 2 App. Cas. 636, Lord Cairns used language in which I do not think he meant to go further, but which puts it in a somewhat different way. He says: "The mortgagee of a ship does not, ordinarily speaking, or by a mortgage such as existed in the present case, obtain any transfer by way of contract or assignment of the freight, nor does the mortgagor of a ship undertake to employ the ship in any particular way, or, indeed, to employ the ship so as to earn freight at all. The mortgagor of a ship may allow the ship to lie tranquil in dock, or he may employ it in any part of the world, not in earning freight, but for the purpose of bringing home goods of his own or for his own benefit." And later on, having referred to the incidents of contract, he says: "All those acts would be the ordinary incidents of the ownership of the mortgagor who remains the *dominus* of the ship with regard to everything connected with its employment until the moment arrives when the mortgagee takes possession." The real question therefore is, was this contract of the 29th of August one which would impair the sufficiency of the security, or, to adopt the other phrase, impair the security? Having heard all the evidence, I am not prepared to say that the agreement to run her on half profits must impair or does impair the security. It does take the boat for a period of six weeks out of the power to earn freight, unless that freight is produced by the profits, but I cannot say that under the circumstances there might not be an honest expectation that there would be profits. Therefore to undertake to run the boat at half profits seems to me not to be terms which either the mortgagor or the charterer might consider would do any wrong to the rights of the mortgagee. Several other clauses of the charter-party have been referred to, but I need not go through them. If under clause 4 the charterer or the mortgagor were attempting to sell part of the equipment of the ship, as at present advised I do not think they have any right to do it, but Mr. Robson has asked us to say that because those words are used in the agreement it must impair the security. I cannot say that the existence of that clause, though it might impair the rights of the parties if a sale of the equipment of the ship had been attempted, makes the charter-party such that it is not binding upon the mortgagee. Then again, by clause 7, certain expenses are to be paid out of the receipts. It may be a perfectly proper arrangement under the charter-party, although if under that Mr. Horton seeks to set off something else, when taking those accounts the question would have to arise whether the security was impaired. Then the only other point is that the ship is not insured. I quite agree that the mortgagee has a right to prevent the vessel being run unless she is properly protected against perils of the sea, but it cannot be contended that if a charter-party is otherwise binding on the mortgagee, the fact that he could have restrained her from running until properly insured would justify him in setting aside the charter-party. Therefore, having regard to the judgments of Lord Westbury and Lord Cairns in the case in the House of Lords, I cannot find that this agreement was one to impair the security of Mr. Ward, and therefore, being entered into by the mortgagor under his powers as owner, as contemplated in the section of the Merchant Shipping Act, it is binding on the mortgagee. He is entitled to take the benefit of it, but he is not entitled to treat it as of no effect.

A. L. SMITH, M.R., and ROMER, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiff, *Wynne, Holme, & Wynne*, for *Whiteley & Co.*, Liverpool.

Solicitors for the defendant, *H. Forshaw & Hawkins*, Liverpool.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

From P. D. & A. Div. (Lord Alverstone, L.C.J., A. L. Smith, M.R., and Romer, L.J.) (And P. D. & A. Div.) — May 22; March 23.

THE CARGO EX PORT VICTOR. (a.)

Ship—Salvage—Charterers having an interest in goods saved—Liability to contribute—Action in personam.

The defendants chartered a ship, in which they agreed to carry, amongst other cargo, certain Government stores from London to Jamaica upon the terms that they were to be responsible for the safe delivery of the cargo, subject to certain exceptions. During the voyage the ship, through her own default, came into collision with another vessel, and salvage services were rendered to her by the plaintiffs. A salvage award was made against the ship, cargo, and freight. the award including a sum in respect of the Government stores. The Government having refused to pay salvage, the plaintiffs brought an action in personam *against the defendants to recover the amount payable in respect of the Government stores.*

Held, affirming the judgment of Jeune, P., that, as the defendants had an interest in the Government stores saved, they were liable to pay salvage remuneration, and an action in personam *lay.*

The Five Steel Barges, 15 *P. D.* 142, 38 *W. R. Dig.* 192, *approved.*

This was an action *in personam* by the owners, masters, and crew of the steamship *Amelie* and the steam tugs *Columbia* and *Shamrock* against the Jamaica Fruit Importing and Trading Co. of London (Limited) to recover £279 15s. 8d. for salvage remuneration in respect of Government stores carried in the steamship *Port Victor*.

By a charter-party dated the 9th of October, 1896, the steamship *Port Victor* was chartered to the defendants for three years.

By clause 10 of the charter-party the charterers agreed to indemnify the owners from any consequences that might arise from the captain following the charterers' instructions and signing bills of lading; and by clause 22 negligence of the master and officers was mutually excepted.

In June, 1897, general cargo and Admiralty stores were shipped on *The Port Victor* at London for Jamaica.

The Admiralty stores were shipped under contracts and Admiralty regulations for the carriage of stores, which provided for bills of lading, and by the terms of which the owners (which meant the party or parties who engaged to convey the stores) were to be held responsible for the safe delivery of the stores shipped, the act of God, Queen's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation excepted. The stores were shipped under bills of lading, which stated them to be shipped subject to the stipulations contained in the charter-party and the regulations of her Majesty's transport service.

While on the voyage *The Port Victor* collided in the English Channel with another steamship, and sustained serious injuries.

Salvage services were rendered to *The Port Victor* by the plaintiffs in the present action, and she was taken back to Tilbury Docks.

The Port Victor was found alone to blame for the collision.

A salvage action *in rem* was brought by the present plaintiffs against the owners of *The Port Victor*, her cargo and freight, and Barnes, J., awarded the plaintiffs the sum of £2,200, and reserved the question of the liability for the proportion of the award due in respect of the Government stores for further consideration if necessary. This proportion was agreed at £297 15s. 8d.

The Admiralty refused to pay salvage on the ground that the collision was caused by the negligence of *The Port Victor*, and that therefore the defendants were responsible.

The plaintiffs thereupon brought the present action to recover the £297 15s. 8d.

Aspinall, K.C., and *Dawson Miller*, for the plaintiffs, now contended that the defendants were liable for the sum claimed on the authority of the *Five Steel Barges*, 15 P. D. 142, 38 W. R. Dig. 192.

Carver, K.C., and *Scrutton, K.C.*, for the defendants, contended that they were not the owners of the property salved, nor had they the right at any time to the possession of the property salved. The action *in personam* to recover salvage could, it was urged, only be brought against the persons who had actually obtained possession of the *res* salved.

They cited the cases of *The Hope*, 3 Ch. Rob. 215; *The Trelawney*, 3 Ch. Rob. 216*n*; *The Thetis*, 3 Hagg. 14; *The Rapid*, 3 Hagg. Adm. 419; *The Zephyrus*, 1 Wm. Rob. 329; *The Cargo ex Schiller*, 2 P. D. 145, 25 W. R. Dig. 270; *Falcke* v. *Scottish Imperial Insurance Co.*, 35 W. R. 794; *The Elton*, 39 W. R. 703, [1891] P. 265.

Cur. adv. vult.

March 23.—JEUNE, P., read the following judgment: This is a claim for salvage in respect of certain Government stores carried in the steamship *Port Victor*, and the claim is made against the Jamaica Fruit Importing and Trading Co. of London, the defendants, as being interested in the cargo. The proportionate part of the salvage award for which the defendants are liable, if at all, has been ascertained, and the only question remaining is that of liability. The interest of the defendants in the cargo is of the following nature. By a charter-party of the 9th of October, 1896, the defendants became the charterers of *The Port Victor* for thirty-six months. By the tenth clause the charterers indemnify the owners against any claim arising under any bill of lading, and by clause 22 negligence of the master and officers is made one of the subjects of mutual exception. The defendants entered into various arrangements in respect of goods to be conveyed by *The Port Victor*, and *inter alia* engaged for the conveyance of the Government stores above mentioned, the engagement being made subject to the regulations for the conveyance of Government stores. These regulations provide for bills of lading, and further provide that the owners (which term is expressly declared to signify the party or parties who engage to carry the stores under the agreement for freight or charter-party) will be held responsible for the safe delivery of the Government stores shipped. The goods in question were shipped under a bill or bills of lading which state them to be shipped subject to the regulations contained in the charter-party and in the regulations for her Majesty's transport service. The salvage service was rendered necessary by reason of a collision caused by the negligence of *The Port Victor*. The result, therefore, is that, as between the Government and the defendants, the defendants were responsible for the safe delivery of the goods, and they are therefore directly interested in the preservation of the goods, and the salvage service was a direct benefit to them.

It was argued before me on behalf of the plaintiffs that the above facts bring the case within that of the *Five Steel Barges*, decided by Lord Hannen. In that case the defendants were under a

(a.) Reported by GWYNNE HALL, Esq., and W. F. BARRY, Esq., Barristers-at-Law.

contract to build and deliver certain barges to the Government. The barges were being towed by the plaintiffs for the defendants from Chepstow to Portland, and were salved by the plaintiffs, who brought an action *in personam* against the defendants in respect of two of the barges which were given up to the Government. It was argued for the plaintiffs that the defendants had an interest in the barges being delivered safely to the Government, and that, therefore, a service was rendered to them personally. It was said, in answer, that the plaintiffs had lost any rights they possessed against the barges by giving them up to the Government, and that the defendants had no property in them. Lord Hannen held that it was perfectly clear on the authorities that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others, and the lien lost. "In this case," the learned judge proceeded, "the property does not appear to have been in the defendants, because it would, I think, under the contract, be in the Government. But I am of opinion that the right to sue *in personam* is not confined to the case of the defendants being the actual legal owners of the property salved. I think it exists in cases when the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which this court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think that, if Mr. Barnes's argument is well founded—viz., that those instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract—it would follow that, if the defendants had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me, therefore, that they had substantially an interest to the full amount of the barges, at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property." There is a decision in the Scotch Courts which appears to me to be in accordance with that in the *Five Steel Barges*. In *Duncan* v. *Dundee Shipping Co.*, 5 Ct. Sess. Cas., 4th ser., 742, it was held by the Court of Session that the shipowners in that case were acting as common carriers, and were, in the circumstances of the case, liable for the safe delivery of the goods, and that, therefore, they had no defence to a claim for salvage in respect of such goods. "The case," Lord Shand said, "comes to this—that, the carrier of these goods being absolutely bound to deliver them at the end of the voyage, the salvage has directly enured to his benefit, for it has enabled him to fulfil his contract and to earn the freight which he charged for these goods. On the ground that it is established in this case as matter of fact that the benefit of this salvage, in so far as regarded the cargo, enured directly to the carrier, I am of opinion that he is liable for the salvage which is here claimed." It was argued before me that the present case can be distinguished from that of the *Five Steel Barges* on the ground that in that case the defendants had a lien for the price of the barges, and so, for practical purposes, were the owners, although the property in law was no doubt in the Government. It was contended that the claim for salvage is limited to a claim against the owners or at least against the persons who, like carriers, are in actual possession of the goods at the time of the salvage, but that in the present case the defendants were not the owners of the goods, nor were ever in possession of them. A legal foundation for this view was sought in the argument that the Admiralty action *in personam* is based on the supposition that the goods were allowed by the salvors to be returned to their former possessor on the terms that he should be liable to pay the salvage reward.

I think that this contention is based on too narrow a view of the right of a salvor, and, in my opinion, the nature and origin of the Admiralty action for salvage do not impose any limits on that right narrower than those indicated by Lord Hannen and Lord Shand in the cases I have mentioned. It is quite true that in the case of *The Elton*, I said, relying on the authorities I there cite, that, "although salvage suits in the form of actions *in personam* are comparatively rare, the Court of Admiralty always had jurisdiction, founded apparently on the fiction of an action *in rem* having been brought, and the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a corpus of property salved." But in the following year, when I had occasion in the case of *The Dictator*, [1892] P. 304, 41 W. R. Dig. 4, to examine the subject of the origin and nature of the Admiralty jurisdiction more fully, I came to the conclusion, which the approval expressed by the Court of Appeal in the case of *The Gemma*, [1899] P. 285, 48 W. R. Dig. 4, leads me to hope was well founded, that the action *in personam* did not arise out of jurisdiction *in rem*, and that the distinction between actions *in personam* and actions *in rem* depended only on whether the person or property of the defendant was arrested in the first instance. To rest the jurisdiction of the Admiralty Court upon an implied request from the owner of the property in danger to the salvors, or on an implied contract between the salvors and owner with the relinquishment of the *res* for consideration, is, I think, to confuse two different systems of law and to resort to a misleading analogy. The true view is, I think, that the law of Admiralty imposes on the owner of property saved an obligation to pay the person who saves it simply because in the view of that system of law it is just he should; and this conception of justice naturally imposes a proportionate obligation on any person whose interest in the property is real, though falling short of that of ownership. I see no reason, therefore, why I should not follow the view of Lord Hannen, and of the Scotch Court of Session, that a man who has had a benefit arising out of the saving of the property is liable to a claim for salvage no less than the actual owner of it. It was urged before me that to take this view would expose mortgagees and insurers to salvage actions. I do not think it is necessary in this case to define exhaustively the classes of persons against whom, under various circumstances, claims for salvage might be made. There is no doubt the authority of eminent judges in the courts of common law for saying that contribution cannot be required by an owner from the

lenders upon bottomry or *respondentia*: *vide* Parke on Marine Insurance, vol. 2, p. 898, and the judgments of Lord Mansfield and Lord Kenyon were cited. On the other hand, Dr. Lushington, in *The Louisa*, 11 W.R. 614, Br. & L. 59, held that mortgagees came within the term "owners" in the sections of the Merchant Shipping Act of 1854 relating to salvage. It is, however, easy to see that the contingent interest of persons who make advantage by way of mortgage, or otherwise, on property, or of insurers, is of a different character from that of persons who have a direct interest in its safe delivery, and may negative, or, at least, impose different conditions on the right of a salvor against some of these persons. It may be, therefore, that it will become necessary hereafter to consider what is the exact definition of the interest in the property saved which gives rise to a claim for salvage. But in the present case I have no doubt that the defendant has such an interest, and my judgment must, therefore, be for the plaintiff.

The defendants appealed.

Carver, K.C. (*Scrutton, K.C.*, with him), for the defendants.

Aspinall, K.C., and *Dawson Miller*, for the plaintiffs, were not called upon.

LORD ALVERSTONE, L.C.J.—In the judgment I am about to deliver I do not desire in any way to infringe upon any of the main principles contended for by the appellants. Like the case of the *Five Steel Barges*, the facts of this case are of a very special character. The defendants chartered the ship for three years. They might have used that ship for their own purposes, putting their own cargo on board, or they might have used it for carrying other persons' goods, charging any rate of freight they could get. The particular amount of freight which they were going to pay to the shipowners was by no means the measure of the freight which they would earn. They could make any bargain they liked with the persons who put cargo on board; and it is clear that in this case the bargain between the owners of the goods and the defendants was different from the bargain between the defendants and the shipowners. Now, in that position of things the defendants came under contract with the Government to carry some Government stores. By the terms of the contract they were to be liable for the safe delivery of the stores. These Government stores which they were going to carry for freight were put on board of the hired ship, and that combined adventure then consisted of the ship, of the goods belonging to various owners, amongst others the Government, and of the interest that the charterers had in earning the freight. The vessel met with some disaster, and was salved and towed into an English port. The salvors, for some reason, did not arrest the cargo, and a salvage action *in personam* was brought against the defendants. Now it is admitted that an action *in personam* can be brought against the owners of the ship, and also against any person in the position of owner of the ship. It is not contended that an action *in personam* cannot be brought against the owners of the cargo. Therefore, whether or not the foundation of the action was that there must originally have been some arrest, in which I entirely agree, it was not conclusive as to the form of action, because dealing with the simple case of owner of ship and cargo, certainly an action in the present day can be brought in the Admiralty Court for salvage, either *in personam* or *in rem*.

We have now to consider what is the real position of these defendants, apart from the decisions to which I will presently refer, in respect of the interest which has been the subject of salvage. I think that the defendants were bailees of these goods. It is perfectly true that they were put, not upon their own ship, but upon a hired ship, but they were put there in pursuance of a contract made with the defendants and for the purpose of earning freight which was to go into the pocket of the defendants, and under a contract whereby the defendants undertook, if I may say so, in the event which happened, to deliver these goods. Now, when the accident happened which led to the salvage, what were the real interests which were at risk? There was the interest of the owners of the ship, the interest of the charterers in the freight — because the charterers' freight might be an entirely different thing from what the owners' freight was—in fact it is quite possible that the chartered freight would not be at risk at all, because it might be something paid for the hire of the ship in advance and so not be at risk at all—and then there was the interest of the owners of the goods. In my opinion this last category includes, for the purpose of what we are now considering, all the persons who were collectively or singly the owners of the goods for the purpose of that adventure. I do not think it at all necessary to go through the cases which have been suggested of persons whose contracts may be affected more or less directly by the destruction of the goods. I think that in a common maritime adventure of the kind we are speaking of at least the persons who have an interest in the goods similar to that of owners by virtue of the contract they have made for their delivery, have an interest which is the subject-matter of salvage. Now, before I come to the authorities, I wish to say one word upon a part of the argument to which I entirely assent. I quite agree that in all salvage services there must be some *res* saved. That was clearly established in the case of *The Renpor*, 31 W. R. 640, 8 P. D. 115, where Lord Esher laid it down clearly that something must be saved in order to give valid ground for a salvage action. That authority, together with others, is cited in Mr. Justice Kennedy's book upon Civil Salvage, at p. 113. The foundation of the doctrine of salvage is that there must be a property saved so as to represent a fund out of which the salvors can be remunerated. But when once that is secured, I think that at any rate at the present day, proceedings against the persons who properly can be made liable to pay that salvage may be either *in rem* or *in personam*. It is quite immaterial to consider what the original object of jurisdiction *in personam* was. In the present day, both in the county courts and in the Admiralty court, because property had been saved the persons who are liable to pay salvage can be proceeded against *in personam*.

Now, how do the authorities stand? Speaking for myself, I feel almost bound by an authority of so great a lawyer as Sir James Hannen on such a subject as this, the circumstances being practically identical with the circumstances of the present case. I should hesitate a very long time to overrule his decision in such a case as that of the *Five Steel Barges*. The defendants there were under contract to deliver the five barges to the Government. Three of the barges were still in such a position that they could be proceeded against *in rem*, and were so proceeded against. The other two had been delivered to the Government, and the action was brought against their late owners. Sir James Hannen said: "But on this point I am of opinion that the right to sue *in personam* is not confined to the case of the defendant being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of

security." He speaks of an interest in property which has been saved. Further on he says: "It is a legal liability arising out of the fact that property has been saved, that the owner of the property, who has had the benefit of it, shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property." I do not intend to decide more than is necessary for this case, but, having regard to ordinary commercial transactions, in my opinion that test of Sir James Hannen does include, and properly include, the class of persons within which the defendants in this case come—I mean the charterers of ships who have received goods put upon their hired ships and are liable to replace those goods if they are lost, and are interested in the earning of freight for carrying those goods. There is also the case in Scotland to which we have been referred, *Duncan* v. *Dundee, &c., Shipping Co.*, in which four very learned Scotch judges came to the same conclusion. It seems to me that upon these authorities, as well as upon principle, the judgment of Jeune, P., was right. I come to the conclusion that these defendants had such a direct interest in these goods, in the fulfilment of the contract of carriage, that they are properly made defendants in this action. Therefore I am of opinion that the decision of the court below must be upheld.

A. L. SMITH, M.R.—We are asked to overrule the decision of so great an authority as that of Sir James Hannen. The judgment of Sir James Hannen in the *Five Steel Barges* was delivered in 1890, after the judgment of the Scotch Court of Session in the other case referred to, and curiously enough the Scotch case was not brought to the attention of Sir James Hannen when he decided that case of the *Five Steel Barges*. Therefore we have, independently of each other, four Scotch judges and afterwards Sir James Hannen spontaneously arriving at the same conclusion. Now we are asked in the year 1901 to say that all of those five learned judges were wrong in what they decided in those cases. I myself am prepared to rest my judgment upon the judgment of Sir James Hannen, and I will say this, that having read this judgment through twice during the argument of this case I consider it is founded upon common sense. A clearer judgment was never delivered by any learned judge, and I refuse to say it is wrong. I think this appeal ought to be dismissed.

ROMER, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *W. A. Crump & Son.*

Solicitors for the defendants, *Parker, Garrett, & Holman.*

High Court of Justice.

Chan. Div. } Kekewich, J. } June 5, 13.

In re CARY AND LOTT'S CONTRACT. (*a.*)

Vendor and purchaser — Freeholds — Conveyance by executors to devisee subject to a charge—Land Transfer Act, 1897, *ss.* 2 (2) (3), 3 (1)—*Lord St. Leonards Act* (22 & 23 *Vict. c.* 35), *s.* 29.

The purchaser from a devisee (of a testator who died in 1898) *to whom freeholds have been conveyed by the executors under the Land Transfer Act*, 1897, *s.* 3 (1), "*subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay,*" *is not entitled, where the executors have given proper notices under Lord St. Leonards Act, s.* 29, *and have paid all debts of which they have received notice, to an indemnity in respect of that charge; in such circumstances the executors are exempt from liability for any debts of which they have received no notice, and such exemption extends to the real estate of the testator.*

Vendor and purchaser summons.

The testator, R. S. S. Cary, who died in 1898, devised the freeholds in question to trustees upon certain trusts which are not material to be stated.

After the expiration of a year from the death of the testator his executors, by a deed dated the 29th of September, 1899, conveyed the freeholds to the trustees "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay."

The trustees sold a part of the freeholds and the purchaser made a requisition that the vendors must give him proper indemnities "against all the outstanding debts and liabilities of the testator, and also all moneys which at the date of the conveyance the said representatives were liable to pay and which moneys still remain unpaid or unsatisfied."

It was admitted that the estate had been fully and properly administered and that there remained unpaid no debt of the testator of which the executors had had notice.

The executors had given sufficient notices under Lord St. Leonards Act (22 & 23 Vict. c. 35), s. 29.

The purchaser's objection was that there might be other debts of which the executors had not had notice, and that by reason of the charge contained in the deed of conveyance these debts, if any, were an incumbrance on the freeholds.

The question of the purchaser's right to an indemnity was not treated as the substantial point of the summons, the real objection taken was that there existed or might exist a charge on the property which constituted a blot on the title.

Warrington, K.C., A. J. Mackey, and *Romer*, for the vendors.—By section 1 of the Land Transfer Act, 1897, the freeholds in question vested in the legal personal representatives in spite of the devise. The words in the conveyance by them to the trustees "subject to a charge for any money which the personal representatives are liable to pay," are taken from section 3 (1) of that Act. Sufficient notices had been given to satisfy the requirements of Lord St. Leonards Act, and by section 29 of that Act, where an executor shall have given such notices "he shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

shall not have had notice at the time of distribution." It is clear that before the Land Transfer Act, 1897, real property which passed into the hands of a purchaser was not liable for any debts of the testator: *Spackman* v. *Timbrell*, 8 Sim. 253; *Richardson* v. *Horton*, 7 Beav. 112; *Pimm* v. *Insall*, 1 Mac. & G. 449, at p. 458. So also in the case of personal property: *Dilkes* v. *Broadmead*, 9 W. R. 238, 2 De G. F. & J. 566. The same applies to chattels real. With regard to them, if the legal personal representative has issued the necessary notices and paid the claims of which he has notice, and then transfers the property, he is freed from all liability for the testator's debts. As to real property, if the executor had notice of debts, then after the Land Transfer Act, 1897, the land would remain liable. But the same principles now apply to real property as apply to chattels real (Land Transfer Act, 1897, s. 2 (2)), and the effect of Lord St. Leonards Act, s. 29, here is to free the executors from liability. So, at the time of conveyance, the executors were liable to no creditors of the testator.

T. H. Carson, K.C., and *F. H. H. Greenland*, for the purchaser.—The question is, what does the charge in the conveyance mean—that is, what liabilities were the legal personal representatives under at the date of the conveyance? Section 3 of the Land Transfer Act, 1897, does not affect the question. Section 29 of Lord St. Leonards Act deals with personal estate only. Under that section the executor remains liable so long as the property is in his hands. The immunity against unknown debts only arises after distribution. So the words in section 3, "subject to a charge for the payment of any money which the personal representatives are liable to pay," means money for which they were liable at or just before the conveyance. The meaning of section 3 is perfectly clear, and cannot be controlled by the general expression found in section 2 (2). The purpose of the Act is to give creditors a continuous security which they did not possess before.

Warrington, in reply.

Cur. adv. vult.

KEKEWICH, J., after stating the facts, said: It is beyond doubt that such an objection if made with regard to freeholds devised by the will of a testator dying before the 1st of January, 1898 (the day when the Land Transfer Act, 1897, came into operation), would have been untenable, and I approach the consideration of that Act with a strong and, I believe, thoroughly sound opinion, that I ought not to regard it as altering a settled rule of law and disturbing the recognized practice of conveyancers unless convinced that this alteration is clearly expressed or is so necessarily implied in the provisions of the Act that it is impossible to give reasonable effect to those provisions on any other footing. The neat question, then, is whether, if it be hereafter discovered that there are debts unpaid of which the personal representatives of the testator have no notice, such debts will be money charged on the freeholds. I have thus stated the question because, although the deed says generally "any money which the personal representatives of the testator are liable to pay," yet it being common ground that there is nothing now remaining unpaid to the knowledge of the executors, that is really what I have to decide. Study of the Act for the purpose of determining this particular question has disclosed numerous and great difficulties of construction and of the application to the new statutory provisions of old rules, and having regard to these difficulties and to the danger of indicating an answer to any question which has not been argued, and the equal danger of suggesting questions which, after all, may not require solution, I think it better to decide the point actually before me on as simple grounds as circumstances permit and with a statement of as few reasons as are compatible with judicial decision.

The Act undoubtedly introduces a new element into the administration of estates in making real property assets for the payment of debts. That this is so is clear from the 3rd sub-section of section 2. The same sub-section says that real estate shall be administered in the same manner, subject to the same liabilities, costs, and expenses, and with the same incidents as if it were personal estate. There is nothing here making the executors liable for moneys for which they would not otherwise have been liable, but only the assets available for satisfaction of the liabilities are increased, and it is reasonable to conclude that if, apart from this increase of assets, the executors are under no liability, such increase was not intended to create one. Before considering whether, under such circumstances as we have here, there is any liability on the part of the executors, it is well to notice the 3rd section, because it justifies the language of the conveyance making the freeholds "subject to a charge for any money which the personal representatives are liable to pay." Those are the words of the Act, and they have been taken from the Act and put into the conveyance. One therefore looks at the Act for an indication of what was intended to be charged, but I observe that the Act only permits the conveyance to be made subject to a charge, leaving it optional to the executors whether they will require that or not, and in consequence it is the conveyance and not the Act which creates the charge, if any there be. I do not think the 3rd section in any way helps one to determine what the charge is.

Prior to the Act 22 & 23 Vict. c. 35 (Lord St. Leonards Act) an executor remained liable to creditors notwithstanding all precautions on the executor's part and want of notice of claims, and, indeed, absolute safety could only be obtained under an administration judgment. That Act, however, provided (section 29) that where an executor has given notice such as would have been directed by the court in an administration suit, then, at the expiration of the time named in such notices, he shall be at liberty to distribute the assets and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executors shall not have had notice at the time of the distribution of such assets, or part thereof, as the case may be. In this case the executor has given notices of the character contemplated by the Act, and they are, in my opinion, such as would have been given by the court in an administration suit. Therefore, so far as the personal estate is concerned, the executor remains under no liability if he distributes the assets on the footing of there being no claims of which he has received no notice. Applying this as having regard to section 2, sub-section 3, of the Land Transfer Act, 1897 I ought to apply it, to real estate; the exemption from liability is complete also as regards that. But it remains to be observed that the 29th section of Lord St. Leonard's Act concludes with a proviso that nothing in that Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively. If the result of the two Acts together is, as regards real estate, merely to exempt the executors from liability but to leave the real estate charged, the purchaser's objection still stands good, but, as already stated, real assets could not have been followed in the hands of a purchaser before the Land Transfer Act, 1897, and

there is nothing in that Act to create a right in the creditors to follow them. The proviso to section 29 of 22 & 23 Vict. c. 35 is not, therefore, applicable to real estate, the law respecting which is, in this particular, intact.

I will declare, as asked by the summons, that the purchaser is not entitled to any indemnity in respect of claims against the testator's estate of which the executors had no notice at the date of the conveyance, and the purchaser must pay the costs.

Solicitors, *Robbins, Billing, & Co.*, for *H. Dymond*, Exeter; *Wood, Bigg, & Nash*, for *Kitsons, Mackenzie, & Hext*, Torquay.

Chan. Div.
Byrne, J. } May 23.

In re CLUTTERBUCK.
FELLOWS *v.* FELLOWS. (*a.*)

Will—Accumulations of rents and income—Investment in purchase of real estate—Purchase of land—Accumulations Act, 1892 (55 & 56 *Vict. c.* 58)—*Interpretation Act* (52 & 53 *Vict. c.* 63), *s.* 3.

A direction to accumulate and invest the rents and annual income of property to be employed in the purchase of real estate is bad under the Accumulations Act, 1892.

In re Danson, Bell *v.* Danson, [1895] *W. N.* 102, *discussed.*

Summons.

This was a summons on the part of the plaintiffs, the executors and trustees of the will of Thomas Clutterbuck (deceased), who died in June, 1900, to determine (*inter alia*) whether a trust contained in the testator's will for the accumulation of the income of his mining properties was valid to any and what extent.

The facts of the case were as follow:

By his will bearing date the 22nd of April, 1893, testator appointed the present plaintiffs his executors and trustees and devised (*inter alia*) his mining properties unto and to the use of his trustees upon trust out of the income arising therefrom to pay certain charges therein mentioned and subject thereto "upon trust to invest in the Parliamentary stocks or funds of the United Kingdom the rents and annual income of my mining property for the period of ten years computed from my death and during that period to pay the income arising from such investments to my nephew Algernon Barlow, and I direct that at the expiration of that period the whole of such investments be transferred or paid to my nephew Algernon Barlow if he be living, but if he be dead at such expiration then the same shall be invested in the purchase of real estate so as to go along with my estate at Whittle. And subject to the aforesaid trusts I direct that my mining property shall be held upon trust for my said nephew Algernon Barlow for his life with remainder upon trust for his first and other sons according to seniority in tail, with remainder upon trust for his first and other daughters respectively in tail, with remainder upon trust for my own right heirs." And testator devised his freehold estate at Whittle to the use of Algernon Barlow for life without impeachment of waste, with remainder to his first and other sons in tail, with remainder to his first and other daughters in tail, with remainder to testator's right heirs.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

The defendant Algernon Barlow, as tenant for life, claimed that he was entitled to the immediate receipt of the rents of the mining properties on the ground that in the event of his dying before the expiration of the period for accumulation, the accumulation was for the purchase of land only and was, therefore, void under the Accumulations Act, 1892, and that in the event of his surviving the period it was an accumulation for his own benefit. The said defendant A. Barlow had an infant daughter, E. Eleanor Barlow, who was made a defendant to the summons.

The Accumulations Act, 1892, s. 1, enacts that "no person shall after the passing of this Act settle or dispose of any property in such manner that the rents, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority of any person or persons who, under the trusts of the instrument directing such accumulation, would for the time being, if of full age, be entitled to receive the rents, profits, or income so directed to be accumulated."

Eastwick, for the plaintiffs.

Dauney, for the defendant E. Eleanor Barlow.—The word "land" in the Accumulations Act, 1892, as defined by the Interpretation Act, 1889, s. 3, means corporeal hereditaments: *In re Danson, Bell* v. *Danson*, [1895] W. N. 102. It is not necessary for the purpose of satisfying the trust in the will for the purchase of real estate that corporeal hereditaments should be purchased.

Levett, K.C., and *A. E. Ellis*, for the defendant A. Barlow.—The direction to accumulate for the purchase of real estate is a direction to accumulate for the purchase of land only, and is void. The word hereditaments includes everything that is capable of being inherited. The alleged *dictum* of Chitty, J., in *In re Danson* was probably a slip of the reporter. It was not necessary for the decision.

Rowden, K.C., and *C. Gurdon; Carson, K.C.*, and *E. S. Ford; Borthwick* and *A. F. Peterson*, for other parties, took no part in the argument.

Dauney replied.

BYRNE, J.—The question in this case turns upon the true construction to be placed upon the Accumulations Act, 1892. [His lordship read section 1.] The testator devised his mining property upon trust after paying certain charges to invest the rents and annual income thereof in the Parliamentary stocks or funds of the United Kingdom for a period of ten years to be computed from his death and during that period to pay the interest arising from such investments to his nephew Algernon Barlow. It is therefore a partial accumulation that is directed. Then the testator directs "at the expiration of that period the whole of such investments to be transferred or paid to my nephew Algernon Barlow if he be living, but if he be dead then the same shall be invested in the purchase of real estate so as to go along with my real estate at Whittle." There is in the case before me no minor in existence who if of full age would be entitled to receive the rents, issues, and profits so directed to be accumulated, and the question is whether, inasmuch as there was a direction to invest in the purchase of real estate, that direction comes within the rule hit at by the Accumulations Act.

In order to ascertain the meaning of the words "for the purchase of land only," we must have recourse to the Interpretation Act, 1889 (52 & 53 Vict. c. 63), to find out what is the true meaning of "land," because unless a contrary intention appears, the word "land" will have the meaning attributed to it by that Act.

Section 3 of that Act provides: "The expression 'land' shall include messuages, tenements, and hereditaments, houses and buildings of any tenure." It is argued that the real estate which by the will is directed to be purchased need not necessarily be land. It need not necessarily be land in the ordinary sense of the word land. The question is whether you can find any real estate which is not messuage, tenement, or hereditament, house or building of some tenure or other. Mr. Dauney admitted that he could not point out anything that would not be real estate and would not be covered by those words. He could point out certain real estate which is not land in the ordinary sense; but none that is not land within the exclusive meaning to be given to the expression land by virtue of the Interpretation Act.

One difficulty has arisen in consequence of a case of *In re Danson*, decided by Chitty, J., when he is reported as saying, "It is not in my view possible to say that the terms used in the Act of 1889 import 'money to be laid out in the purchase of land'; that could only be effected by an express definition clause. Land, therefore, in the definition of the Interpretation Act means corporeal hereditaments. That definition I read into the Act now before me (the Accumulations Act), whose words I consequently find to mean that which they would naturally at first sight appear to mean." That expression was not necessary for the determination of that case at all, because, as was pointed out by the learned judge then, you might have a permanent investment in Consols by virtue of the powers of the Settled Land Act, and the decision would be just as good if the judge had said it meant corporeal or incorporeal hereditaments. I think that it would be too strong to safely import into the report of this judgment the meaning sought to be put on it—namely, that land within the meaning of the Accumulations Act, 1892, must mean corporeal hereditaments. The judgment was not corrected by the judge, and I think that there must be a slip in the report. Under these circumstances I think that the direction to lay out the investments at the expiration of ten years if Algernon Barlow be then dead in the purchase of real estate is bad. The result is that in any event Algernon Barlow takes the rents so directed to be accumulated.

Solicitors, *Pontifex, Hewitt, & Pitt*, for *Nevinson & Barlow*, Malvern, *Black & Moss; Oldman, Clabburn & Co.*, for *Wilson, Gilbert, & Co.*, Norwich; *Hardisty, Rhodes, & Hardisty.*

Chan. Div.
Cozens-Hardy, J. } May 7, 8, 17.

MEARS v. CALLENDER. (a.)

Landlord and tenant—Removable fixtures—Fruit trees—Glasshouses—Compensation—Agricultural Holdings (England) Act, 1883 (46 & 47 *Vict. c.* 61), *ss.* 3, 34, 54, 55, 60—*Market Gardeners' Compensation Act*, 1895 (58 & 59 *Vict. c.* 27), *ss.* 3, 4, 6.

Where a market gardener has erected glasshouses for the purposes of his trade he may, in the absence of a covenant in his lease to the contrary, remove them as trade fixtures at the end of his tenancy.

Where a clause in a lease gives power to the tenant to convert meadow-land into an orchard, such a clause constitutes the consent in writing of the landlord required by section 3 *of the Agricultural Holdings (England) Act*, 1883, *and entitles the tenant to claim compensation for orchard trees planted by him.*

If the said Act is excluded by the lease, such exclusion is good as regards section 34 *of the Act, and is not, to that extent, hit by section* 55.

Section 4 *of the Market Gardeners' Compensation Act*, 1895, *gives no right to compensation except in respect of improvements made after the Act.*

Action.

About twenty years ago Mr. Joseph Mears bought of Mr. Wiltshire a farm called Kingwood Farm, in Oxfordshire. It was a purely agricultural holding.

For some few years he occupied the farm, but on the 17th of August, 1887, he granted a lease of it to the defendant for seven, fourteen, or twenty-one years, from Michaelmas, 1887, at the yearly rent of £165.

The lease contained the usual covenants applicable to a small farm and farmhouse, and in addition the following provisions, which were not in common form: "(10) Subject to clause 14, the tenant shall not break up or convert into tillage any meadow or pasture land without the landlord's written consent, and if he shall do so he shall, during the remainder of the tenancy, pay the additional yearly rent of £50 for every acre of land which shall be so broken up or converted into tillage, and so in proportion for any less quantity than an acre, such additional rent to be payable half-yearly on the days aforesaid, and to be recoverable by distress or otherwise as rent hereby reserved, and generally the tenant shall manage and cultivate the farm in a husbandlike and in the best manner, so as not to impoverish any part thereof, and shall leave the same at the end of the tenancy in good heart and condition. (11) If the landlord shall at any time during the said term, by agreement with the tenant, expend any money in draining, building, or other permanent improvements on the said premises, the tenant shall during the said term pay to the landlord interest on the sum expended after the rate of £5 per centum per annum, such interest to be considered as additional rent, and to be recoverable as such by distress or otherwise. (12) The tenant shall not in the last year of the tenancy prepare and sow with a white corn crop more than one-half part of the arable land. (13) In the last year of the tenancy the landlord or his incoming tenant shall be at liberty to enter upon the lands for a wheat season so soon as the crop for that year is cleared off, in order to prepare the same for such season, and may also sow seeds among the Lent or summer corn, which the tenant shall harrow in; and the tenant shall also leave *gratis* for the landlord or his incoming tenant all the roots remaining unconsumed in the ground, and also all improvements made by the tenant, and all cultivations, dressings, and manures, in consideration of no claim being made by the landlord for similar matters on the tenant now entering. (14) The tenant may at any time during the said term, at his own cost, extend the present kitchen garden, part of the said premises, eastwards across the full extent of the pasture field surrounding the said house by a line at right angles with the present kitchen garden wall, and also at the like cost convert into an orchard so much of the meadow land surrounding the said house as he may think proper. (21) The Agricultural Holdings (England) Act, 1883, shall not apply to the contract of tenancy."

Shortly after the lease the defendant converted part of the meadow surrounding the house into an orchard. There were at the commencement of the action upwards of 1,200 trees in the orchard

(a.) Reported by W. MORRIS CARTER, Esq., Barrister-at-Law.

—apples, pears, plums, and cherries—in good bearing condition. These trees, though not capable of removal, were worth several hundred pounds to anyone taking the farm. The defendant also erected ten glasshouses, in which grapes, peaches, nectarines, tomatoes, and strawberries were grown. From these houses he supplied fruit to Reading and also to Covent Garden, and he carried on the trade of a market gardener on the premises with considerable success, and with the full knowledge of his landlord.

The defendant gave notice to quit the farm at Michaelmas, 1901, and he claimed the right to remove the houses and to have compensation for the orchard trees. He pulled down three houses before action brought, and the question raised in this action was whether the plaintiff, who was the present reversioner, could take the benefit of the orchard trees and of the remaining houses without making any compensation or payment for the same. As to one of the houses which had concrete sides and which was erected in or shortly after 1893, the glass span roof was not attached in such a way as to constitute it part of the freehold. It substantially rested by its own weight upon the concrete wall, and it could be lifted up and removed without in any way pulling to pieces or damaging the walls. As to the other houses, wooden piles were driven into the ground, on the top of which wide sills were placed which supported the glass span roofs, except in the case of the vinery, where there was a lean-to roof. The roofs were nailed to the sills or backings, which in turn were nailed to the posts.

Eve, K.C., and *J. G. Wood*, for the plaintiff.—Clause 13 binds the tenant to leave roots and all improvements; he was let into the tenancy without any valuation, and it was the intention that he should go out without any valuation; the contract excludes the Agricultural Holdings Act. Section 55 of that Act is limited to the exclusion of tenants' rights under sections 1 and 3, and not of those under section 34, which is the section in point here. The glasshouses are not trade fixtures, nor are they chattels capable of removal without losing their original character: *Whitehead* v. *Bennett*, 6 W. R. 351, 27 L. J. Ch. 474; *Wake* v. *Hall*, 31 W. R. 585, 7 Q. B. D. 295, 8 App. Cas. 195; *Elwes* v. *Maw*, 3 East 38. The trees cannot be removed, they were not planted to be replanted and sold as young plants.

Vernon Smith, K.C., and *A. F. Peterson*, for the defendant.—We do not claim removal of, but compensation for, the trees under sub-section 11 of Part I. of Schedule I. of the Agricultural Holdings Act; clause 14 in the lease gives the consent in writing required by section 3. As to the glasshouses, clause 13 does not apply, as they are not "similar matters." By general law we can remove those placed on concrete as trade fixtures (*King* v. *Ottley*, 1 B. & Ad. 161; *Wansbrough* v. *Maton*, 4 Ad. & E. 884), and also the other houses connected with the land: *Penton* v. *Robart*, 2 East 88; *Dean* v. *Allalley*, 3 Esp. 11. The cases cited on the other side referred to solid and substantial brick buildings. In the alternative we claim to come under section 4 of the Market Gardeners' Compensation Act, 1895, in conjunction with section 3, sub-section 1, of the Agricultural Holdings (England) Act, 1883.

Eve, K.C., in reply.—As to the trees, the landlord could withold the consent required in section 3, for he could give an illusory compensation merely. Here the tenant has had his compensation in anticipation because he entered without giving compensation. As to the houses, if they are tenant's fixtures they fall within clause 13, and will have to be delivered up: *West* v. *Blakeway*, 2 Man. & Gr. 729, at p. 756. The true test as to removal is not, will the removal interfere with the soil, but can the fixture be removed as an integral fixture without being knocked into pieces—that is, without losing its chattel character.

COZENS-HARDY, J., after stating the facts, read the following judgment: It is contended on the part of the plaintiff that the defendant is bound to leave the orchard and all the houses without claiming compensation. On the other hand, the defendant claims, both at common law and under the Agricultural Holdings (England) Act, 1883, as enlarged by the Market Gardeners' Compensation Act, 1895, to be entitled to remove or to have compensation for all the glasshouses, and he claims under those Acts or one of them to be entitled to compensation for the orchard trees.

It will be convenient to consider—first, what are the rights of the parties irrespective of the Acts of 1883 and 1895, and next to what extent their rights are modified or affected by those Acts. Now at common law it is plain that the defendant could not cut down or remove the orchard trees or claim compensation. But, as to the glasshouses, a much more difficult question arises. If erected for the mere purpose of pleasure and ornament, and not for the purpose of a trade, they would not be removable: *Buckland* v. *Butterfield*, 2 Br. & B. 54; *Jenkins* v. *Gething*, 2 J. & H. 520. If, however, they were erected, as in the present case, by a market gardener for the purposes of his trade, different considerations arise. In *Penton* v. *Robart*, 2 East, 88, Lord Kenyon intimated a strong opinion in favour of the tenant: "The old cases upon this subject leant to consider as realty whatever was annexed to the freehold by the occupier, but in modern times the leaning has always been the other way—in favour of the tenant in support of the interests of trade, which is become the pillar of the State. What tenant will lay out his money in costly improvements of the land if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighbourhood of this metropolis, who expend thousands of pounds in the erection of greenhouses and hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousand in the necessary course of their trade? If it were otherwise the very object of their holding would be defeated. This is a description of property divided from the realty." On the other hand, Lord Ellenborough, in the leading case of *Elwes* v. *Maw*, 3 East, 38, did not approve of Lord Kenyon's observations, at least in so far as they might be taken to apply to agriculture: "He"—*i.e.*, Lord Kenyon—"certainly seems, however, to have thought that buildings erected by tenants for the purposes of farming were, or, rather, ought to be, governed by the same rules which had been so long judiciously holden to apply in the case of buildings for the purposes of trade. But the case of buildings for trade has been always put and recognized as a known allowed exception from the general rule which obtains as to other buildings." I am not satisfied that Lord Ellenborough dissented from Lord Kenyon's view, so far as market gardeners were concerned. If, however, there be any difference between Lord Kenyon and Lord Ellenborough, I prefer the view that glasshouses erected by a nurseryman for the purposes of carrying on his trade may be removed. The *dicta* of Lord Bramwell in *Wake* v. *Hall* supports this view. Moreover, the whole tendency of the courts in recent years has been to enlarge the

rights of tenants in respect of fixtures. Nor do I consider that there is anything in Kindersley, V.C.'s, judgment in *Whitehead* v. *Bennett*, which ought to lead me to a contrary conclusion. Unless, therefore, the defendant is precluded by some covenant in the lease, I think he is entitled to remove the glasshouses. But it is contended that by clause 13 the defendant is bound to leave all the houses without claiming any compensation from the plaintiff, these houses being "improvements" made by the tenant within the meaning of clause 13. Upon the whole I do not think this contention can prevail. I think clause 13 only applies to "similar matters" to those in respect of which the landlord made no claim when the defendant entered—in other words, to the tillages, &c., in respect of which, according to the custom of the country, payment would otherwise have to be made to an outgoing tenant of an agricultural holding. I cannot read them as applying to extensive houses of the nature of trade fixtures erected by a market gardener on the property.

The next question is as to the effect of the Acts of 1883 and 1895. Now, the Act of 1883 divides improvements into three classes—(1) those to which the consent of the landlord is required; (2) those in respect of which notice to the landlord is required; and (3) those which require neither consent nor notice. By section 3 compensation under the Act is not payable in respect of improvements of the first class, unless the landlord has previously consented in writing to such improvement, and any such consent may be given by the landlord unconditionally or upon such terms as to compensation or otherwise as may be agreed upon between the landlord and the tenant, and in the event of any agreement being made between the landlord and the tenant any compensation payable thereunder shall be deemed to be substituted for compensation under this Act. The improvements of the first class include planting of orchards or fruit bushes and erection or enlargement of buildings. By section 34 where after the commencement of the Act a tenant affixes to his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, then such fixture or buildings shall be the property of, and be removable by, the tenant before or within a reasonable time after the termination of the tenancy. There are provisions to which I need not refer in detail by virtue of which the tenant removing must make good all damage and give the landlord one month's notice so as to enable the landlord to elect to purchase. By section 54 the Act applies to a holding such as the defendant's. By section 55 any contract, agreement, or covenant made by a tenant by virtue of which he is deprived of his right to claim compensation under this Act in respect of any improvement mentioned in the first schedule hereto (except an agreement providing such compensation as is by this Act permitted to be substituted for compensation under this Act) shall, so far as it deprives him of such right, be void both at law and in equity. By section 60 what I may call the common law rights of the tenant are preserved. I am relieved from the necessity of considering the effect of section 4 of the Act of 1895, which confers certain benefits upon market gardeners holding under a current tenancy. For since this case was argued before me it has been held by the House of Lords in *Callander* v. *Smith*, Ct. of Sess. Cas., 5th series, vol. 2, 1140, that under a precisely similar section in the Market Gardeners' Compensation (Scotland) Act, 1897, no right to compensation is given except in respect of improvements made after the Act. The consequence is that I must put aside the Act of 1895, and consider only the Act of 1883. Now as to the glasshouses, the written consent of the landlord was not obtained, and the Act does not help the plaintiff. The attempt in the lease to exclude the Act of 1883 succeeds as to section 34, which is not hit by section 55. But the landlord's consent in writing to planting the orchard was given by the lease, and there is nothing in clause 13 which sufficed to deprive the tenant of his statutory right to compensation. If, however, my view of the true construction of clause 13 is not correct, then it seems to me that section 55 of the Act of 1883 applies, and that the contract by which, on that hypothesis, he is said to be deprived of his right to claim compensation is void both at law and in equity. A landlord cannot impose as a condition of his consent the term that no compensation shall be paid. The Act prohibits this. The result is that, in my opinion, the plaintiff fails in his contentions, and the action must be dismissed with costs.

Action dismissed.

Solicitors, *Coode, Kingdon, & Cotton; Drake, Son, & Barton.*

Chan. Div. } June 11, 12.
Buckley, J. }

CHAPLIN & CO. (LIMITED) *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF WESTMINSTER. (*a.*)

Metropolis — Management — Highway — Obstruction — Lamp-post—Use of street by adjoining occupier—Private right—Special individual interest—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 130.

The placing of a post in a highway which interferes with the use of the highway by the occupier of premises abutting on the highway to the maximum of his convenience is not an interference with his private right, but with his public rights, if any, although he has such a special individual interest as to be able to sue to enforce those public rights, if any, without joining the Attorney-General as a party.

A local authority, acting in good faith and making a reasonable use of their statutory authority, cannot be sued by an adjoining occupier for interfering with his convenient use of the highway.

The defendants, acting under section 130 *of the Metropolis Management Act*, 1855, *proposed to set up a lamp-post in a particular place in a London street where the plaintiffs occupied business premises. The plaintiffs alleged that a lamp-post in that place would interfere with the use they had been accustomed to make of the highway for loading and unloading their goods, and they asked for an injunction to restrain the defendants.*

Held, that in the absence of bad faith being shown on the part of the defendants, the court would not interfere with their discretion, and the injunction was refused.

This was an action by a company carrying on business in premises in Villiers-street, Strand, London, to prevent the local authority from erecting a lamp-post in the street near their premises.

Villiers-street is a street which runs north and south immediately on the eastern side of Charing Cross Railway Station, and it has a slope downwards from north to south.

The plaintiffs were wine and spirit merchants, who

(*a.*) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

were lessees of certain cellars running a considerable distance along Villiers-street both to the north and, to a slight extent, to the south of a passage-way called Craven-passage, which runs east and west from Villiers-street under Charing Cross Railway Station, and their offices were situate on the western side of Villiers-street, immediately south of Craven-passage. The frontage of their premises upon Villiers-street was 37ft. 6in., and Craven-passage was 30ft. wide.

The defendants stated they had a large business and that many of their vans were daily discharging or receiving goods from their cellars and premises. They were accustomed to have three vans or drays in the street at one time. One received empties from a door upon the southern part of the premises; another unloaded casks higher up the street; and a third stood higher up still from which goods were carried by hand. The middle van or dray carried heavy casks of fifteen or sixteen hundredweight, and this was unloaded by a "slide" or "pulley" from the tail of the dray, which had to be turned so that the slide pointed towards the rise of the slope, otherwise the casks got out of hand. The end of the slide came near the midde of Craven-passage.

In or soon after the summer of 1899 the Corporation of Westminster, or their predecessors, the Vestry of St. Martin's-in-the-Fields, determined to light Villiers-street by electricity, and for that purpose they erected certain standards or lamp-posts to hold the lights. They were minded to put one of these standards or lamp-posts on the western side of the street opposite the centre of Craven-passage, and they did in fact erect as a trial a temporary post there, which after standing two months was taken down.

This arrangement of the plaintiffs of having three vans at work in the street at one time necessitated the end of the slide of the middle van being brought up nearly to the place of the proposed post, with the result, as stated by the plaintiffs, that there was danger that the men in unloading the van might get pinned between the cask and the post.

The plaintiffs contended that the defendants had no right to place the standard in the position proposed, having regard to the inconvenience and danger thus caused to them and to their men. They suggested that instead of having a lamp-post the lamp should be suspended from a bracket fastened to their premises, and they offered facilities for this being done. This suggestion was not accepted by the defendants, and the plaintiffs brought this action asking for an injunction to restrain the defendants from placing or erecting, and permitting to remain erected, any structure or post on the west side of Villiers-street in such a position as to cause obstruction to them as occupiers.

The action was heard without pleadings.

H. Terrell, K.C., Hatfield Green, and *E. J. M. Chaplin,* for the plaintiffs.—The defendants are committing a common law nuisance by their lamp-post, and they are not authorized to do this. The Act only authorizes them to put up lamps where they can do so without committing a nuisance: *Vernon* v. *St. James's Vestry,* 29 W. R. 222, 16 Ch. D. 449; *Metropolitan Asylums District Board* v. *Hill,* 29 W. R. 617, 6 App. Cas. 193. They are interfering with the access of the plaintiffs to their premises, and thus with their private right: *Attorney-General* v. *Conservators of Thames,* 11 W. R. 163, 1 Hem. & Mill. 1, at p. 32; *Lyon* v. *Fishmongers' Company,* 25 W. R. 165, at p. 167, 1 App. Cas. 662, at p. 675; *Fritz* v. *Hobson,* 28 W. R. 459, 14 Ch. D. 542.

Astbury, K.C., and *A. à B. Terrell,* for the plaintiffs.—The defendants are authorized and required by the Metropolis Management Act, 1885, s. 130, to set up lamp-posts in the street, and unless they are shown to be acting in bad faith, which is not suggested, they may put their lamp-post where they think best: *Goldberg & Son (Limited)* v. *Mayor, &c., of Liverpool,* 82 L. T. Rep. 362, 48 W. R. Dig. 191.

H. Terrell in reply.—In *Goldberg & Son (Limited)* v. *Mayor, &c., of Liverpool* the statute authorized the defendants to do the particular act complained of.

BUCKLEY, J.—Having regard to what I am going to say, I do not think that it is within my province to ascertain whether the defendants might or might not have reasonably accepted the suggestion of the plaintiffs that the lamp should be suspended from a bracket. The defendants say the position of the proposed standard lamp is the most convenient, in fact the only convenient position for it, and it is for them to decide where the posts or brackets are to be placed, if at all. The plaintiffs in substance set up a supposed right to have this particular portion of the highway so kept as that they shall be easily able to have three vans loading or unloading opposite their premises at one time. That supposed right is based on this, that the plaintiffs' claim to have part of the highway so kept as that they shall be able to exercise this supposed right of using it to the maximum of their own convenience. I do not think that they have any such right. It has been put forward that they have some private right here. I think not. The right they claim is a right which they enjoy in common with all other members of the public to use the highway. They have a special individual interest in the public right which enables them to sue without joining the Attorney-General as plaintiff, inasmuch as, by reason of the neighbourhood of their premises, they use this part of the highway more than other people, but it is not a private right. I apprehend that a person who owns premises abutting on a highway does enjoy as a private right the right of stepping from his own premises on to the highway, and if any obstruction is placed in his doorway or gateway, so as to prevent him doing this, it is an interference with a private right: see the judgment of Lord Hatherley, when Page Wood, V.C., in *Attorney-General* v. *Conservators of the River Thames,* of Lord Cairns in *Lyon* v. *Fishmongers' Company,* and of Fry, J., in *Fritz* v. *Hobson.* It appears to me that the former of these cases is exactly in point, applying it by analogy. The proposed lamp-post is an obstruction to the highway adjoining the premises of the plaintiffs, but no obstruction of their private right of stepping from the highway on to their premises. Then the plaintiffs say that the lamp-post will be an obstruction to the highway, and as such a common law nuisance. But under the Metropolis Management Act, 1855, s. 130, a statutory duty is cast upon the defendants to cause the streets to be lighted, and for that purpose that they "shall maintain, or set up and maintain, a sufficient number of lamps in every such street." Their *bona fides* in what they are doing is not questioned. What they say, and it commends itself to one's common sense, is that when you put up a physical obstruction the cardinal question is, How far is that obstruction from the next obstruction? The proximity of the two points will to a greater or less extent increase the difficulty of circulation. They say that this particular fixed point is at a greater distance than any other position that they can take from another fixed point. If they put the lamp-post in the middle of Craven-passage at the edge of the kerb, it is at a greater distance from the plaintiff's premises, and at a greater distance from the next adjoining premises to the north than if placed anywhere else. And if they place it rather more towards

the north—that is, not immediately opposite Craven-passage—it would not light the passage so well. The duty of lighting the passage is cast, not upon the defendants, but upon the railway company, but they might very well consider the fact that if they placed the lamp at the side it would cast a shadow down the passage. They are therefore selecting a position which in their discretion they think best for the convenience of the public. Now the plaintiffs' right is to use this portion of the highway for loading and unloading their goods reasonably in common with the rest of the public. The highway has under the statute to be lighted, and lighted if necessary by fixed obstructions, and it appears to me that the plaintiffs cannot set up an individual interest in this public right against the reasonable use by the defendants of their statutory authority. I agree that the local authority must not so use their powers as to commit a nuisance. They ought to use it so as to benefit all the members of the public whom they have to consider reasonably to the best of their judgment; and I think that they may, for the benefit of all, affect to some extent the convenience of one. Now a word as to the evidence. [His lordship then reviewed the evidence as to the obstruction caused by the temporary post, and continued:] I arrive, therefore, at the conclusion that the erection of the proposed post will be in no reasonable sense an obstruction to the plaintiffs in unloading their goods at the entrance of the passage. It is obvious that it will to some extent affect the elasticity of their operations, but that is all that can be said. It seems to me that both upon the law and the facts the action fails, and I dismiss it with costs as between solicitor and client.

Action dismissed.

Solicitors for the plaintiffs, *Dale, Newman, & Hood.*

Solicitors for the defendants, *Fladgate & Co.*

Chan. Div. Joyce, J. April 17, 18; May 23.

In re DU BOCHET.
MANSEL *v.* ALLEN. (*a.*)

Will—Construction—Illegitimate children—Repute—Child born after the date of the will, but before the death of testator.

Following Holt *v.* Sindrey, 17 *W. R.* 249, *L. R.* 7 *Eq.* 170, *and* Hill *v.* Crook, 22 *W. R.* 137, *L. R.* 6 *H. L.* 265, *illegitimate children born before the date of a will, who have acquired the repute of being the children of a certain man, may take a bequest given to them as children of that man, notwithstanding that they take as members of a class with the legitimate children of other persons. A child, however, born after the date of the will, but before the death of the testator or testatrix, is not entitled to take, although he or she may have acquired such repute before the death of the testator or testatrix.*

Occleston *v.* Fullalove, 22 *W. R.* 305, *L. R.* 9 *Ch. App.* 147 *distinguished.*

In re Bolton, Brown *v.* Bolton, 34 *W. R.* 325, 31 *Ch. D.* 542, *followed.*

Summons for directions by the trustees of the will of Julia Elizabeth Du Bochet.

(*a.*) Reported by C. W. MEAD, Esq., Barrister-at-Law.

By her will dated the 17th of July, 1876, the testatrix bequeathed her residuary estate in trust equally for all such of the children (being daughters) of her nephew Richard Du Bochet, her niece Alice, wife of Josiah Allen, and her neice Julia, wife of George Hall, as should live to attain the age of twenty-one years or marry under that age, each child to be paid his or her share on attaining that age or marrying under it.

The testatrix died on the 2nd of July, 1883, before which date a daughter of her niece Alice Hall had attained the age of twenty-one years.

At the date of the will the nephew Richard Du Bochet was then and had for many years previously been living with a lady known as Mrs. Du Bochet and reputed and believed by the testatrix and the rest of the family to be his lawful wife. Richard Du Bochet and this lady were not, however, married till 1890. Before this event three daughters had been born to them, two of whom, Gertrude and Alice, were born before the date of the will in 1876, the youngest, Jessie, was born in 1879, after the will was made. The testatrix always spoke of and treated Mrs. Du Bochet as her nephew's wife, and the three daughters as their children.

On these facts becoming known to the trustees of the will this summons was taken out for directions, *inter alia*, as to whether the three children of Richard or any of them were entitled to a share in the testatrix's residuary estate.

Badcock, K.C., and *E. Ford*, for the three children of Richard.—With regard to the elder children born before the date of the will it is certain that they are entitled to share in the residuary estate; they are sufficiently described and are ascertainable, and it matters nothing whether they are legitimate or illegitimate, so long as they are properly described they may be legatees as well as legitimate children: *Holt* v. *Sindrey*, 17 W. R. 249, L. R. 7 Eq. 170; *In re Haseldine, Grange* v. *Sturdy*, 34 W. R. 327, 31 Ch. D. 511. [JOYCE, J., referred to *Andrews* v. *Partington*, 3 Bro. C. C. 401.] In view of the surrounding circumstances the court should read the words other than in their strictly primary meaning: *In re Deakin, Starkey* v. *Eyres*, 43 W. R. 70, [1894] 3 Ch. 585. In *In re Jeans, Upton* v. *Jeans*, 72 L. T. Rep. 835, 43 W. R. Dig. 193, step-children were held to be intended by "children." As to the child born after the date of the will—the old rule excluding after-born illegitimate children did not apply to wills—the rule only applied to settlements on the grounds of public policy and morality, but in the case of wills this was not needed, as a man by making such a provision could not encourage himself in immorality; much less then will this rule apply to the will of a third person when the child is born before the death of the testator: *Wilkinson* v. *Adam*, 1 V. & B. 422; *Occleston* v. *Fullalove*.

J. Ashton Cross, for the other residuary legatees.—"Children" must mean "legitimate children," and the gift to the children of Richard fails. The evidence which has been brought forward to show that the testatrix recognized his illegitimate children is really an attempt to bring in evidence of what the testator intended, under guise of the surrounding circumstances, Kay, L.J., in *In re Fish, Ingham* v. *Rayner*, 42 W. R. 520, [1894] 2 Ch. 83. Neither the children born at the date of the will nor the child born afterward are entitled to take: *In re Bolton, Brown* v. *Bolton; Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265; *Dorin* v. *Dorin*, 23 W. R. 570, L. R. 7 H. L. 568; *Seale-Hayne* v. *Jodrell*, [1891] A. C. 304, 40 W. R. Dig.

Badcock, K.C., replied.

Cur. adv. vult.

May 23.—JOYCE, J., after stating the facts, continued: Upon the facts properly admissible in evidence and proved I do not, nor as I believe does anyone else, entertain the smallest doubt that the testatrix died in the full belief that these three girls were included as children, being daughters of Richard Du Bochet, in the class among whom she had directed her residuary estate to be divided. It is now contended that they are not so included and that none of them take a share.

In *Holt* v. *Sindrey* a testator bequeathed an annuity to trustees "upon trust during the life of his daughter M., the wife of J. L., for her separate use, and after her death for all and every the child and children of his said daughter M. L., begotten or to be begotten. The testator was not aware when he made his will that his daughter, was not the wife of J. L. and that four children then borne by her to J. L. were illegitimate. The testator had always treated his said daughter and J. L. and their children as if the parents had been married and their children lawfully begotten. After the date of the testator's will, M. L. bore three other children to J. L., which also were illegitimate. A sum of £703 13s. 1d., Bank £3 per Cent. Annuity had been appropriated to answer the bequest to M. L. and her children. M. L. died without having had any other than the aforesaid children. It was held that the four children born before the date of the will were, although illegitimate, sufficiently described in it as legatees of, and therefore entitled to, the fund in court." I have read the head-note from the report at p. 126 of volume 28 of the Law Journal, for the head-note in 7 Eq. is imperfect and erroneous, as pointed out by Lord Selborne in *Occleston* v. *Fullalove*. As appears by the report in the Law Journal, Mr. Hinde Palmer admitted that the three children born after the date of the will could not claim any part of the fund. This decision is an undoubted authority. It has never been overruled, nor, so far as I am aware, questioned, and in numerous cases it has been implicitly if not expressly recognized. *Crook* v. *Hill* is reported in 19 W. R. 649, L. R. 6 Ch. App. 311, 24 L. T. R. 488, and *sub nomine Hill* v. *Crook* in 22 W. R. 137, L. R. 6 H. L. 265. I think that the head-note is hardly accurate in either report. Of the report in the House of Lords it is, I think, not only inaccurate but misleading. The facts were as follows: A testator gave a legacy to his son-in-law John Crook, and gave leaseholds to trustees upon trust during such part of the testator's term and interest therein as his "daughter Mary, the wife of the said John Crook," should happen to live, to pay the rents to her for her separate use "independently of her present or after-taken husband," and after her decease he directed that the premises should go, remain, and be upon such trusts for such one or more of the children of his said daughter Mary Crook in such manner as his daughter Mary Crook should by will appoint; and in default of appointment as in the will mentioned. The testator died on the 22nd of March, 1859. The marriage between John Crook and Mary Crook, which had taken place with the testator's sanction in 1854, was to the knowledge of the testator void, John Crook having been the husband of Mary Crook's deceased sister. They had two children born in the testator's lifetime who were recognized by the testator as his grandchildren. At the date of the will Mary Crook was *enceinte* of a third child, born after the testator's death, and named Robert Crook; and subsequently she had another—that is, a fourth child. Mary Crook died in 1868, having by will exercised her power of appointment in favour of such of her four children as being sons should attain twenty-one, or being daughters should attain that age or marry.

The two eldest children of Mary Crook filed a bill against the trustees and executors, making their brother Robert Crook also a defendant, praying to have it declared that the plaintiffs and, if the court should be of such opinion, the defendant Robert Crook, were intended by the testator's will to take as children of his daughter Mary Crook. It was not suggested that the fourth child had any interest. The executors demurred, and the demurrer was allowed by Stuart, V.C. The plaintiffs appealed. The Lord Justices reversed his honour's decision. The case then went to the House of Lords, when the decision of the Lord Justices was affirmed. The gift there in question was not, as I understand the case, that set out between inverted commas in the head-note in L. R. 6 H. L., but the one which preceded it and is not set out, and the decision was not that there was a sufficient designation of the children of Mary as the intended object of the testator's bounty, but that there was a sufficient designation of the two children of Mary who were born before the date of the will of the original testator. Lord Cairns in concluding his judgment says distinctly: "I do not go over what has been said as to the impossibility of providing for future illegitimate children, that is out of the question here. The question here is whether those children who have filed this bill, and who were born before this will was made, can take under this bequest, and in my opinion they can. And Mellish, L.J., at the end of his judgment in the Court of Appeal (L. R. 6 Ch. App. 311, at p. 320), said: "I consider that we are bound to say, according to the principle laid down in the authorities, that the two children who were born before the date of the will are entitled to take under the gift. We are not called upon to decide whether the third child, who was in *vêntre sa mère* at the date of the will, and of the testator's death, is entitled to participate." It does not appear how in fact the property was ultimately divided—it would be interesting to know. In the case I have just mentioned James, L.J., said (L. R. 6 Ch. App. 311, at pp. 315, 316): "The question then resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed."

Applying that test to the present case I hold, upon the facts proved and appearing by admissible evidence (and in my opinion no rational person can doubt), that the testatrix when she made her will intended the two girls then in existence, whom she knew and regarded with affection, to be included in the class among whom her residuary estate was to be divided, subject to their attaining the age of twenty-one years or marrying. In other words, there is so strong a probability of it being the intention of the testatrix to use in her will the words "children being daughters of her nephew Richard Du Bochet" as including the two children Gertrude and Alice that a contrary intention cannot be supposed. I am of opinion, therefore, that at all events the children

Gertrude and Alice must be treated and share as daughters of Richard Du Bochet in the distribution of the residuary estate of the testatrix under this will, notwithstanding that they take as members of a class with the legitimate children of other persons. But with respect to the youngest child Jessie, who, though born in the lifetime of the testatrix, and fully recognized by her, was not in existence at the date of the will, there is a serious difficulty, she not having been a reputed child of Richard Du Bochet at the date of the will. *Crook* v. *Hill*, as I have shown, is no authority for admitting her to share. In *Occlestone* v. *Fullalove* a testator made a bequest to his reputed children C. and E., and all other children whom he might have or be reputed to have by M. L. (his deceased wife's sister), then born or thereafter to be born; a third child was born in the testator's lifetime, but after the date of the will. It was held (reversing Wickens, V.C.) by James and Mellish, L.JJ., *dissentiente* Lord Selborne, that this third child was entitled to share. In *In re Goodwin's Trusts*, 22 W. R. 619, L. R. 17 Eq. 345, Sir George Jessel says: "The principle of the decision in *Occlestone* v. *Fullalove*, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix."

In *In re Bolton, Brown* v. *Bolton*, the head-note says: "G. B. went through the ceremony of marriage with J. A. C., whose husband had deserted her and gone abroad many years before and was believed to be dead, but G. B. was aware that there was no certain information as to his death. Shortly afterwards G. B. made his will, by which he gave 'to my dear wife J. A. B., formerly J, A. C.,'" an interest in certain chattels during the widowhood, and also gave to her the income of his residuary personalty during her widowhood, and after her decease or remarriage he gave the "corpus" to "all and every my child and children," as therein mentioned, and in default of children to his nephews and nieces. G. B. and J. A. C. cohabited for more than a year and a-half after the date of the will, when G. B. died, leaving J. A. C. *enceinte* of her only child. She enjoyed the income of the residue till her death, upon which event the nephews and nieces claimed the property under the gift over, and proved that J. A. C.'s child was illegitimate, her former husband having been alive at the time of her marriage to the testator. It was held by the Court of Appeal, affirming the decision of Kay, J., that the child could not take. Cotton, L.J., says (31 Ch. D. 542, at p. 552): "*Occleston* v. *Fullalove* was much relied on, but in my opinion that case does not cover this, and leaves untouched the rule that there cannot be a valid gift to a future illegitimate child described only by reference to paternity. In that case the gift was to two reputed children whom the testator named, and all other the children which he might have or be reputed to have by Margaret Lewis then born or thereafter to be born. The court thought that a description sufficient to include an illegitmate child of which Margaret Lewis was *enceinte* when the will was made. It was argued on behalf of the appellant that the present is the same case, for that, under the circumstances the testator must by 'children' have meant reputed children. But you cannot treat 'child' as denoting a man's reputed child, unless a particular child is referred to. To ascertain whether this child is the testator's child we should have to inquire into circumstances which the law does not permit to be inquired into. The argument really comes to this, that the testator's description of the woman as his wife carries with it the same consequences as to children born during the cohabitation as if there had been a valid marriage. *Crook* v. *Hill* is quite different from the present case, and I am unable to come to a conclusion in favour of the appellant." He then proceeds to record his dissent from the view expressed by Sir George Jessel in *In re Goodwin's Trusts*. Moreover, in *Occleston* v. *Fullalove*, James, L.J., points out the great practical difference between a gift to the future illegitimate children of a male and a gift to the future illegitimate children of a female, as *In re Hastie's Trusts*, 35 W. R. 692, 35 Ch. D. 728.

I should have been glad to have held the gift in the present case to have been equivalent to a gift to all the children, being daughters, which my nephew Richard Du Bochet may be reputed to have by his reputed wife. But after much consideration and with great regret I do not in the face of the decision of Kay, J., and the three Lords Justices affirming Kay, J., in *In re Bolton*, see my way to admitting the daughter Jessie born and begotten after the date of the will to any share under the residuary gift.

Solicitors, *Tucker, Lake, & Lyon*, for *Gem, Docker, & Tartelon*, Birmingham; *Eley & Winch*.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 1.

NELSON & CO. v. THE BOARD OF TRADE. (a.)

Assurance—Life—Life assurance company—Grant of annuities in connection with tea dealing business—Life Assurance Companies Act, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 3.

N. & Co., tea dealers, in order to promote the sale of their tea, offered to every woman who should have become a widow since Christmas, 1897, *and who since that date should have purchased not less than a specified quantity of tea per week for the last five consecutive weeks previously to her becoming a widow, a pension payable as long as she remained a widow, and they offered a similar pension to every woman who became a widow previously to Christmas*, 1897, *or previously to her commencing to purchase N. & Co.'s tea, provided she should have purchased a specified quantity of tea per week for ten years. Cards were issued to women who desired to qualify for a pension at a charge of* 1*d. The holder of a card entered the purchases of tea made by her, and the entries were checked from time to time by N. & Co.'s manager. Records of the purchases were also kept in N & Co.'s books. By a trust deed N. & Co. undertook to pay to trustees a proportion of their profits for the purpose of forming a fund for the payment of this pension.*

Held, upon these facts, that justices were justified in finding that N. & Co. carried on the business of "granting annuities upon human life," and were a life assurance company within the meaning of the Life Assurance Companies Act, 1870.

Case stated by justices for the borough of Louth.

At a petty sessions held for the borough of Louth in Lincolnshire on the 29th of November, 1900, an information was preferred by Thomas Mountain on behalf of the Board of Trade the respondents, against Nelson & Co., otherwise known as Rasmus Jensen, the appellants, for that they, being a company not

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

registered under the Acts relating to friendly societies, and being a company who grant annuities upon human life and carry on the business of life assurance within the United Kingdom, and being established after the passing of the Life Assurance Act, 1870, did on the 19th of May, 1900, unlawfully make default in depositing the sum of £20,000 with the Accountant-General of the Court of Chancery, and that such default had since continued and still continued.

Upon the hearing of the information the following facts were proved or admitted:

The appellants were not registered under the Acts relating to friendly societies and had not on the 19th of May, 1900, or since, deposited the sum of £20,000 with the Accountant-General of the Court of Chancery pursuant to section 3 of the Life Assurance Companies Act, 1870. The appellants were established after the passing of the Life Assurance Companies Act, 1870, for the purpose of carrying on business under the scheme described below, which they commenced to do in January, 1898, and had since done.

The appellants published in a leaflet issued in January, 1898, the following announcement:

"In commemoration of the sixty years' reign of her Most Gracious Majesty Queen Victoria, the greatest and most noble widow the world has ever known,

"NELSON & CO.,

"THE GREAT TEA MEN,

Will pay to every woman who shall have become a widow since Christmas, 1897, and who, since that date, shall have purchased not less than one half-pound of their tea per week for the last five consecutive weeks previously to her becoming a widow, ten shillings per week as long as she remains a widow, and to every woman who became a widow previously to Christmas, 1897, or previously to her commencing to purchase Nelson & Co.'s tea, ten shillings per week as long as she remains a widow, provided she shall have purchased half-a-pound of tea per week for ten years.

"Customers who require only a quarter-of-a-pound of tea weekly, and purchase the same under the above conditions, will receive five shillings per week instead of ten shillings.

"Customers—always provided that those not being widows before commencing to take Nelson & Co.'s tea shall have purchased the tea for the last five consecutive weeks previously to their becoming widows—will not lose the benefit should they occasionally omit their weekly purchase of tea, but as many weeks as they omit purchasing the tea since they began, so many weeks' money will they lose when they come into benefit.

"Nelson & Co. are determined that widows shall have an income of not less than ten shillings per week.

"Nelson's tea is a very fine tea, sold at two shillings per pound, but one spoonful will go as far as two of common tea.

"Estimated yearly balance of 1,000 branches, selling 500 pounds of tea weekly each branch:

	£	s.	d.
Tea sold, 260,000 chests, 2s. per pound	2,600,000	0	0

	£	s.	d.
Salaries	208,000	0	0
Rents	52,000	0	0
Costs of growing tea, carriage, &c.	1,083 333	6	8
Duty, 4d. per pound of tea... ...	433,333	6	8
10,000 widows at 10s. each, weekly	260,000	0	0
Reserve Fund, 1d. on every pound sold...	107,313	6	8
Balance of cash in hand and at bankers	456,020	0	0
	2,600,000	0	0

"Bankers: The Stamford, Spalding, and Boston Banking Co. (Limited), Louth. Solicitor, H. F. V. Falkner, Esq., Louth. Auditor, Mr. Geo. Vere, Louth (Fellow of the Society of Accountants and Auditors).

"This is to certify that I have had the books of Messrs. Nelson & Co. examined for the half-year ending the 1st of July, 1898, by the auditor, Mr. George Vere, and that the reserve fund, as shown in the balance-sheet, has been handed to me to hold in trust for the benefit of the widows, the half is intended to be invested in freehold property, and the other half in Government securities.

"January 20, 1898. H. F. V. FALKNER.

"London offices, 30 & 32, Ludgate-hill, E.C.

"Head offices, The Limes, James-street, Louth, Lincs.

"Branches and depôts for packing and distributing the tea everywhere."

Other leaflets were issued from time to time containing the same announcement with some variations, and the following condition was introduced: "The only condition is that at the commencement of the continuous taking of tea the husband must be certified to us by a duly qualified medical practitioner to be in good health, but a certificate of health will be dispensed with in the case of customers who have purchased the tea every week for twelve months next previous to the husband's death." The leaflets also contained lists of the widows receiving weekly pensions.

Cards were provided by the appellants at a charge of 1d. upon which purchasers entered the dates and amounts of their purchases. These were initialled from time to time by the manager of the branch and corresponding entries were made in the appellants, books. The following words were printed on the cards: "The entries on this card must correspond with the books of the branch, such books being considered the only evidence of the consecutive purchase of the tea."

A trust deed was executed by the appellants on the 17th of February, 1900, whereby after reciting that they had already paid to the trustees of the settlement a sum of £20,000 they covenated to pay until the determination of the trust a sum equal to 1¾d. for every pound of tea sold by them to be held by the trustees in trust to pay to the settlors weekly the amounts which should be required for the payment of the pensions.

The women mentioned in the leaflets bought the appellants' tea pursuant to the scheme set forth in the leaflets, having respectively produced to the appellants certificates of the health of their respective husbands. The women respectively received a purchaser's card and were widows who had proved to the appellants the death of their respective husbands. The appellants paid the above widows 5s. or 10s. per week, whichever amount they were respectively entitled to under the appellants' scheme, and such of the widows as were living at the date of the information were in receipt of the weekly sum.

The justices were of opinion on consideration of the above facts that the appellants were on the 19th of May, 1900, and subsequently, carrying on the business of life assurance within the United Kingdom within the meaning of the Life Assurance Companies Act, 1870, and convicted the appellants and ordered them to pay a fine of £5 and £5 costs.

The term "company" is thus defined by section 2

of the Life Assurance Companies Act, 1870: "Any person or persons, corporate or incorporate, not being registered under the Acts relating to friendly societies, who issue or are liable under policies of assurance upon human life within the United Kingdom, or who grant annuities upon human life within the United Kingdom."

Haldane, K.C. (*G. Wood Hill* with him), for the appellants.—A perusal of the Act shows that the life assurance companies which are intended to be within its purview are life assurance companies which carry on the ordinary business of life assurance, and that it does not extend to everybody who happens to, or even does systemically, grant pensions. Sections 4, 5, 7, 8, 12, and 14 bear out this view. Nelson & Co. were not liable under any policy, for the card issued to purchasers was not a policy within 14 Geo. 3, c. 48, because it did not set out the husband's name as would be required to be done under the provisions of that statute; nor was the insurance granted an insurance in the ordinary sense; for though, no doubt, Nelson & Co. would be liable to any person who complied with the conditions, yet they may refuse to sell the tea. Again, no inquiry is made into the age of the husband nor, in certain cases, into the state of his health, and there are no actuarial calculations of any kind as in ordinary insurance. Nelson & Co. are merely tea dealers who give a *bonus*, not as some do, by way of a Christmas present, but by way of an annuity depending upon certain contingencies.

Sir R. Finlay, A.G., and *H. Sutton*, for the Board of Trade, were not called on.

Lord ALVERSTONE, L.C.J.—In this case the magistrates came to the conclusion on the facts that the appellants were on the 19th of May, 1900, carrying on the business of life assurance in the United Kingdom within the meaning of the Life Assurance Companies Act, 1870. The question for the court is whether, on the facts stated in the case and disclosed by the documents, Messrs. Nelson & Co. are a company granting annuities upon human life. This is really a question of fact, but as the case has been submitted to us I think we ought to express our opinion upon the facts before us inasmuch as the case arises upon documents and it is obviously a case of importance.

The facts, as I understand them, are these: Messrs. Nelson & Co., perfectly *bonâ fide* and with the intention of promoting their own business, devised a very attractive scheme whereby widows would in certain events receive annuities on the deaths of their husbands of 10s. or 5s. a week. Of course it is not suggested that the annuities are given out of charity, but they come out of the profits on the sales of tea. A proportion of the price of the tea is the money which Messrs. Nelson & Co. use for the purpose of insuring the annuities to these widows. A purchaser of tea takes a card on which is entered her name. A weekly record is kept of the number of pounds of tea bought by the person holding a card. That would indicate so much money paid to Messrs. Nelson & Co. by that particular woman upon the terms of the bargain or contract, whichever it is right to call it, which is held out by Messrs. Nelson & Co. to her. There is entered in the books of the branch a record which is to be *primâ facie* evidence, if not the only evidence, of the fact of the purchase. Therefore these gentlemen are perfectly *bonâ fide* and properly keeping a record with regard to customers who may become entitled to this annuity.

Some will and some will not become entitled. Some will drop off and will not continue to pay, and others will not become widows under circumstances that will enable them to obtain the annuity. I only use this for the purpose of seeing whether the magistrates were right in the conclusion to which they came, as to the nature of the business that was being carried on. In addition to that, Nelson & Co. published an attractive advertisement in which they say that they are establishing a business which, if by the assistance of many customers it reaches the magnitude therein indicated, will show profits sufficient, after deducting salaries, rents, taxes, costs, and duty, to pay 10,000 widows 10s. a-week, with an enormous balance of cash in hand which would be available as security for the insurance. Further, they purport to set aside a penny for every pound of tea sold, and there is a trust deed which says that £20,000 is held in respect of the business.

In the face of those facts it is, in my opinion, quite impossible to come to any other conclusion than that in connection with their tea business Messrs. Nelson & Co. are carrying on a scheme of insurance by granting annuities to women who buy their tea, which become effective on the death of their husbands.

I do not think that the argument based upon what is a policy within the Act of Geo. 3 has any real relation to the subject. But, even if it had, the business carried on by Messrs. Nelson & Co. is within the latter words of the definition "granting annuities upon human life," because the annuities are to be for the life of the widow commencing upon the death of her husband, and I think that the section points to the payment of annuities dependent upon the duration of human life.

I will only add, further, that the £20,000 deposit required by section 2 has no relation to the amount or kind of business done. It was, no doubt, considered to be a sort of indication that the person or company who carried on this kind of business was in a substantial position. I think that the magistrates came to a perfectly right conclusion, and had the facts been submitted to me as a judge of first instance I should have come to the same conclusion.

LAWRANCE, J., concurred.

Solicitors for the appellant, *Collyer-Bristow, Hill, Curtis, & Dods.*

Solicitor for the respondents, *Treasury Solicitor.*

Court of Appeal.

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) July 1.

CARRITT v. BRADLEY. (a.)

Mortgage—Redemption—Collateral advantage to mortgagee—Advantage continuing after redemption—Fetter on redemption.

The holder of shares in a tea company mortgaged them to secure repayment of an advance, and at the same time agreed to use his best endeavours to secure that the mortgagee should always thereafter have the sale of all the company's teas as broker, and, in the event of the company's teas being sold otherwise than through the mortgagee, to pay to the mortgagee the amount of the commission which he would have earned if the teas had been sold through him.

Held, that the collateral advantage secured to the mortgagee by this agreement was one which might be bargained for; for, although the effect of it was to continue after redemption, it did not fetter the mortgagor's right to redeem.

Application for judgment or a new trial in an action tried before Bigham, J., and a jury.

In May, 1892, in consideration of an advance of £2,250 made by the plaintiff by way of loan to the defendant William McKenzie Bradley, the said defendant mortgaged to the plaintiff 1,541 shares in the Sephinjuri Bheel Tea Co. (Limited) to secure repayment of the loan, and at the same time agreed to use his best endeavours to secure that the plaintiff should always thereafter have the sale of all the company's teas as broker, and he personally engaged and agreed, in the event of the company's teas being sold otherwise than through the plaintiff, to pay to the plaintiff the amount of the commission which the plaintiff would have earned if the teas had been sold through him.

The defendant James Bradley, who was the brother of the first-named defendant, entered into a similar agreement with the plaintiff.

In 1899 the plaintiff called in the loan, and the defendant W. M. Bradley repaid it.

The company having ceased to employ the plaintiff as their broker, and having appointed a new broker, the plaintiff brought this action against the defendants to recover damages for breach of their agreements.

The defence was that the agreements were limited to the duration of the mortgage security, and that, if not, they were a clogging of the equity of redemption, and were, therefore, void.

At the trial the jury returned a verdict for the plaintiff for £750 damages, and Bigham, J., gave judgment accordingly.

The defendants applied for judgment by way of appeal, or, in the alternative, for a new trial.

Dickens, K.C., and *Montague Lush*, for the defendants.

J. A. Hamilton, K.C., and *Dawson Miller*, for the plaintiff.

Cur. adv. vult.

July 1.—STIRLING, L.J., read the judgment of the court: This is an action the object of which (so far as it is material to state it) is the recovery of damages from the defendants, W. M. Bradley and James Bradley, for breach of two agreements, both dated the 16th of May, 1892.

The defendant W. M. Bradley was at that date the holder of a large number of shares in a company named the Sephinjuri Bheel Tea Co., and by virtue thereof had a controlling interest in the company. The defendant James Bradley, is his brother. The plaintiff carries on business as a tea broker, and at the same date acted as broker for the sale of the company's teas.

In May, 1892, the defendant W. M. Bradley was desirous of obtaining a loan on the security of his shares in the company, and through his brother, the defendant J. Bradley, applied to the plaintiff to make him an advance. After some negotiations the plaintiff advanced to the defendant £2,250, upon the defendants' respectively executing the following documents:

"Thomas Carritt, Esq., 130, Fenchurch-street, E.C.

"Dear Sir,—In consideration of £2,250 this day advanced by you to me—1 I undertake to repay to you the said sum of £2,250 on or before the 30th of June, 1893, together with interest thereon until repayment at the rate of 7 per cent. per annum, payable quarterly on the 30th of June, the 30th of September, the 31st of December, and the 31st of March, the first payment to be made on the 30th of June next. 2. As security for the repayment of the said loan and interest, I herewith hand you (1) my promissory note payable on demand to your nominee or order for said sum of £2,250, with interest at the rate aforesaid, (2) transfer to your nominee of 1,541 fully-paid shares in the Sephinjuri Bheel Tea Co. (Limited), and (3) certificate of said 1,541 shares in my name. 3. In case of default in payment of the principal sum on the date aforesaid or of any interest thereon on any due date, and if any such default shall continue for seven days after such date as aforesaid, you or your nominee shall be entitled at any time thereafter, without giving any notice or taking any preliminary step, either to take over the said shares in satisfaction of the said sum and interest absolutely, or to sell the said shares at such price and in such manner in every respect as you shall see fit, and in the event of there being a deficiency after such sale of the shares I agree to make good the same (without prejudice nevertheless to the obligations on my part herein contained). You or your nominees shall further be entitled in case of any such default as aforesaid to enforce payment of the said promissory note as and when you see fit. 4 I further agree as a shareholder in the Sephinjuri Bheel Tea Co. (Limited) and in every other capacity to use my best endeavours to secure that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker. And in the event of any of the company's teas being sold otherwise than through you or your firm, I personally engage and agree to pay to you or your firm the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm. This engagement on my part is in addition and without prejudice to any previous engagements to you and in particular to the contract dated the 14th of August, 1889, by which I agreed on behalf of the proprietors to give you the sale of all the company's teas."

The rest of the agreement is not material. This document was signed by "Wm. McKenzie Bradley," and dated the 16th of May, 1892. The second document was as follows:

"Thomas Carritt, Esq.

"Dear Sir,—In consideration of your having at my request this day lent to my brother William McKenzie Bradley the sum of £2,250 at interest, I agree to use

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

my best endeavours as a shareholder in the Sephinjuri Bheel Tea Co. (Limited) and in every other capacity that you or any firm of brokers of which you for the time being shall be a partner (as you shall elect) shall always hereafter have the sale of all the company's teas as broker, and in case of any of the company's teas being sold otherwise than through you or your firm I personally engage and agree to pay you the amount of the commission which you or your firm would have earned if the teas had been sold through you or your firm.

"This agreement is in addition and without prejudice to the letter dated the 14th of August, 1889, signed by Mr. W. McKenzie Bradley as attorney for myself and my co-proprietors, in which I agree to give you the sale of the company's teas, which letter I adopt and confirm.

"I also agree to use my best endeavours to secure to you or any firm of brokers of which you shall be a partner for the time being (as you shall elect) the sale at all times hereafter of the entire tea crops of the Jetinga Valley Tea Co. (Limited) or any continuation or amalgamation thereof.—I am, yours truly,

"May 16, 1892." "JAMES BRADLEY.

In 1899 the plaintiff called in the loan; the defendant repaid it, and had the shares in the company transferred into his own name. Immediately afterwards he again transferred them by way of security for a fresh loan. The new transferee took advantage of his position to oust the plaintiff from his position as broker of the company, and thereupon the present action was brought.

The defendants raised three defences: (1) That on the true construction of the documents of the 16th of May, 1892, the operation of the stipulations as to the plaintiff occupying the position of broker was confined to the existence of the security; (2) that, if not, these documents ought to be rectified on the ground of mutual mistake; and (3) that the stipulations just referred to were bad in law as between mortgagor and mortgagee.

At the trial Bigham, J., held that on the construction of the documents the stipulations were not limited to the period during which the security might remain in force. The question of mutual mistake was left to the jury, who gave a verdict for the plaintiff for £750. Bigham, J., held that the stipulations were not bad in law, and gave judgment for the plaintiff accordingly.

From his judgment the defendants appeal, asking that judgment may be entered for them or a new trial ordered. Upon the argument the application for a new trial was practically abandoned, and the questions to be decided are those as to the construction of the documents and the validity of the stipulations.

Upon the former question we agree with Bigham, J. According to the natural meaning of the documents the words "always hereafter" do not mean during the existence of the security, and we are unable to see that there is anything in the context or in the surrounding circumstances which renders it proper for the court so to limit their operation.

The remaining question requires careful consideration. It was laid down in *Jennings* v. *Ward*, 2 Vern. 520, decided in 1705, that "a man shall not have interest for his money and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement." These words have in some modern cases been treated as an accurate statement of the law: see, for example, *James* v. *Kerr*, 37 W. R. 279, 40 Ch. D. 449. It has, however, been held by Romer, J., and by the Court of Appeal in *Biggs* v. *Hoddinott*, 47 W. R. 84, [1898] 2 Ch. 307, that the proposition stated in *Jennings* v. *Ward* is too wide, and that a collateral advantage may be bargained for unless either (1) the mortgagor's right to redeem on payment of principal, interest, and costs is fettered; or (2) the bargain is unconscionable or oppressive. We consider that we are bound by what is so laid down.

It is then to be considered, in the first place, whether the stipulations referred to do fetter the plaintiff's right to redeem. It was contended that any obligation on the part of the mortgagor which does not cease to have effect after redemption must be such a fetter. It was said (and with truth) that in the recent cases of *Biggs* v. *Hoddinott* and *Santley* v. *Wilde*, 48 W. R. 90, [1899] 2 Ch. 474, the stipulations ceased on redemption; but in neither of those cases, nor in any other case, has it been laid down that it is essential for their validity that they shall do so; nor, as it seems to us, could it be so held without departing from the principle on which (as we understand it) the decision in *Biggs* v. *Hoddinott* was based. Lord Lindley, then Master of the Rolls, there remarked that it would be unfortunate for business men if the following proposition were laid down—viz., "That while two people are engaged in a mortgage transaction they cannot enter into any other transaction with each other which can possibly benefit the mortgagee, and that any such transaction must be before or after the mortgage, and be independent of it, so that it cannot be said that the mortgagee got any additional benefit from the mortgage transaction." He subsequently remarked: "Of course we must follow settled authorities, whether we like them or not; but do they support this proposition?" We take this to mean that while existing rules are to be obeyed they are not to be extended.

The cases in which redemption has been hitherto held to be fettered divide themselves into two classes —(1) those in which the mortgagee has stipulated that on redemption he shall receive something beyond principal, interest, and costs, and (2) those in which it is stipulated that the mortgaged property shall upon redemption come back to the mortgagor in a worse condition than it was when mortgaged. Of the former class *Broad* v. *Selfe*, 11 W. R. 1036, may be taken as a modern example; and it is enough to remark that this case has been somewhat narrowed in recent times by such decisions as those in *Potter* v. *Edwards*, 5 W. R. 407, 26 L. J. Ch. 468, and *Mainland* v. *Upjohn*, 37 W. R. 411, 41 Ch. D. 126. As regards the second class the recent case of *Rice* v. *Noakes*, 48 W. R. 629, [1900] 2 Ch. 445, affords a striking illustration of the rule. There the subject-matter of the mortgage was a leasehold public-house, and the mortgagor covenanted so as to charge the premises, into whosesoever possession the same might come, and to the further intent that the obligation of the covenant might run with the land, that the mortgagor would not use or sell or permit to be sold on the premises during the continuance of the term of the lease any malt liquors except those purchased from the mortgagee; and, further, that if and whenever there should be a breach of the foregoing covenant the mortgagor would pay £1,000 as liquidated damages for each such breach. It was held that these covenants in effect converted the public-house from a free into a tied house and were within the doctrine of the court. Rigby, L.J., says: "The property which comes back to the mortgagor must not be worse than it was when it was mortgaged, and the mortgagee must not either expressly or by implication reserve to himself any hold upon the property after the time for redemption has arrived and the right of redemption has been put in force." The present case certainly does not fall within the first class, whatever its extent may be; the mortgagor was entitled to redeem and did redeem without paying anything

beyond principal, interest, and costs. Further, on redemption the property came back to the mortgagor just as it was when it was mortgaged; and the mortgagee did not expressly reserve to himself any hold upon the property after redemption. Neither did he do so in our opinion "by implication," an expression which we consider to have been used by Rigby, L.J., with reference to a class of cases in which the obligation takes the form of a penal sum or liquidated damages by way of penalty on the doing of a particular thing. In such cases courts of equity, when satisfied that the object was to prevent the doing of the particular thing, have granted relief by way of injunction: see, for example, *National Provincial Bank of England* v. *Marshall*, 37 W. R. 183, 40 Ch. D. 112. It is said, however, that the shares after redemption are fettered inasmuch as the stipulations into which the mortgagor has entered will prevent him from dealing so freely with his property as he otherwise would; that he will, upon any proposed dealing with them, as, for example, by way of sale or mortgage, have to take into consideration that the result may be to deprive him of his controlling interest in the company and disable him from securing the position of broker to the plaintiff and thus expose himself to a serious liability. It is quite possible that an indirect effect of this nature may flow from these stipulations; but the same result would have followed if the stipulations had been entered into on the occasion of an advance being made by the plaintiff to the defendant W. M. Bradley on his personal security; and in that case the stipulation would, as it seems to us, have been perfectly valid; indeed, the contrary was hardly contended. There is no decision that such indirect effect of the stipulations brings them within the doctrine of equity under consideration; and so to hold would reduce the operation of the decision in *Biggs* v. *Hoddinott* within very narrow limits. For these reasons we think that the equity of redemption ought not in the present case to be held to be clogged.

It is, lastly, to be considered whether the transaction was oppressive or unconscionable. Now, the persons engaged in it were business men in the City of London, dealing at arms' length. There is no evidence of anything in the shape of undue influence or pressure. We cannot say that the stipulations were of themselves unreasonable; they seem to us eminently of a kind as to which business men in such a position may well be left to decide for themselves. In our judgment the transaction cannot be impeached on this ground. The result is that the appeal fails and ought to be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *William A. Crump & Son.*

Solicitors for the defendants, *Merriman, White, & Thomson*

From K. B. Div. (Collins and Stirling, L.JJ.) } April 23, 25; May 13.

EADY *v.* ELSDON. (*a.*)

Practice—Costs—Taxation—Official solicitor—Guardian ad litem—*Party and party or solicitor and client taxation—Costs of issue that failed—R. S. C., ord.* 65, *r.* 13.

In taxing the costs of a guardian ad litem, *the established practice is to tax the costs as between party and party and not as between solicitor and client, in the absence of a direction to the contrary in the order directing the taxation.*

The costs of a guardian ad litem *ought to be taxed on the footing that he is a successful party. The costs, therefore, even of an issue on which he has failed ought not to be disallowed him.*

This was an appeal from a decision of Grantham, J., directing the master to review his taxation of costs in an action against an infant for whom a guardian *ad litem* had been appointed. The question arose out of an action by a schoolmaster against an infant who had set fire to the school and burnt it down; the plaintiff claimed damages in respect of that tort. The official solicitor was appointed guardian *ad litem*, the action was tried, and after two questions had been put by the judge to the jury damages were awarded to the plaintiff for £450. The two questions put to the jury were these: "(1) Was the boy deranged, and out of his mind when he set fire to the plaintiff's house? (2) Was it part of the bargain on which the plaintiff took the boy that he should be responsible for such an act as this was and undertake the risk of it?"

Both questions were answered in the negative, and the plaintiff was awarded £450 damages.

And then came the question of the costs of the guardian *ad litem*, and an order in respect of that was made in these terms: "It is ordered that the plaintiff do pay the costs of the official solicitor, the guardian *ad litem* of the defendant, and that the question of such costs be referred to one of the masters of the Supreme Court of Judicature to tax same and certify the amount thereof."

The rule with respect to the costs of a guardian *ad litem* is ord. 65, r. 13, which is in these terms: "Where the court or a judge appoints one of the solicitors of the court to be guardian *ad litem* of an infant or person of unsound mind, the court or judge may direct that the costs to be incurred in the performance of the duties of such office shall be borne and paid either by the parties or some one or more of the parties to the cause or matter in which such appointment is made, or out of any fund in court in which such infant or person of unsound mind may be interested, and may give directions for the repayment or allowance of such costs as the justice and circumstances of the case may require."

When the matter came before the master, the official solicitor claimed to be entitled to costs as between solicitor and client. Master Pollock taxed them on what he called the party and party scale and found as to a particular issue—namely, the issue of the boy's lunacy, against the guardian *ad litem*, who was only given costs on the footing that he was really a party and a defeated party.

There was an appeal to the judge on objections taken—first, that the guardian *ad litem*, under that order and under the rule, was entitled to costs as between solicitor and client; secondly, that the master was wrong in giving him costs on the issue on which he had failed only on the footing of a defeated party.

Grantham, J., made an order sending it back to the master "with a view to allowing costs as between solicitor and client" to the guardian *ad litem*.

From this order the plaintiff appealed.

Hon. M. M. Macnaghten, for the plaintiff.

Montague Lush, for the official solicitor.

Macnaghten replied.

Cur. adv. vult.

May 13.—COLLINS, L.J., stated the facts and continued: Mr. Macnaghten contended before us

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

that where the learned judge has made an order without giving any special indication of the scale to be applied in assessing the costs payable to the guardian *ad litem*, the rule of practice is that the standard called party and party costs shall be applied, and not the method of solicitor and clients costs. Dealing with that issue I am of opinion that Mr. Macnaghten is right. We took time to consider this matter in order that we might inquire into the practice of the masters, because in a question of this kind it is exceedingly important that a well-ascertained practice if it exists should be followed. There is nothing more dangerous than interfering with matters of practice. We have had the opportunity of consulting two most experienced masters, one on the Chancery and one on the common law side, and they tell us that the uniform practice is, in the absence of special directions giving solicitor and client costs, to tax the costs of a guardian *ad litem* on the footing of party and party costs; and though, strictly speaking, that principle cannot be logically applied inasmuch as for this purpose the guardian *ad litem* is not a party, in practice what they mean by party and party costs in this relation is that the costs payable by the plaintiff to the guardian *ad litem* are such costs as the guardian *ad litem*, assuming he were a successful party in a litigation with the plaintiff, would be entitled to on taxation against the plaintiff. That decides the appeal on the first point.

But then comes the second point as to the costs of the issue on which the guardian *ad litem* has failed. The master has treated him as a real party who has failed, and he has assessed the costs on that footing. That would probably be right on a true party and party taxation but it is wrong on the hypothesis by which the costs of the guardian *ad litem* are ascertained. He has to be treated as a successful party. That is the standard as far as we can understand it, and it is the standard applied both in Chancery and common law. Now, that being so, the appeal succeeds as to part and fails as to part, but I agree that the appeal should be allowed without costs, and I think the same result ought to follow in respect of the hearing below, so that the appeal will be allowed without costs.

STIRLING, L.J.—In this case two points are raised—first, that the costs ought to be allowed as between solicitor and client; and second, that the costs of the issue on which the defendant failed, which have been disallowed by the taxing-master, ought to be allowed.

Now, as regards the first question, as to whether the costs are to be taxed as between solicitor and client. I think, having regard to the uniform practice which has existed in the Chancery Division apparently ever since the year 1842, when the first rule of the kind was introduced, adopted under the consolidated order of the old Court of Chancery and adopted by the rules made in pursuance of the Judicature Act, I think that costs can only be allowed as between party and party in the absence of a direction to the contrary. This is in accordance with the universal rule as to the construction of orders as to taxation, and if the official solicitor considers there are circumstances which entitle him to solicitor and client costs they ought to be called by him to the attention of the judge when he is invited to deal with the costs under the rule, and an order made in terms authorizing the taxing-master to deal with them as between solicitor and client.

As regards the other point, the disallowance of the costs of the issue on which he failed, the master assigns two reasons. First, that the issue was found against the defendant, and even if it had been found in his favour it would have been immaterial. Both issues were found against the defendant, and if that rule were applied strictly the guardian *ad litem* would recover no costs at all under this order. Therefore I cannot agree with the master as to that.

And then, as regards the other point, that even if it had been found in his favour it would not be material. It is to be borne in mind that the learned judge gave the issue to the jury. That implies, to my mind, clearly an opinion on the part of the learned judge that if the issue had been found the other way—that is to say, found in favour of the defendant, there would have been something to discuss, and therefore he must have been of opinion that the issue was one which if found the other way was not entirely irrelevant. Now, having that before him and in his mind, the learned judge directs the costs of the official solicitor to be paid by the plaintiff. I cannot see that the master has any right to deprive him of the costs of either issue on which he fails. And I say that, fully remembering the power which is conferred on the taxing-master by ord. 65, r. 27, sub-rule 20. I do not think that the disallowance of these costs is brought within that rule. I think, therefore, that on this point the appeal fails.

Solicitors, *A. W. Mills; The Official Solicitor.*

High Court of Justice.

Chan. Div.
Cozens-Hardy, J. } April 24.

TAYLOR v. PONCIA. (*a.*)

Practice—Payment out—Estate duty—Fund in court—Tenant for life—Finance Act, 1900 (62 & 63 *Vict. c.* 7), *s.* 11.

When payment out of court is authorized of funds in which one of the petitioners had a life interest now released, the practice of the court is to retain a sufficient sum of money to satisfy the amount of estate duty payable in the event of the death of the tenant for life within twelve months of the date of the release.

A testator, Robert Fletcher, died on the 6th of September, 1867, having by his will, dated the 12th of May, 1864, given and bequeathed to John Poncia, William Taylor, and Eliza Fletcher (*inter alia*) two sums of money upon trust for Maria Louisa Maher.

The testator's estate was distributed, and the amount accruing to M. L. Maher and her children, in pursuance of orders made in the action, was carried over to the credit of an account entitled "The account of Maria Louisa Maher, widow, and her children."

They now petitioned the court that a portion of the said sums should be paid out of court.

Under the testator's will Maria Louisa Maher only received a life interest in the share of the property bequeathed to her, but she had a power of appointment to her children.

In 1896 she released all the trust funds and property held upon or subject to the trusts of the said will from the powers of appointment to the intent that the said powers might be absolutely extinguished except so far as they had already been exercised.

The question was now raised whether the fund could be properly paid out without providing for the duty payable in case the tenant for life died within twelve months of the date of the release.

Methold, for the petitioners.

Galbraith, for other parties.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

COZENS-HARDY, J., made an order for the payment out of the sum according to the prayer of the petitioners, but subject to the payment of the duty. If the duty was not paid or an arrangement made with the Revenue authorities a sufficient sum was to be left in court to provide for the payment, and for the expenses of obtaining payment out of court.

Solicitors for all parties, *Emmet & Co.*, for *Banks, Kendall, & Taylor*, Liverpool.

Chan. Div. }
Cozens-Hardy, J. } April 17.

In re WHITHAM.
WHITHAM *v.* DAVIES. (*a.*)

Vendor and purchaser—Requisitions of title—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 70—*Sale by order of court—Conditions of sale—Abstract of title.*

By order of the court certain landed property was put up for sale. In the contract for its sale a clause was inserted that "all facts or matters appearing to be proved or to be certified by a chief clerk or master attached to the chambers of the said judge, or to be stated or implied in any judgment or order in the action in which this sale is made, are to be deemed thereby sufficiently and conclusively evidenced." The master certified that the property to be sold formed part of the estate of one Joseph Whitham, deceased, from whom the title was derived.

Held, that, having regard to section 70 *of the Conveyancing Act*, 1881, *and to the terms of the contract, a good title had been shown.*

This was a summons on behalf of Mary Eleanor Robinson, of Holmfield, Aigburth, for a declaration that requisitions made by her on the title of the Holmfield estate, of which she was the purchaser, had not been sufficiently answered, and that a good title had not been shown to the said premises.

It appeared that Joseph Whitham, who died in February, 1866, by his will dated the 13th of December, 1865, gave and bequeathed his real and personal estate (which included the property now in question) to trustees upon trust for his children, one only of whom, Joe Whitham, was now alive.

Since the death of the testator Joseph Whitham numerous transactions touching the title to the property had taken place, culminating in an action brought by Joe Whitham against the trustees of the estate. By an order made in this action and dated the 1st of July, 1899, it was among other things ordered that the hereditaments and property comprised in the 1st schedule to the master's certificate, dated the 27th of June, 1899 (in which the above-mentioned property was included), be sold with the approbation of the judge freed from incumbrances of such of the incumbrancers as should consent to the sale and subject to the incumbrances of such of them as should not consent, and it was ordered that the proceeds of such sale be paid into court.

The property was subsequently sold by private treaty to the applicant M. E. Robinson and an agreement for sale dated the 15th of December, 1900, was entered into. An abstract of title was delivered to the purchaser under the said agreement, but it did not contain an abstract of certain deeds which the purchaser contended she was entitled to have abstracted.

The vendors declined to comply with the requisitions made by the purchaser and contended that they were under no obligation to do so.

W. H. Cochran, for the purchaser, said the order alone was not a sufficient title.

Peterson, for the vendors, referred to section 70 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and to the case of *In re Hall Dare's Contract*, 30 W. R. 556, 21 Ch. D. 41.

COZENS-HARDY, J.—The purchase was made under a contract clause 6 of which is "All facts or matters appearing to be proved or to be certified by a chief clerk or master attached to the chambers of the said judge, or to be stated or implied in any judgment or order in the action in which this sale is made, are to be deemed thereby sufficiently and conclusively evidenced." It has been certified here by the master that the property in question formed part of the estate of Joseph Whitham. There is an order for the sale of this estate. It is admitted, and could not really be disputed, having regard to section 70 of the Act, that that order for sale binds all beneficiaries of every kind. It is not disputed that the purchaser will get the legal estate. She gets the legal estate from the mortgagees who concur in the sale.

But it is argued that the purchaser is entitled to an abstract showing the will of Joseph Whitham, and the appointments of the trustees prior to the year 1885, by which the property was conveyed to Joe Whitham, in order to show that they were duly appointed trustees of the will. However, the purchaser of the legal estate gets the whole of the beneficial interest. She gets every deed relating to the land in question. It is not as though the trustees of the will were selling out of court and had to make a title in their character of trustees of the will. It does not matter in the least whether these trustees were well or badly appointed, they had the legal estate. Even if they had not the legal estate the equitable interest would be bound by the deed, for the estate is not under the trustees, but under the will, affected by the order of the court. The purchaser has all she is entitled to; an abstract of title beginning in August, 1868, as stipulated by the contract, and including every deed affecting or dealing with this property. I think that I must therefore make no order on the summons except that the purchaser do pay the costs.

Solicitors for the purchaser, *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool.

Solicitors for the vendors, *Blair & W. B. Girling*.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Chan. Div. }
Farwell, J. } June 6, 12.

GREENHALGH *v.* BRINDLEY. (*a.*)

Vendor and purchaser—Easement—Light and air—Non-disclosure of deed of acknowledgment—Specific performance – Compensation — Costs — Prescription Act, 1832 (2 & 3 *Will.* 4, c. 71), *s.* 3.

A contract for the sale of a house with windows looking over land of a third person does not imply any representation or warranty that such windows have any right to access of light over such land.

The vendor of new houses having windows which overlooked a recreation ground vested in a town corporation, had, before his open contract with the purchaser, entered into a deed of covenant with the corporation that the owner of the houses should pay one shilling yearly as an acknowledgment that no easement of light or air over the

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

recreation ground attached to the houses. This deed was not disclosed to the purchaser before the contract.

Held, that the vendor was entitled to enforce specific performance of the contract and without making compensation, but the court declined to order the purchaser to pay the vendor's costs of the action.

Witness action.

On the 4th of October, 1900, the plaintiff, C. Greenhalgh, who was the owner in fee of twelve houses in Florence-street, Stockport, entered into a written contract with the defendant, Miss Brindley, for the purchase by her of that property.

The contract was an open one, and in the course of the negotiations that led up to it the plaintiff wrote to the defendant on the 27th of August stating that the houses were four years old, and in September the defendant visited and saw the houses for herself.

The property abutted on Florence-street, which was 18ft. wide, and had windows looking over the street on to public recreation grounds on the other side.

These recreation grounds were vested in the mayor and corporation of Stockport under a conveyance from Lord Egerton of Tatton and his trustees, dated in 1873, and were subject to covenants which prevented the erection of buildings thereon and their user for any purpose other than recreation grounds without the consent of the grantors.

Nothing was said either in the negotiations or in the contract with reference to the access of light to the windows.

But the defendant ascertained after the contract that the plaintiff had entered into a deed of covenant with the corporation, dated the 10th of February, 1900, and she relied on this as a ground for declining to perform the contract.

This deed was as follows: "This indenture, made between the corporation of Stockport of the first part, William Walmsley, the mortgagee of the houses, of the second part, and the plaintiff (hereinafter called the owner, which term shall include the owner for the time being of the houses) of the third part, witnesses that the owner covenants with the corporation that the owner will pay to the corporation the yearly sum of 1s. on the 25th of March in each year, the first payment to be made on the 25th of March, 1897, and the owner and the mortgagee declare each of such payments to be a fresh acknowledgment that the owner has not been nor is he entitled as of right to the uninterrupted flow of light or air to any windows or lights in the southerly walls of the said houses over or from the recreation ground. And it is hereby declared that in case of the non-payment of the said sum of 1s. in any year or in any number of years the fact of any such non-payment or non-payments for any year or any number of years shall not be taken as an abandonment of the rights of the corporation to obstruct on their own land the admission of light or air to the said lights or windows, but these presents so far as is hereinbefore contained shall remain in full force notwithstanding such non-payment."

The defendant having declined to perform the contract without compensation, the plaintiff commenced this action for specific performance.

W. H. Upjohn, K.C. (*T. T. Methold* with him).—The plaintiff, in executing the deed of covenant, could not charge the land so as to bind a purchaser with the payment of the shilling. There is no period of years fixed for the payment or conveyance to uses, but only a kind of tenancy at will. As soon as the defendant renounces the agreement the twenty years will begin to run. It is not a question of defective title; we have contracted simply to sell the houses, and the defendant now claims a right to a future easement. It is not a burden or consent affecting the land, the only object of the covenant being to protect the ground of the corporation. An access for a few years gives no easement: *Bonner* v. *Great Western Railway Co.*, 32 W. R. 190, 24 Ch. D. 1. It is not a case for compensation, even if it could be assessed.

C. E. E. Jenkins, K.C. (*F. Russell* with him), for the defendant.—I do not say there was a warranty of any easement or light, and I agree that I could not be sued for the shilling. But I say that there was a negative representation of freedom from incumbrances, and that I was entitled to think I should get free light in sixteen years and am entitled to the property unhampered by conditions which prevent my acquiring an easement. On the sale of freehold property a purchaser is entitled to the property with all ordinary easements and rights (*Bewley* v. *Atkinson*, 28 W. R. 638, 13 Ch. D. 283), and the potentiality of acquiring an easement is an ordinary right of property. I am entitled to compensation if I am to be forced to complete. [FARWELL, J.—But there is no tangible legal entity cut off for which you can have compensation. There is only the potentiality of acquiring an easement.] Then my remedy is rescission.

W. H. Upjohn, K.C., in reply.—It is not a part of the bargain for the sale of a house that a purchaser should get a potentiality.

Cur. adv. vult.

FARWELL, J. (after stating the facts as above), said: In this case both parties knew that the houses were new, and it is not, nor, in my opinion, could it have been, contended that a contract for the sale of a house with windows looking over land of a third person implies any representation or warranty that such windows have any right to access of light over such land. As to the contract with the corporation, no purchaser would be bound by the covenant to pay therein contained; but as against a purchaser with notice the deed would have the effect of a consent in writing within section 3 of the Prescription Act granted by the corporation and accepted by the purchaser, and continuing until determined by notice of repudiation. In this respect the arrangement bears some resemblance to that which formed the subject of the decision in *Bewley* v. *Atkinson*. Notwithstanding Mr. Jenkins's argument, I have no doubt that the arrangement created by the deed can be put an end to by a subsequent purchaser. The very nature of the transaction shows this, for the object is to prevent time from running under the Prescription Act against the corporation, and notice of repudiation gives them twenty years in which to assert their rights by blocking the windows. Further, on the construction of the deed, the person to make the payments is the owner for the time being; but the covenant cannot bind him to make any such payment, and the proviso that follows and that does bind him merely negatives the presumption of abandonment of right by omission to receive, and does not extend to the presumption or inference arising from a positive refusal to pay and acquiescence in such refusal. The effect of the deed, therefore, as against the purchaser is merely to postpone the commencement of the statutory period until he has given notice of repudiation; and this he can do as soon as he has completed his purchase. It is argued that the purchaser is prejudiced by this in two ways: (1) By losing four years of the statutory period; and (2) by being compelled to give notice of repudiation, with the consequent probability of exciting the corporation to block the lights at once. But, as I have already said, a contract for the sale of a house with windows looking over the land of a third

person implies no representation or warranty that the windows are entitled to the access of light over such land. If such access has in fact been enjoyed for the statutory period, then the property has the easement of light; but an access for ten years creates nothing at all (*Bonner* v. *Great Western Railway Co.*), and what counsel called the potentiality of the acquisition of the easement within less than twenty years is not an interest in land or easement known to the law. It is a mere question of the doctrine of chances; and assuming that the owner of the adjoining land is alive to his own interest, the chances are far greater that he will block up lights in the second than in the first half of the period. There is no such period of twenty years to the lapse of a portion of which the purchaser is entitled, as the defendant's argument assumes. There is either an easement of light or there is not. If there is not, there is no intermediate stage which has any legal existence; and the vendor does not fail to possess the fee simple of a house free from incumbrances, because he has not got the easement of light over the adjoining property nor because the time necessary for acquiring that easement has not commenced to run. I find, therefore, no ground on which I can refuse to grant specific performance or on which I can give the defendant compensation. Compensation is given in respect of the difference between the expressed subject-matter of the contract and the property offered by the vendor as answering that description, and in this case there is none. But although I must make the usual decree for specific performance, I make no order as to costs, for this reason. A vendor knows and a purchaser does not know the incumbrances of the property before the contract. In this case the vendor has chosen to enter into a contract with the corporation which renders his position different from the normal position of the vendor of a house, and he appeals to this court for its equitable remedy of specific performance. I think he ought to have informed the defendant before the contract of his covenant with the corporation and left her to judge for herself whether it was or was not advantageous to the property; and in refusing to make the defendant pay costs I am only following the example of Romer, L.J., in *In re Summerson*, [1900] 1 Ch. 112*n.*, which I have already followed in *Hepworth* v. *Pickles*, 48 W. R. 184, [1900] 1 Ch. 108.

Solicitors, *Rowcliffe, Rawle, & Co.*, for *Russell, Coppock, & Helm*, Stockport; *Robinson & Bradley*, for *Joseph Grundy*, Stockport.

Chan. Div.
Farwell, J.

Feb. 26.

In re BIRD.
In re EVANS.
DODD v. EVANS. (*a.*)

Settlement—Tenant for life and remainderman—Apportionment—Unauthorized investment—Breach of trust—Loss.

Where a trustee, in breach of trust and without the knowledge of the tenant for life or remainderman, sells out an authorized investment and invests the proceeds in an unauthorized investment, resulting in a loss of some capital and income, the tenant for life is entitled to such a proportion of the amount realized by the unauthorized investment plus the income he received therefrom during its continuance, as the dividends he would have received from the authorized investment in the same period bear to the capital value of the authorized investment plus those dividends, the tenant for life being liable to bring into account all income received by him from the unauthorized investment, although not liable to refund any portion of this income.

Further consideration of an administration action.

On the 16th of March, 1885, John C. Evans, the trustee of certain funds settled by the will of T. Bird, hereinafter called the testator, invested, without the knowledge of the tenant for life or remaindermen and in breach of trust, the sum of £10,000, being the proceeds of sale of £10,021 Consols, part of the settled funds, at 4 per cent. on an equitable mortgage of real property belonging to himself, and known as the Merton Grange and Paine's estates, Cambridgeshire, the interest on which was regularly paid by the trustee or his executor up to the 10th of March, 1894, when it fell into arrear. The trustee died on the 1st of June, 1893, and on the 19th of December, 1894, the plaintiffs, who were some of the remaindermen, having discovered the breach of trust, commenced this action against the trustee's executor and others to administer the estates of the testator and the trustee.

On the 18th of May, 1895, North, J., pronounced judgment, declaring that the investment of the £10,000 was a breach of trust, and that the trustee's executor was liable out of the assets of the trustee to pay that amount to the trustees of the testator's will when appointed with interest at 4 per cent. per annum from the date of the investment until payment, and that until payment that amount and interest should stand charged upon the Merton Grange and Paine's estates, and ordering (*inter alia*) administration of the real and personal estate of the trustee.

New trustees of the testator's will were subsequently appointed and added as defendants. A receiver of the rents of the mortgaged estates was appointed, and these estates were gradually sold during the years 1895 to 1897, the proceeds being paid into court and invested in New Consols, and various payments being made to the tenant for life out of the rents and dividends until her death on the 25th of February, 1900.

By the master's general certificate of the 25th of January, 1901, which incorporated the results of previous certificates, it was certified that the tenant for life had received from the trustees or his executor £3,400 on account of the income of the investment in seventeen half-yearly payments of £200, beginning the 6th of February, 1886, and ending the 16th of March, 1894; and that since that date she had received from the trustee's executor, or the receiver in the action, or under orders of the court, a further sum of £666, making a total of £4,066 paid to her on the account aforesaid up to her death.

It was also certified that the net proceeds of sale of the mortgaged estates were represented by a sum of £6,629 New Consols and £173 cash in court to the credit of the action, "proceeds of sale of John Carbery Evans' real estate known as Merton Grange and Paine's estates," and by a sum of £39 which had been raised by a sale of £35 New Consols for repairs of other estates, and was now to be repaid to this account.

The trustee's estate being of no appreciable value, one of the questions on the further consideration was how the fund in court ought to be divided as between the estate of the tenant for life and the remaindermen so as to apportion the loss fairly between them.

J. G. Butcher, K.C. (*Metcalfe* with him), for the plaintiffs.—The actual aggregate amount of income

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

and capital produced by investment, after deducting accretions since the death of the tenant for life belonging to the remaindermen, must be divided as between tenant for life and remaindermen in the proportion borne by the total interest which the tenant for life would have received on £10,021 Consols from the date of the wrongful investment to her death, to the value of £10,021 Consols at that date, and the executor of the tenant for life must give credit for the whole amount of the £4,066 received on account of income: *In re Foster, Lloyd* v. *Carr*, 39 W. R. 31, 45 Ch. D. 629; *In re Hobson, Walker* v. *Appach*, 34 W. R. 70; *In re Baker*, W. N. (1897) 154.

W. H. Upjohn, K.C. (*Martelli* with him), for the representative of the tenant for life.—The account must only be taken from the 10th of March, 1894, when the interest first fell into arrear, and the fund in court should be divided in the proportion borne by the arrears of interest at the tenant for life's death to the value of £10,021 Consols at that date: *In re Moore, Moore* v. *Johnson*, 33 W. R. 447; *Lyon* v. *Mitchell*, W. N. (1899), 27. The tenant for life was not responsible for the breach of trust, but we are willing to calculate the arrears on the present interest on Consols. The principle laid down in *In re Foster*, which is confined to the case of a mortgagee in possession, was not followed in *Lyon* v. *Mitchell*, but if it is to be applied here, the account should only be taken from the 10th of March, 1894. *Bate* v. *Hooper*, 3 W. R. 639, 5 De G. M. & G. 338, shows that the plaintiffs are not entitled to make the estate of the tenant for life recoup income paid in respect of an unauthorized investment of which she knew nothing.

FARWELL, J.—The question I have to answer is, how the loss caused by the breach of trust is to be borne. The authorities are in a perplexing condition, and I am unable to reconcile the decision of Pearson, J., in *In re Moore*, with that of Kay, J., in *In re Foster*. The present case is distinguishable from both those authorities as in neither of them was the loss caused by a breach of trust. I think the true principle is that stated by James, V.C., in *Cox* v. *Cox*, 17 W. R. 790, L. R. 8 Eq. 343: "The true principle in all these cases is that neither the tenant for life nor the remaindermen is to gain an advantage over the other—neither is to suffer more damage in proportion to his estate and interest than the other suffers—from the default of the obligor. The two must share the loss in the same way as they would have shared it had it occurred when they first became entitled in possession to the fund."

Applying this principle, I have first to ascertain what the fund for division ought to be, on the assumption that the sale and wrongful investment never took place. In that case there would have been £10,021 Consols for division, and the tenant for life would have received the interest on those Consols down to her death. As a matter of fact she received altogether the sum of £4,066 in respect of the wrongful investment. She was in no way responsible for, or indeed cognizant of, the breach of trust, and I could not order her executor to refund any portion of this income. But I am dealing with a case of adjustment of a loss as between tenant for life and remaindermen, and so long as any funds are available for that purpose I must so apportion them as to throw the loss on income and capital rateably. The proper method of doing this is to ascertain the total amount of the dividends on £10,021 Consols that the tenant for life would have received if the sale and wrongful investment had not been made, and also to ascertain the value of £10,021 Consols at her death, the proper time for distributing the fund. This will show the amount that ought to have been available for income and capital respectively. On the other hand, the fund in court, plus the £4,066 income actually received, minus accretions since the death of the tenant for life, which accretions belong to the remaindermen, gives the aggregate amount actually produced by the wrongful investment up to the death of the tenant for life.

In order to throw the loss on income and capital rateably, this aggregate must be divided between the estate of the tenant for life and the remaindermen according to the rule in *In re Foster*—*i.e.*, in the proportion which the total amount of dividends that the tenant for life would have received on the £10,021 Consols from the date of the wrongful investment to her death bears to the value of £10,021 Consols at her death, her executor giving credit for the £4,066 actually received, but not being liable to refund any overpayment for the reason above stated.

Whether this is the proper mode of apportionment in a case where the loss has not arisen from a breach of trust is not for me to determine. There was a breach of trust in the present case, and I must restore the *status quo ante* as far as the funds available will permit.

Solicitors, *Gasquet & Metcalfe; Pollock & Co.; J. E. Mason.*

K. B. Div.
(Kennedy and Phillimore, JJ.) } May 7, 8.

In re TOWNSEND. (*a.*)

Inland revenue—Estate duty—Trust property—Income to children subject to annuity to widow—Division on widow's death — Testator died before 1894 — *Time when property passed—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 10.

A testator, who died in 1892, *by his will gave his real and personal estate to trustees on trust to invest, and out of the income of the invested fund to pay an annuity to his wife and to pay the residue of the income of the said trust fund during his widow's life to his eight children; and after his widow's death, if the trust fund exceeded* £9,600, *to pay eight-ninths of such excess to his eight children in equal shares and the remaining one-ninth of such excess to the children of a ninth child who had predeceased him. The testator's widow died in* 1900.

Held, that the testator's estate (*save one-ninth of the excess above* £9,600), *subject to the widow's annuity, passed to his children upon his death, and that estate duty was consequently not payable on the death of the testator's widow.*

Petition of Charles Benjamin Townsend and Joseph Fielding Johnson.

Thomas Townsend, of Attleborough Hall, Attleborough, in the county of Warwick, cycle manufacturer, deceased, by his will bequeathed certain real and personal estate to trustees upon trust for sale and investment and out of the income thereof to pay an annuity to his widow, and subject to such annuity to pay the income in equal shares to his eight children. After his widow's decease, the trust fund, if the same exceeded £9,600 then, was as to eight-ninths of such excess, given to the children in equal shares; and if the fund exceeded £9,600, the remaining ninth part was given to the children of his deceased son Isaac Thomas Townsend equally between them.

Thomas Townsend died on the 10th of January, 1892, and probate, estate, and succession duty was paid in respect of his real and personal estate.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Sarah Townsend, the widow, died on the 29th of May, 1900.

The Commissioners of Inland Revenue now claimed that upon the death of the said Sarah Townsend the entirety of the trust estate of the testator passed to his children within the meaning of the Finance Act, 1894, and that estate duty became and was payable upon the real estate, subject to an appropriate allowance in respect of the succession duty that had been already paid.

The petitioners contended that upon the true construction of the will all the trust estate of the testator (save one-ninth part of the excess thereof over £9,600), subject to the widow's annuity, passed to his children upon his death, and not upon the death of the said Sarah Townsend, and that the only property that upon the death of his widow passed under the will of the testator was the said one-ninth share of the excess of the trust fund of the testator over £9,600, and the benefit which accrued to the eight children of the testator by the cesser of the annuity by the will given to the testator's widow.

Montague Lush, for the petitioners.—The testator died in 1892, and the Crown then considered that this property as to eight-ninths then passed, and they claimed and obtained succession duty thereon. [He referred to *Salmon* v. *Green*, 18 L. J. Ch. 166.] The Crown cannot now say that the same property did not pass until the death of the testator's widow.

Sir R. B. Finlay, A.G., and *Vaughan Hawkins*, for the Crown.—Until the death of the widow the beneficiaries could not have come to the court and asked that enough might be set aside to pay the annuity, and that the residue should be paid over to them in their proper proportions. The property therefore cannot be deemed to have passed until after the death of the testator's widow: *In re Greenwood*, 17 W. R. 861, L. R. 4 Ex. 327; *Earl Cowley* v. *Commissioners of Inland Revenue*, 47 W. R. 525, [1899] A. C. 198.

KENNEDY, J.—In this case my judgment must be for the petitioners. Their contention is that the trust estate (except as to one-ninth part of the residue and the amount required to satisfy the annuity) passed on the death of the testator. If it did, the claim of the taxing authorities is bad. The petitioners are willing to pay in respect of the benefit they get by the cesser of the annuity. My difficulty is that I cannot understand how the Crown hopes to maintain its contention. As to the £9,600 the children took a definite share each on his father's death. The only uncertainty is as to the amount of residue beyond the £9,600.

PHILLIMORE, J.—I also think that the petitioners should succeed, and I am not a little astonished that the law officers should have supported this claim made by the taxing authorities. The testator gave eight legacies of £9,600 in all, and then the residue of his estate in ninths. The peculiarity of the will is that the testator does not give the legatee of one-ninth's share any share of income during the life of his widow. It seems to be obvious that as regards the legacies of £9,600 and eight-ninths of the residue the property passed on the death of the testator. The contention of the Crown would indeed lead to serious consequences against the Crown in other cases, and we must save the Crown from itself.

Judgment for the petitioners.

Solicitors for the petitioners, *Crowders, Vizard, & Oldham*, for *Browetts*, Coventry.

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

K. B. Div. (Darling and Channell, JJ.) — March 12.

BLAND (*Petitioner*) v. BUCHANAN (*Respondent*). (a.)

Election law—Municipal election—Election of mayor—Vote of councillor subsequently disqualified—Validity of such vote — Vote of chairman — Casting vote—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 10, 15 (3), 42, 61 (4), 102.

At a municipal election N., a councillor, voted, whose election as a councillor was then about to be challenged on the ground that he had an interest in a contract with the council.

T., the retiring mayor and chairman of the meeting, who had himself voted, said if N.'s vote was disallowed there would be an equal number of votes for each of the two candidates for the position of mayor, and he should therefore give a provisional casting vote for the respondent.

On the hearing of the petition N. was held disqualified from acting as a member of the town council, and the question was then raised for the decision of the High Court, (1) *whether, on the authority of* Nell v. Longbottom, [1894] 1 *Q. B.* 767, *his vote given for the election of the mayor was valid;* (2) *whether the chairman at a meeting of the council for electing a mayor may give a casting vote to take effect in case the votes turn out to be equal, owing to one of the votes being disallowed.*

Held, (1) *that as N. had been found to be disqualified to act as a councillor, his vote was bad and ought to be disallowed;* (2) *that under the Municipal Corporations Act T., the outgoing mayor, would have been entitled to give an original vote, and that there was nothing in the Provisional Order of* 1900 *to take away that right;* (3) *that T. had a right, under the circumstances, to give a casting vote, as the number of lawful* (i.e., *valid*) *votes—N.'s not being a lawful vote—were equal, and therefore both the original and casting vote of T. were good and the respondent entitled to claim the seat.*

Arguments on questions of law reserved by Mr. H. R. Mansel Jones, a commissioner, to whom was assigned the trial of an election petition under the Municipal Corporations Act, 1882, against the return of the respondent to the office of mayor for the city of Gloucester.

There were originally three petitions presented. The first petition alleged that the election of W. J. Newth, as a councillor, was null and void on the ground that he was interested in a contract with the corporation at the time of his nomination.

The two other petitions were against the election of the mayor, the present respondent, Albert Buchanan, and ten aldermen on the ground that their election was due to the vote of Newth, who was disqualified from voting.

The commissioner who heard the petitions held that Newth had an interest in a contract with the corporation at the time of his nomination, and was therefore disqualified from being elected. He further held that the election of the mayor and aldermen was also void, on the ground that it was carried by the vote of Newth.

Against this decision Newth, the mayor, and the ten aldermen appealed, and the court, after hearing argument, dismissed the appeal in the case of Newth, holding that he was interested in a contract with the corporation, and therefore his election was void: see *ante*, p. 345.

The appeal of the mayor now came on for argu-

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

ment, the question of law being raised in the following form: The commissioner stated that the petition was heard by him on the 30th and 31st of January, 1901, at Gloucester. The election was held on the 9th of November, 1900, when the respondent was declared elected mayor. The petition prayed that it might be declared that the said Albert Buchanan was not duly elected, and that his election was null and void, and that the petitioner, Samuel Bland, was duly elected, and ought to have been declared elected; that W. J. Newth purported to vote at the election for the respondent, and his vote was counted as a good vote. That Frank Treasure, who had been elected mayor at the last election (9th of November, 1899) presided as chairman and purported to vote for the respondent in the first instance and counted the vote so given as a vote for the respondent. Sixteen votes, including those of Newth and Treasure and the respondent, purported to have been given for the respondent, and fifteen were given for the petitioner, and Treasure (the outgoing mayor and chairman)—the voting being then sixteen to fifteen—thinking that Newth's vote might be impeached (as in fact it was), gave a casting vote for the respondent.

By the Local Government Board's Provisional Order Confirmation Act, 1900 (63 & 64 Vict. c. clxxxiii), the area of the city of Gloucester was extended.

By article 9 it is provided that for the purposes of an election of a town council for the city the following provisions shall apply: (*a*) The town clerk and the mayor of the existing city, or such persons as the Local Government Board shall appoint, shall perform the duties devolving upon the town clerk and mayor respectively under the Municipal Acts and the mayor of the existing city or such other person as he shall appoint shall be the returning officer at the election of each ward; (*b*) thirty councillors of the city shall be elected on the 1st of November, 1900, and ten aldermen of the city shall be elected on the 9th of November, 1900; (*c*) notwithstanding anything in the Municipal Corporations Acts to the contrary, all the councillors of the existing city who shall be in office on the 1st of November, 1900, shall go out of office on that date, and all the aldermen of the existing city who shall be in office on the 8th of November, 1900, shall go out of office on that date, and all such councillors and aldermen shall be eligible for election as councillors on the 1st of November, 1900. Mr. Treasure, who had been a councillor up to the 1st of November, did not avail himself of that provision, and was not re-elected among the thirty councillors who were elected on the 1st of November.

At the conclusion of the trial, after hearing argument, I determined, subject to the opinion of the High Court of Justice on the question of law hereinafter submitted, that Mr. Treasure was entitled to vote as mayor in the first instance, but that the second so-called casting vote which he gave was bad, but I postponed granting a certificate until the questions which I now submit for the consideration of the High Court have been determined by them.

The questions are: (1) Was Mr. Treasure as mayor entitled to vote in the first instance? (2) Was he, under the circumstances above stated, entitled to give a casting vote?

If the court answers both the above questions in the affirmative, my certificate will be that the respondent was duly elected, and the petition dismissed.

If the court answers the first of the above questions in the affirmative, and the second in the negative, my certificate will be that the respondent was duly elected, and the petition will be dismissed.

If the court answers both questions in the negative, then my certificate will be that the respondent was not duly elected, and that his election was void, and the petition is to be allowed.

If the court answers the first of the above questions in the negative, and the second in the affirmative, my certificate will be that the respondent was duly elected, and the petition is to be dismissed.

The document was signed H. R. Mansel Jones, and dated the 6th of February, 1901.

It was agreed by the parties at the hearing of the petition that the following question should be taken as included among the questions reserved by the commissioner: (3) "Whether Newth's votes upon the election of the mayor was good notwithstanding that he had a contract at the time in respect of which his election had been declared void."

The following sections of the Municipal Corporations Act, 1882, are material:

Section 42 (i.): "The acts and proceedings of a person in possession of a corporate office, and acting therein shall, notwithstanding his disqualification, be as valid and effectual as if he had been qualified."

Section 102: "Where a candidate who has been elected to a corporate office is by a certificate of an Election Court, or a decision of the High Court, declared not to have been duly elected, acts done by him in execution of the office before the time when the certificate or decision is certified to the town clerk shall not be invalidated by reason of that declaration."

H. Terrell, K.C. (*Lewis Coward* and *Daldy* with him).—We say that Newth's vote was valid although his election was subsequently declared void. That is the effect of sections 42 and 102 of the Municipal Corporations Act, 1882, for the effect of those sections is to make Newth's act in respect of his municipal office valid. *Nell* v. *Longbottom*, 38 SOLICITORS' JOURNAL, 309, [1894] 1 Q. B. 767, was wrongly decided, and that is the only authority contrary to our contention that Newth's vote was good.

Asquith, K.C. (*Ruegg, K.C.*, and *S. H. Day* with him).—We say that *Nell* v. *Longbottom* absolutely concludes the matter. Whether it was rightly or wrongly decided, it has been followed as good law and never before questioned.

THE COURT intimated they thought Newth's vote was bad.

Asquith, K.C., then submitted that the original and casting vote of the mayor was bad. The provisions of the Act of 1882 could not be applied when a new city was called into existence, as had been the case with Gloucester. The mayor only continued in office for the specific purposes mentioned in the provisional order. Section 61 (4) showed his casting vote was bad. There was no such thing as a right to give a prospective or contingent future vote. It was not for the chairman to go into the question of a voter's qualification, and to say in effect that if a particular vote was successfully challenged then he would give a casting vote.

Terrell, in reply.—One of the duties of a mayor specified in article 9 is to vote. As to the casting vote, equality of votes must mean equality of valid votes. [He referred to sections 42 (i.) and 102.] If the mayor was unseated, and no new mayor elected, the result would be that the ten aldermen would be seated before the mayor was elected, yet the Act provided that they could not elect aldermen before the mayor. Who, then, was to elect in that case the mayor, for the Act only authorized the outgoing aldermen to elect the mayor, and the aldermen had ceased to exist. [DARLING, J.—Suppose a mayor was elected and then the election of aldermen was proceeded with, and the proper number returned, and

it was then discovered that the election of the mayor for some reason or other was void. Do you say the election of the aldermen would be void?] I should say so, because you have elected your aldermen before your mayor. [DARLING, J.—Suppose the mayor died?] If the mayor died that would be another matter, but in this case the mayor has been declared not elected *ab initio*. The order of things cannot be reversed. The Act gives directions that the mayor is to be elected first, and then the aldermen. [DARLING, J.—Is Gloucester now without a corporation altogether?] It is in a state of hopeless chaos. The effect of the order was not to do away with the office of mayor, who had a vote and an existence until the appointment of his successor.

DARLING, J.—In this case Mr. Terrell has contended on behalf of the respondent that although Mr. Newth's election had been declared void, his vote could not be questioned by reason of section 42 of the Municipal Corporations Act, 1882. If the decision in *Nell* v. *Longbottom* is right then that contention fails. It may be that *Nell* v. *Longbottom* is an authority not binding on this court; but I think on the whole it was rightly decided, and therefore Newth's vote can be questioned and in my judgment was rightly disallowed. Now the object of the provisional order to which we have been so frequently referred during the argument was to enlarge the boundaries of Gloucester, and for that purpose it was necessary that the corporation of the old and smaller city should come to an end, and the provisional order provided how that was to be brought about. It provided that the old councillors and aldermen should cease to exist on given days, but that the mayor and town clerk of the old city, or others whom the Local Government Board might appoint, should remain in office to perform the duties devolving upon them under the Municipal Corporations Act, and that the mayor should be returning officer in the new elections. Mr. Asquith said the mayor was only retained as returning officer and nothing else. Now the mayor himself was part of the town council, and the first thing in which he was engaged was the election of a mayor to succeed him. Therefore he had to do something as mayor, and he acted as such when he took part in the election of mayor, and although he was mayor of the old corporation, which was gone, he had a part in the reconstructed district which had been enlarged. The provisional order did not deprive him of it; and I do not think it was intended to deprive him of the power of taking part in the election of mayor. I therefore think his original vote was a good one. Next comes the question of his casting vote. If his original vote was a good one, as things turned out, it made an equality of votes for the mayor, if Mr. Newth's vote was held bad, for "equality of votes" must mean an equal number of valid votes; but if Mr. Newth's vote was held good, there was not an equality of valid votes. But as Mr. Newth's vote was challenged, the mayor said he would give a casting vote in case there turned out to be an equality of votes. As it had turned out, Mr. Newth's vote being struck off, there was an equality of votes; but it was said that Mr. Treasure could not give a casting vote as to a contingency. I do not think that that was the meaning of the provision as to casting votes. I think that the mayor, when the number of valid votes was equal, may give a casting vote. Now Newth's vote was bad, the mayor's original vote was good, and that resulting in an equality, his casting vote was good, and therefore the person for whom he voted was elected by a majority of one. There must, therefore, be judgment for the respondent. As to whether there should be an appeal, we will grant leave on the assumption that it is proceeded with at once, or else it will be practically useless, as the people affected in Gloucester are only elected for a short period.

CHANNELL, J.—I concur. In my opinion it would be wrong for us not to follow the decision given in *Nell* v. *Longbottom*, which is a decision directly in point. As I agree with it I feel myself under no duty to consider whether that decision can be reviewed after the years that have elapsed since it was decided, coupled with the fact that it has often been cited with approval before the courts. I do not wish to decide whether it is right or wrong, for although I admit that the reasoning cannot be said to be conclusive, I do not see why the result arrived at should be otherwise than correct. As to the casting vote there appears to be no direct authority on that point, but in my opinion it would be a very practical thing for a chairman to say: "I do not know whether I have a casting vote or not, but if I have then I give a casting vote in favour of Mr. A. B." I see nothing in the Act to prevent a chairman doing this. As to the original vote given by the chairman in this case, I agree with all that has been said by Darling, J., and I agree, therefore, that our judg- should be for the respondent with costs.

Terrell, K.C.—The aldermen's case will also depend on whether Mr. Newth's vote was a good one. I asked the court to request the commissioner to give formally some points in that case, and then the court can give judgment upon it.

DARLING, J., said the commissioner had given no decision on the aldermen's case.

CHANNELL, J., said no doubt the commissioner would reserve his decision until the time of the appeal came.

Terrell, K.C.—He will no doubt make a certificate in the ordinary way.

Judgment for the respondent, with costs. Leave to appeal granted.

Solicitor for the petitioner, *C. T. Courtney Lewis*, for *W. Langley Smith*, Gloucester.

Solicitors for the respondent, *Ayrton, Biscoe, & Barclay*.

House of Lords.

From C. A. (England). May 20.

INLAND REVENUE COMMISSIONERS *v.* MULLER & CO.'S MARGARINE (LIMITED). (*a.*)

Inland revenue—Stamp duty—Goodwill—Agreement executed in England—Sale of foreign business—"Property situate locally out of the United Kingdom"—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.

For the purposes of the Stamp Act, 1891, *an agreement for sale executed in this country by the purchasers is made in England.*

The goodwill of a business situated and carried on abroad is "property locally situate out of the United Kingdom," and an agreement executed in England for the sale of such goodwill is excepted from duty under section 59, *sub-section* 1, *of the Stamp Act,* 1891.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Decision of Court of Appeal, [1900] 1 *Q. B.* 310, 48 *W. R. Dig.* 77 (Earl of Halsbury, L.C., *dissenting*), *affirmed.*

Appeal from an order of the Court of Appeal (A. L. Smith, Collins, and Vaughan Williams, L.JJ.), [1900] 1 Q. B. 310, 48 W. R. Dig. 77, reversing a judgment of the Queen's Bench Division (Day and Lawrance, JJ.).

The following statement of the facts is taken from Lord Macnaghten's judgment: One Muller, who carried on the business of a manufacturer of margarine at Gildehaus, in Germany, under the style or firm of Muller & Co., was minded to sell his business there with all that appertained to it. He gave an option of purchase to one Newman. Newman, or the person for whom he was acting, transferred this option to a syndicate. The syndicate found or formed a company called Muller & Co.'s Margarine (Limited) to take the purchase off their hands.

On the 4th of October, 1897, an agreement, in which the intermediaries were joined, was made between Muller and the company for the sale and purchase of the business. This agreement was executed by Muller abroad and by the company in England. In it, though the price was a lump sum, in addition to the ascertained value of the stock-in-trade, the subject of the sale is split up and described under different headings, one of which is in the following terms: "The goodwill of the said business, with the exclusive right to use the name of Muller & Co. as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendors and in succession to them."

The Crown claimed duty on the value of the goodwill and on the value of the pending contracts of Muller & Co., and the appellants found that the proportion of the total purchase-money applicable to these subjects of sale was £77,418—the whole consideration for the sale being £122,500—and assessed the duty at the rate of 10s. per cent.—namely, £387 5s. in addition to a fixed duty of 10s. in respect of other matters not chargeable with *ad valorem* duty. The claim was allowed by the Divisional Court, and disallowed by the Court of Appeal.

Sir R. B. Finlay, A.G., and *Danckwerts, K.C.* (*Rowlatt* with them), for the appellants.

A. T. Lawrence, K.C., and *Compton Smith*, for the respondents.

The House took time for consideration.

Lord MACNAGHTEN.—In this case your lordships have listened to an interesting disquisition on the subject of that which is commonly called goodwill. Most, if not all, of the many cases touching upon that subject have been cited at the bar with the view of satisfying your lordships that the goodwill of a foreign business, which was confined within certain known and narrow limits on the Continent, and which apparently never had a single customer in this country, cannot be described as "property locally situate out of the United Kingdom." [His lordship here stated the facts as given above.] There are two questions in the case—first, Was this agreement made in England? and secondly, Was the goodwill of this business property locally situate out of the United Kingdom?

Now, as to the first question I do not think there can be any difficulty. It seems to me that according to the true construction of the Stamp Act of 1891 an agreement is made in England if it is executed in England by a party to the agreement whose execution is required to make the instrument on the face of it complete and perfect. The argument that because section 59 of the Act speaks of an agreement for sale, and not of an agreement for sale and purchase, regard is only to be had to the execution by the vendor, is in my opinion too refined to be substantial. I think the agreement was made in England, and not the less so because it may also be described with equal propriety as made abroad.

I now come to the second point. It was argued that if goodwill be property, it is property having no local situation. It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will—of course, under the conditions attaching to property of that nature.

Then comes the question, Can it be said that goodwill has a local situation within the meaning of the Act? I am disposed to agree with an observation thrown out in the course of the argument—that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here, and another element there. To analyze goodwill and split it up into its component parts, to pare it down as the commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

For my part, I think that if there is one attribute common to all cases of goodwill, it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt where the reputation of a business is very widely spread, or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localize goodwill. But here, I think, there is no difficulty. We have it in evidence that the firm of Muller & Co. had no customers out of Germany, and it is a significant fact that the protected area—the limit within which the vendor is prohibited from setting up in business—was the limit of fifty miles from Gildehaus. Moreover, under the Stamp Act of 1891 we are not required to define the local situation of the goodwill. We have only to determine whether it is or is not situate out of the United Kingdom. Surely if there were an agreement made in England for the sale of a local German newspaper, the circulation of which did not extend beyond a limited district in Germany, no one would doubt that the goodwill of that business was locally

situate out of the United Kingdom, and so it must be, I think, in the present case.

I am therefore of opinion that the judgment of the Court of Appeal is right and ought to be affirmed, and I move your lordships accordingly.

Lord DAVEY.—The questions on this appeal arise on the construction of a few words in section 59, sub-section 1, of the Stamp Act, 1891 (54 & 55 Vict. c. 39). By an agreement of the 4th of October, 1897, the goodwill of a business carried on in Germany, together with the factory and buildings in which the business was carried on, and all the plant, machinery, apparatus, rolling stock, and chattels employed in the business except stock-in-trade and all pending contracts and orders in connection with the business, books of account, documents, and papers, was sold for a lump sum to the respondents, who are an English company. The principal question is whether the goodwill so sold was either wholly or partially "property situate out of the United Kingdom" within the meaning of the exception in the section referred to. But other subsidiary points have been argued, to which I will first address a few remarks.

First it was said that the agreement was not made in England because the vendors executed it in Amsterdam. It was not, however, a completed agreement for purchase and sale till it was executed by the purchasers, and that was done in England. It was argued that the acceptance by the purchasers might have been proved by oral evidence—which is true. But what we have to deal with is the document in which the acceptance by the purchasers was expressed by the execution of it in this country.

Another point made was on the construction of the section. It was suggested that the word "property" ought to be read as *ejusdem generis* with the words which immediately precede it—namely, "lands, tenements, hereditaments, or heritages"—and to be confined to real property. The first observation which occurs to one is that if such had been the intention it would have been so easy to have expressed it—to have said "real property." But the word "property" occurs in two places in the earlier part of the section. It is there used in its widest sense as meaning property of every description, and I can find no sufficient reason in the context for thinking that it is used in a more restricted sense in the passage in question. The clause is drawn in rather a confused manner. The material words "any contract or agreement . . . for the sale of any estate or interest in any property, except lands, &c.," or "property locally situate out of the United Kingdom, or goods, &c." Whatever the word "property" means in the words imposing the duty I think it must have in the words of exception. It is not disputed that property in its wider sense may include whatever rights or benefits pass under the term "goodwill."

I pass now to the principal question which has been argued—namely, whether goodwill can be said to be situated outside the United Kingdom or to have any local situation. A more accurate way of stating the question would, in my opinion, be whether the goodwill which is comprised in this contract has a locality for the purpose of the Stamp Act. Now the subject of the contract is the sale as a going concern of a German manufacturing and commercial business carried on by a German in Germany, with the buildings in which the business is carried on and all the plant, &c., necessary for carrying it on. It does not appear to me that the mention of goodwill adds anything to that which would be included in a sale of the business. What rights pass to the purchaser of the goodwill, in my opinion, depends *primâ facie* on the German law, but the parties have to a certain extent defined them for themselves as "the exclusive right to use the name of Muller & Co. as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendors and in succession to them," and they have protected the purchaser by the vendor's covenant not to carry on the business of manufacturers of margarine, at any time thereafter, within fifty miles of the business premises. It is said that the purchaser might remove the business (say) to England. Whether he could do so and still retain the rights conferred by the contract is, in my opinion, a question of German law. It seems to me, however, immaterial whether they can do so or not, because (I repeat) this business was at the date of the contract in Germany. What we have to look at is the state of things at the date of the contract, and the possibility of its removal no more affects the question than if it were a valuable chattel, such as a picture or a statue.

The position taken up by the Attorney-General was a singular one, and somewhat embarrassing to persons who have to stamp their contracts. He admitted that so far as the goodwill was attached to the business premises, and thereby enhanced their value, he did not claim that an *ad valorem* stamp should be affixed in respect of that value. But I am not aware that you can split up goodwill into its elements in that way, and I see great difficulty in doing so. The term "goodwill" is nothing more than a summary of the rights accruing to the respondents from their purchase of the business and property employed in it. As that business and property undoubtedly had their local habitation in Germany at the date of the contract, I have no difficulty in coming to the conclusion that the Court of Appeal were right, and this appeal ought to be dismissed.

I do not find it necessary to say anything about the numerous cases which were referred to in the course of the argument, because, in my opinion, they have no direct bearing on this case. Nor do I express any opinion on the abstract question whether an incorporeal right can have a local situation, beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases.

Lord JAMES OF HEREFORD.—I share the view that the judgment of the Court of Appeal is correct, and that this appeal should be dismissed.

For the reasons already given, I think the contention of the Crown that this contract was made in England is correct.

The principal question for decision by your lordships no doubt afforded great opportunity for ingenious argument; but that question can, I think, easily enough be solved by the application of mere common sense.

The question whether the agreement for the sale of the goodwill of a manufacturing business should be charged with an *ad valorem* stamp under the Stamp Act of 1891 depends upon the application of certain facts existing in this case to the words of that Act.

The business sold was a wholesale manufacturing business carried on in premises situated at Gildehaus, in Germany. All the stock and plant of the company were on those premises. All the customers of the company were resident in Germany.

Now, as the Stamp Act imposes no duty on agreements referring to property locally situated out of the United Kingdom, the question arises, where is the goodwill of this business to be found? I would premise that in my view no substantial difference can be established between the words "locally situated"

and the word "situated." It is admitted that goodwill is property within the Act, and the Act assumes that the property—*primâ facie* all the property mentioned in the Act—may be situated out of the United Kingdom. Now in this case we have a business in respect of which a goodwill exists. This business, without doubt, lies abroad. It cannot be otherwise, for premises, plant, manufacture, trade, residence of customers are all in Germany. And this business, locally situated out of the United Kingdom, has a goodwill attached to it. It is difficult to separate them; certainly out of the business the goodwill springs, and its value depends entirely upon the local existence of the premises and the manufactory, and the existence and action of more or less local customers. The parties to the agreement certainly attached value to the continuance of the business in the locality, for the vendor contracted not to carry his business on within fifty miles of the existing premises.

I entirely dissent from the view that the goodwill of a business, either wholesale or retail, cannot be locally situated. On the contrary, I should say that the goodwill of most businesses is locally situated. There may be exceptions; but this case is not one of them, and I therefore think that no stamp duty is chargeable upon that part of the agreement which refers to the goodwill of the business sold, and that therefore the judgment of the Court of Appeal should be affirmed.

Lord BRAMPTON.—By section 59, sub-section 1, of the Stamp Act, 1891, it is enacted that "any contract or agreement made in England . . . for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property, except lands, tenements, or heritages, or property locally situate out of the United Kingdom . . . shall be charged with the same *ad valorem* duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold." Before dealing with the contents of the instrument sought to be charged with the stamp duty in this case, I think it desirable to describe in a few words the relative positions of the parties to it. Wolf Muller (the vendor) carried on, under the style of Muller & Co., at Gildehaus, in Germany, the business of a manufacturer of margarine. One Newman, as a trustee for Wigley, acquired from Muller the right to purchase the said business and the assets thereof for a sum of £80,000, exclusive of the stock-in-trade and book debts, which were to be taken on a valuation. Subsequently Newman, with the sanction of Wigley, agreed to make over his rights to a syndicate, and the syndicate afterwards arranged to sell its rights of purchase to the respondent company, which before the contract in question was made had been incorporated under the Companies Acts, 1862 to 1893.

To put this arrangement in the form of a written agreement the instrument in question, which bears date the 14th of October, 1897, was prepared, the above-named persons and company being all parties to it, Wolf Muller being described as "the vendor," and the respondent company (called the company) being treated as the purchaser; the others—Newman, Wigley, and the syndicate—being joined for the mere purpose of testifying their concurrence. By the first article of the instrument it was agreed that the vendor, by the direction of the three intermediate parties, should sell and the company should purchase as from the 1st of June then last—first, the goodwill of the said business, with the exclusive right to use the name of "Muller & Co." as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendor, and in succession to him. Secondly, all the freehold hereditaments specified in the first schedule thereto, and therein described as "all those four acres of land with the factory and buildings erected thereon, situate in the parish of Waldseil, in the community of Gildehaus, Hanover, Germany; also all those two houses, situate in the Bahnstrasse at Gildehaus aforesaid." A description of the remainder of the property made the subject of the agreement is not material to this case.

The price to be paid by the vendor was £122,500, which included the profit made by the intermediate parties. This sum was not divided and appropriated part to the goodwill and part to the premises, but they were treated as one subject of sale. The purchase was to be completed on or before the 22nd of November, 1897, and possession of the premises to be then given; in the meantime it was to be retained by the vendor, who during that time was to carry on the same business as a going concern, and be deemed to have been so carrying it on as from the 1st of June on behalf of the company. By the 11th clause the vendor bound himself not to carry on the business of a margarine manufacturer within fifty miles of the said freehold premises, with one exception immaterial to be stated.

The agreement was executed under seal by the vendors, and by Newman and Wigley, at Amsterdam, and afterwards by the syndicate and by the purchasing company under their respective common seals in England.

Upon this state of things, the first question raised is whether this instrument of agreement was made in England; for upon it, and it alone, if at all, can the stamp duty now sought to be imposed be charged.

If the question were, "In which country was the instrument executed?" the only possible truthful answer would be "Partly in Holland and partly in England." But when the question is, "Where was the contract made?" one is driven to say, "It was not in Holland; for while in that country, though it was then signed and sealed by the vendor and two of the intermediates, it lacked the execution of the syndicate and of the vendee, which was essential to its validity as a contract. It only became a perfect contract when the purchasing company and the syndicate affixed their respective common seals to it.

It was suggested, however, that there must have been an oral contract made in Germany before the written instrument was prepared. That, however, would not assist the respondent company, for it is only the written instrument which requires to be, or is capable of being, stamped.

I may add that by the Stamp Act the duty is to be paid by the purchaser, and the written instrument could not bind the purchasing company until it was executed by that company's common seal.

So far as the contract by the purchasers was concerned, it was entirely made in England. For these reasons I have no hesitation in answering the first question in the affirmative, in favour of the Crown.

As to the second question, I think it is very clear that no equitable estate or interest in the property was ever vested in either Newman, Wigley, or the syndicate. The whole interest, both legal and equitable, remained in the vendor until the rights of option to purchase were exercised by the intermediate parties in the manner hereinbefore described and carried out by the written contract. This question, therefore, must be answered in the negative against the Crown. The remaining question is, whether the goodwill of the business, sold as it undoubtedly was in one contract, and as part of one subject-matter of

sale, with the buildings, houses, and land in and upon which the business was carried on by the vendor, was property locally situate out of the United Kingdom. I think it was. Whether the goodwill and the land and the factory are rightly to be treated as combined and inseparable, or as separated from each other, each is undoubtedly property within the meaning of the Stamp Act, and has been decided so to be by a long string of cases of which I will only mention that of *Potter* v. *Inland Revenue Commissioners*, 2 W. R. 561, 10 Exch. 147.

Granting that a goodwill is property, the question still remains: Was the goodwill in this case, when it was purchased by the company, "property locally situate out of the United Kingdom"? The answer to this depends, in my judgment, upon whether at the time of the making of the written contract the goodwill was attached to and incorporated with the business premises, and formed in the hands of the then vendor an inseparable property, very valuable in its combination as giving to the premises a character and an increase of value which, stripped of the goodwill, they would not have possessed, and which represents the value of the profit-earning quality of those premises when and so long as they are used by the then occupier for carrying on in them the business he had created within them, by reason of the attraction of customers from any of those causes which tend to make a prosperous business—for that is what the vendor had to sell, and sold; and the question must be determined having regard to the time when the contract of sale was made, and not regarding anything the vendee might think fit to do with them in the future.

This word "goodwill," when used in connection with the sale and purchase of a trade, must, I think, be interpreted according to its popular acceptation. Taken in its strictest sense, "goodwill" would hardly be a saleable commodity at all. I do not say there may not be such a thing as a goodwill of a business utterly unconnected with the premises in which the business has been previously carried on; for it is quite possible that a man retiring from business might wish to retain the premises for his own private use, and sell merely the goodwill; but as was pointed out by Pollock, L.C.B., in *Potter's case*, there is a wide difference between the sale of a goodwill together with the premises in which the trade is then carried on, whereby the value of the premises is enhanced, and the sale of a goodwill without any interest in land or buildings connected with it, and which is merely the advantage of the recommendation of the vendor to his connections and customers, and his covenant to allow the vendee to use his trade name, and to abstain from competition with him.

In the first of these cases the trade and the premises are inseparable so long as the trade is therein carried on. The advantages and facilities constituting the goodwill are all more or less derived from them or the profitable results of such goodwill are therein realized. The goodwill of a trade carried on in a shop is as essential to the tradesman as the shop itself, which is benefited by it. What is the trade of a shop but the business done in it, and how is that custom brought to the shop but by the goodwill attached to it? The combination of a suitable shop with the trade done in it, and the goodwill inducing that trade, seem to me to be inseverable. In my judgment it matters not whether the business be a manufacturing one, or that of a shopkeeper or a publican or a brewer—in each case the seller of his business premises with his goodwill sells, and the purchaser buys, the outgoing man's premises, with, so far as in him lies, the whole business carried on therein as a going concern, with the same prospects the vendor himself would have had had he continued it; and I think it immaterial whether the business has been built up by reason of the personal good qualities of the outgoer, the goodness of his wares or merchandize, the good situation of the premises, or the absence of competition; in each case the business and custom, in fact, have been attracted to the house or premises, and when the incomer takes possession he takes all the chances offered and conveyed to him by his purchase, of standing, so far as the business is concerned, in the shoes of the outgoer, and he must rely upon his own good qualities and aptitude for his undertaking to continue the prosperity of the business and profit by his bargain.

Dealing with an argument touching an injury to the custom of a public-house, Lord Westbury in *Ricket* v. *Metropolitan Railway*, 15 W. R. 937, L. R. 2 H. L. 175, at p. 204, says: "It is a fallacy, almost a mockery, to answer, the custom is one thing and the house another; and the injury is to the custom, not to the house. You cannot sever the custom from the house itself, or from the interest of the occupier, for the custom is the thing appertaining to the house which gives it its special character, and constitutes its value to the occupier." In short, as was observed by the Court of Exchequer, "the goodwill is part of the value of the property."

The judgment of Lord Esher, M.R., in *Inland Revenue Commissioners* v. *Angus*, 38 W. R. 3, 23 Q. B. D. 579, is to the same effect. It must not for a moment be imagined that these observations are intended to affect in the least degree the present mode of assessing for sale or compensation purposes the value of premises to which a goodwill is attached.

In this case the business sold was commenced, and its reputation was made and established, on these premises and nowhere else. The margarine and butter substances have all been there manufactured, at this factory; all the orders of customers, for the most part resident in Germany, have been received at it, and from it the manufactured commodities have been delivered. I care not to inquire into the reasons for its success, for there is the business, consisting of goodwill and premises combined, for which in their combination as vendors, the vendees voluntary consented to pay the large sum of money mentioned in the contract.

The vendees may, of course, deal as they please with the future of that which they have bought. We have only to deal with it as it stood at the time of the sale. I cannot understand how that business goodwill so attached can be treated or spoken of as being otherwise than locally situate in Germany.

The cases referred to in the Divisional Court and in the Court of Appeal have been so completely disposed of by each of the Lords Justices that I do not feel it necessary to say more about them; both are distinguishable from the present, even if rightly decided.

I think the judgment of the Divisional Court was rightly reversed by the Court of Appeal, and that this appeal should be dismissed with costs.

Lord ROBERTSON.—I am bound to say, on the main question argued, that my judgment, which is against the appellants, is dependent on a fact which does not appear in the stated case; but the learned Attorney-General argued upon the assumption that it is true as stated by the respondents' solicitor in their letter of the 14th of December, 1897 (in answer to a categorical question of the Board of Inland Revenue), that "the whole of the regular customers [of Muller] are resident within the country in which Gildehaus is situate—namely, Germany, and that there is no trade

whatever transacted outside the latter country." Now when this is taken along with the fact that the manufactory and, so far as appears, the office were at Gildehaus, the case is, so far as facts are concerned, as compact and free from complication as any case could be which gives rise to the present question. So far as the seat of trade and so far as the trade itself are concerned, everything is out of the United Kingdom, and of nothing connected with the trade can it be predicated in any sense whatever that it was not out of the United Kingdom.

This consideration seems to me to lift the present case clean over such questions and phrases as whether the goodwill is attached or affixed to the manufactory. I do not accede to the view that the goodwill is affixed or attached to the manufactory. Supposing that the products of the manufactory were all exported to England and sold to English customers, I should find it difficult to hold that the goodwill was out of England merely because the manufactory was. The application of the words "locally situate" would then present a difficult question, requiring, I should think, a different answer. Again, if the facts as to the distribution of the products were more complicated, as, for example, if the trade were diffused over England and other countries, then the location of the goodwill would be a more complex, although I do not by any means think an insoluble problem.

I confess I find no repugnancy in affirming of the goodwill of a business that it is locally situate somewhere. It is, I should say, locally situate within the geographical limits which comprehend the seat of the trade and the trade. That sounds like a very cautious statement, and fortunately it is enough for the present question. It seems to me that in the statute the distinction drawn is between what, from a British point of view, we should call British property and foreign property; and the goodwill of a business which begins and ends abroad is, I think, property locally situate outside the United Kingdom. I think it right to add that the *Smelting Co. of Australia (Limited)* v. *Commissioners of Inland Revenue*, 45 W. R. 203, [1897] 1 Q. B. 175, although not a case of goodwill, would fall within the principle of my present judgment, and I respectfully consider it to have been decided on too narrow a view.

On the point as to the place of the execution of the agreement I have nothing to add.

Lord LINDLEY.—Before addressing myself to the main controversy in this case I will say a few words on one or two minor points arising on the construction of section 59 of the Stamp Act, 1891.

It was said that the agreement for sale in this case was not made in England, because the selling company signed it abroad and the purchasing company signed it in this country. Until the purchasing company signed it there was no written agreement, but only an offer to sell. The document was made complete as a contract for sale by what was done in this country, and I have no doubt therefore that section 59 applied to it.

Then comes the question whether the word "property" in the exception is confined to real property or extends also to personal property. In my opinion it includes personal property. Property is used in the widest possible sense in the earlier part of the section, and it appears to me to be used in the same sense when repeated in the exception. The words "lands, tenements, and hereditaments" themselves exhaust real property, and the introduction after them of the word "property" shows that something more is to be expected. Nothing more can be suggested which is *ejusdem generis*, and nothing but personal property remains. Upon this point my own opinion coincides with that of Rigby, L.J., in the case of the *Smelting Co. of Australia*.

But even if the word "property" in the exception extends to corporeal personal property which can have a local situation, it is contended that incorporeal property such as goodwill cannot be said to be locally situate anywhere, and cannot therefore fall within the exception. This is the main contention of the appellants. It is necessary to deal with it, as it has not been contended that goods, wares, and merchandise cover goodwill; and if goodwill is to be excepted it must be because it is property locally situate abroad.

Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense goodwill is inseparable from the business to which it adds value, and, in my opinion, exists when the business is carried on. Such business may be carried on in one place or country, or in several, and if in several there may be several businesses, each having a goodwill of its own.

That in some cases and to some extent goodwill can and must be considered as having a distinct locality is obvious, and was not in fact disputed. The goodwill of a public-house or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business; and so far as the goodwill adds value to land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them.

This consideration alone would, in my opinion, suffice for the determination of this case, for the factory, business, and goodwill were all sold together for a lump sum, and I do not myself see why the goodwill should be dealt with as having value apart from the factory. But even if the goodwill in the case before us can be properly regarded as to some extent separable from the factory, I still think it must be treated as locally situate abroad.

The goodwill sought to be taxed is that of a manufacturer of margarine. His business was to manufacture and sell. His factory was in Germany, the owner was a German living in Germany, he had no agency or place of business abroad, his customers were all in Germany, and his business, so far as selling was concerned, was a wholesale and not a retail business. He covenanted not to carry on business within fifty miles of the old place. If, therefore, the goodwill of a wholesale manufacturer can be regarded as situate anywhere, the goodwill in this case can only be regarded as situate in Germany. Not one of its elements is or can possibly be regarded as situate anywhere else. The contention for the Crown was that some part of the goodwill—namely, such part of it as did not simply enhance the value of the land and buildings of the factory—could not be regarded as situate anywhere, and was therefore liable to stamp duty. This view, if sound, would be very embarrassing to buyers and sellers, who have to see that they stamp their agreements properly. But the view contended for is, in my opinion, quite untenable.

Goodwill is only taxable as property; and the legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature, and has, physically speaking, no locality at all. We, however, are dealing, not with anything which in fact fills a portion of space, but with a legal conception, or, in

other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible.

The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution of the case before us. Those cases tend strongly to shew that, for purposes of probate, goodwill, except so far as it merely enhances the value of lands and hereditaments, must be regarded as personal property situate somewhere; and if this were a probate case I do not suppose that anyone would say that the goodwill with which we have to deal would be regarded as in any sense situate in this country. *Commissioners of Stamps* v. *Hope*, [1891] A. C. 476, 40 W. R. Dig. 162, in which the locality of debts for probate purposes is considered, contains some valuable general remarks on the subject, but there is nothing in that case which conflicts with the view I take of this goodwill.

It may perhaps be true that property which has no physical existence may, if necessary, be treated for some purposes in one locality and for other purposes in some other locality. But until the necessity for so treating it is apparent I see no justification for introducing confusion by judicially holding the same property to be legally situate in two different places at one and the same time. But this confusion would be introduced if your lordships were to decide that the analogy of probate cases was to be no guide in dealing with liability to stamp duty.

I am not aware of any case in which goodwill, as property, has been treated as having no locality for legal purposes. *Smelting Co. of Australia* v. *Inland Revenue Commissioners*, so much relied upon by counsel for the Crown, was not a case of goodwill at all. The property then in question was not the goodwill of a business, but a share in an Australian patent, and a licence to use the same in Australia. This share and licence belonged to an English registered company, which agreed to sell it to another English company, and the question was whether the instrument of agreement required a stamp. The court decided that the share and licence were property, and came within the first part of section 59, clause 1, of the Stamp Act, 1891. But they held that such property could not be regarded as locally situate abroad. Lord Esher and Lopes, L.J., considered that incorporeal personal property could not be said to be situate anywhere. This is, of course, true physically speaking, but not, I think, in contemplation of law. Rigby, L.J., did not adopt the reasoning of the other members of the court. He referred to the probate decisions; but he considered that as the property was saleable and sold in this country it could not be regarded as locally situate out of it. I am not myself able to adopt this conclusion arrived at by Rigby, L.J. Any property situate anywhere can be agreed to be sold or purport to be sold in any other country, and the test of locality relied upon by the Lord Justice was not, I think, the true one. The patent was not assignable without registration in Australia, and the view of the Lord Justice is, I think, opposed to *Attorney-General* v. *Dimond*, 1 Cr. & J. 356, the case of French Rentes. Be this as it may, in the Australian patent case the court was not dealing with the goodwill of a foreign manufacturing business, and it would be wrong, I think, to treat the decision as governing the case before us.

In my opinion the decision appealed from ought to be affirmed, and the appeal be dismissed with costs.

Earl of HALSBURY, L.C.—I regret to say I am unable to concur in the view which has found favour with your lordships in this case.

The goodwill of the business is what the word itself expresses, although the concurrence of so many of your lordships leads me to doubt what I should otherwise have had no doubt upon. The advantages which may be conferred upon a business either by its local situation or by its attractive appearance have nothing to do with the goodwill, although they may have originally contributed to procure it, and may to some extent be connected with the nature of the business, which itself, however, is a different thing. "The goodwill thereof" is a thing which can be assumed to exist separately. Like every other thing which suggests one simple idea it is difficult, if not impossible, to define it. The right to trade under the name of a firm which has acquired a reputation is not confined to a particular locality or to any particular premises. The right would remain if the business were transferred to another site elsewhere, or if the premises were entirely altered. In the case of a public-house, owing to the convenience of its situation and its being known as a favourite place of resort, the advantages of its situation are so mixed up with the goodwill of the business that as a matter of fact it may well be that it is very difficult to sever them and to say how much is goodwill and how much is local situation. But these difficulties of fact will not necessarily make their separate existence possible. In compensation cases, for instance, where a man is being turned out of his holding and has to be put into the same position so far as compensation can do it, by money which is to be awarded to him, it is unnecessary to regard any such severance into the different elements which make up the advantages of his holding. He is to be compensated for the loss which he has sustained by the alteration of his premises or the removal of his trade from those premises and for the extent to which his business may be injured under the circumstances, and it would be quite unnecessary to consider how much he is to be allowed for each element, because he is, so far as the tribunal can do it, to be placed in the same position as he was in before. The illustrations which are given of businesses—for instance, the business of a local newspaper—seem to me not to touch the question. It may be very probable that in such a case there would be no goodwill of the business, or very little, but the mere fact that the business was practically or altogether local would not make the goodwill of the business simply local unless by the contract of sale it was confined to a particular spot. In the particular case now under review the vendors would not be entitled to come to this country and set up a business here under that name and claim the goodwill of customers who might have been brought together in Germany. The right to the goodwill was absolutely transferred to the vendees here. I think if, in order to ascertain what would be the rights of the parties, one looked at the contract apart from any question arising as to the limit of fifty miles, one would see that the thing transferred was the goodwill of that business, whatever it consists of; that would be in every part of the world. The question whether it would be worth the while of the parties to transfer it is a question quite beside that which in point of law constitutes goodwill. I am wholly unable to see that goodwill itself is susceptible of having any local situation.

In my opinion, therefore, the judgment of the Court of Appeal ought to be reversed; but as the majority of your lordships take a different view, of course the appeal will be dismissed, and the judgment of the Court of Appeal affirmed.

Appeal dismissed.

Solicitor for appellants, *F. C. Gore*, Solicitor of Inland Revenue.

Solicitor for respondents, *H. A. Graham*.

From C. A. (England). April 25.

MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD UNION ASSESSMENT COMMITTEE. (a.)

Poor law—Rating—Lairages—Profit-earning capacity—Evidence of receipts and expenditure—Admissibility of evidence—Principle of assessment.

In the assessment of premises to the poor rate the duty which the Legislature has imposed upon the overseers is to ascertain, as a matter of fact, what sum a tenant will reasonably give for them by the year, making the usual deductions. In ascertaining this sum the circumstances of the particular occupation, also the receipts and expenditure, are legitimate objects for consideration.

Decision of the Court of Appeal (48 *W. R.* 259, [1900] 1 *Q. B.* 143) *affirmed.*

Appeal from an order of the Court of Appeal (A. L. Smith, Collins, and Vaughan Williams, L.JJ.), 48 W. R. 259, [1900] 1 Q. B. 143, affirming the decision of a Divisional Court (Lawrance and Channell, JJ.), on a case stated by the quarter sessions at Birkenhead.

The case is given at length in the report below, where the authorities are also collected.

The appellants were in occupation of certain lairages which were the only places in the neighbourhood at which foreign cattle could be landed except under penalties; these lairages were erected and worked by the appellants under statutory powers.

In ascertaining the rental value of these premises their profit-earning capacity and evidence of the receipts and expenditure of the appellants in carrying on the business were taken into consideration.

The Court of Appeal held that the assessment was properly made.

Asquith, K.C., and *Marshall, K.C.* (*Horridge, K.C.*, with them), for the appellants.

Pickford, K.C., *A. A. Tobin*, and *R. M. Montgomery*, for the respondents, were not heard.

Earl of HALSBURY, L.C.—In this case it appears to me, for reasons which have been given by the Court of Appeal and the subsequent explanation of the learned recorder, that this appeal ought to be dismissed with costs.

I cannot help thinking that a great deal of the hesitation and confusion which has arisen upon the subject-matter which your lordships have heard debated now on the part of the appellants has arisen from the advisory character of the judgments which have been given from time to time by the various courts before whom this question has come.

The thing that the Legislature has called upon the overseers to do is to solve a simple question of fact; and although it may be by no means simple in the mode in which they are to arrive at it, the question of fact is simple enough as stated—that is to say, they are to look at the rent at which the annual value of the several hereditaments rated thereunto might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent.

That is the proposition which is put for the parish officers, which they have to answer, and they are to arrive at the value, so far as I know, unfettered by any statute as to the way in which they can do it.

Now I am not aware of any rule of law or of any statute which has limited them as to the mode in which they shall arrive at it, and it is not a question of law at all—it is a question of fact.

These questions have from time to time come before the courts, and have been argued as questions of law, where, instead of doing what the section has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included; and, of course, in that sense, where you are dealing with a question of fact which has to be answered by any tribunal, it may be that the question has come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact: What is the rent which a tenant, subject to the deductions mentioned in the statute, can reasonably be expected to give for the premises as a tenant from year to year?

The first part of the proposition is that you are to rate—what?—Not the tenant's trade. Some questions arise, which I will deal with presently to see how they arise, as to whether you are to go into the question of profit and loss. They are excluded by the language from the statute. You are to rate the premises according to their value. Therefore it would be very wrong indeed to rate the trade as if you were dealing with it as a question for income tax. You are not rating the income; you are rating the premises. So that where you have premises of a similar character with equal facilities for carrying on the trade, you have a very facile mode of coming to the conclusion what sum would reasonably be given by a tenant from year to year for such premises. But if, instead of doing that, you choose to go into elaborate calculations of how much the thing cost to erect, and when erected what would be the value of it, you are only elaborating and making more complex and difficult the simple proposition which the Legislature has put before the overseers to answer. From time to time observations have been made by some learned judges saying this should have been done, and the other should not have been done, but that was not as pronouncing judgments upon the law of evidence as to whether or not such and such a topic was legitimate or not to arrive at the conclusion which the Legislature have directed them to arrive at, but what was the ordinary and natural means of arriving at the conclusion which they were bound to arrive at.

I am more anxious to point this out because I think in these later days we got rid of a good many of these sources of confusion. The advisory character, as I have said, of the judgments given by the courts to quarter sessions have no doubt led to words being used not in the strict sense, but as matters of advice to the justices in determining such questions, and sometimes they have been printed in the law reports as if they were decisions upon the law of evidence in this country.

I protest against any such view, and in this very case, although, as I say, during the last half-century we have arrived at conclusions which get rid of a great deal of the confusion which at one time existed, I find that the learned judge, Channell, J., uses a phrase which I am afraid I cannot assent to—namely, that wherever you can arrive at it by comparing it with similar tenements you are bound to arrive at it in that way. If that means that is the facile and proper way of doing it, I should agree; but if it is laid down as a proposition of law that that is the means by which it can be arrived at, I venture to say I do not assent to that view.

Again, I find that Collins, L.J., in the same way

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

says: "Hence the rule that in ordinary cases, when the standard of rent is applicable, evidence of actual profits made cannot be received. But it is equally true that when no such standard of comparison exists, it is legitimate to inquire into the profits actually earned."

Again, I am compelled to say that I cannot concur with the form in which that proposition is put. It is not a question of deciding what, according to the law of evidence, is receivable, but what is the more natural and ordinary and usual mode by which you can answer the proposition put by the Legislature to the overseers.

The proposition appears to me a very intelligible one if unclouded by all these questions which from time to time have been raised by ingenious persons; and at the expense of the parishes a good many academic questions have been discussed. You are to find out what a tenant will reasonably give, looking at all the circumstances of the particular occupation, including therein the business that might be done on the premises; and I think I had occasion to say in a former case that it would be a very extraordinary thing if, although you can give evidence by expert testimony as to what kind of business might be done, you are not at liberty in point of law to ascertain what business has been done. It seems to me that no such proposition could reasonably be maintained. If, on the other hand, to go into the account of profits and losses, if you are finding out what a man's income is, would not be irrelevant, so for the purpose of ascertaining what a tenant would be likely to give, to suggest that that is something which in point of law you have no right to inquire into is absurd.

If all the circumstances of the particular occupation, the mode in which the trade was carried on, and if the circumstances either of restriction or of amplitude of the trade are all legitimate subjects of inquiry, the only question of law is whether the particular tribunal has followed the line I have indicated.

Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included, because the proposition is a proposition of fact, and the only mode in which you get in a question of law at all is as to the mode in which that proposition of fact has been dealt with.

Let me see, in that view, what it is that the learned recorder has done. I must take the recorder's own statement of what he has done, and how he has applied his mind to the topics which I have stated are legitimate topics—the topics to which he has been directed to apply his mind by the Legislature: "I did not assess the rate upon the profits of the tenant, but I used them together with other evidence to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers who carried on the business, the nature of the business and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to put them up." Upon that no question arises before your lordships. "I therefore accepted these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom, in order to arrive at the net annual values by a consideration of the evidence before me, most of which was given by the appellants."

Now, when we are dealing with it as a question of law, the limits to which I have pointed being whether in arriving at this conclusion of fact anything wrong has been done either by way of inclusion or exclusion —when I read that, how is it possible to say that what the recorder here has done is wrong? What abstract proposition of law can be laid down to say that the learned recorder was wrong?

I have nothing to do with the question of amount. He may be or may not be wrong in the particular amount he has arrived at, but that is not a question of law. The question of law is whether upon any of these statements of fact you can say he has included anything which he ought not to have included, or has excluded something which he should have included. Upon that statement of fact it is hopeless to contend that either of those propositions can be made out, and I therefore move your lordships that this appeal be dismissed with costs.

Lord MACNAGHTEN.—I am of the same opinion.

Lord SHAND.—I also concur, and adopt all that has been said by the Lord Chancellor in giving judgment.

Lord DAVEY.—I am of the same opinion. I only desire to say a very few words upon what I understood to be Mr. Asquith's argument upon this case, or at all events the chief argument he put forward. If I understood Mr. Asquith rightly, his argument was this—that he did not say as an abstract proposition that profits made from the use of the hereditament ought not to be taken into account generally, but he argued that they ought not to be taken into account in this particular case, because by statute the occupier of the hereditament was precluded from putting those profits, or the produce of carrying on this business on this hereditament, into his own pocket for his own advantage and the enhancement of his own wealth, but was bound to apply those profits in the particular mode pointed out by the statute in reducing the debt, and so forth.

Now I think that argument is answered by the case which was decided in this House in the year 1865 of *Jones* v. *Mersey Docks*, 13 W. R. 1069, 11 H. L. Cas. 443, because in that case, although it is quite true that the question which was put to the learned judges by the House, and the question which was decided, was whether the hereditament was rateable at all, yet in answering that question *ex necessitate* the consideration of the question was involved, upon what basis the rating should be, because the argument used was that there was no beneficial occupation, and it was held to be rateable because there was a beneficial occupation.

I conceive that in principle and impliedly, as I think has been held in subsequent cases which have come before the courts, what was really decided was that, notwithstanding the restriction upon the application of the profits resulting from carrying on that business on that hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating. I think that that is put beyond controversy in a passage in the judgment of Blackburn, J., as he then was, in advising the House on behalf of himself and the other judges. He said this: "Whichever may be the true mode of enunciating the position, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words beneficial occupation are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase is to be understood in this limited sense, the trustees have a

beneficial occupation, for they actually occupy lands as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks." Every word of that is applicable. "Hereafter the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks as at present enjoyed by the trustees a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent." And Lord Westbury in moving the judgment of the House, after referring to the Parochial Assessment Act, which he quoted as saying "that 'occupation' must be of property yielding or capable of yielding a net annual value," and so forth, continued: "It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For on principle it is by no means necessary that the occupation should be beneficial to the occupiers"; or, in other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament, after paying the expenses and other outgoings; whether it is applied for the purpose of public uses, whether it is applied for the payment of debt and other charges, as in the present case, or whether it goes into the pocket of the occupiers.

What you have to look at is, whether the occupation is beneficial in the sense in which the term is used in that passage; and I conceive, if the principles there laid down are adopted (although I admit that the question was not then before the House upon what principle the rate should be made), they are applicable to the case which is now before us, and, as it appears to me, that is a complete answer to the argument which Mr. Asquith addressed to us.

Lord ROBERTSON and Lord LINDLEY concurred.

Appeal dismissed.

Solicitors for appellants, *Rowcliffes, Rawle, Johnston, & Gregory*, for *W. C. Thorne*, Liverpool.

Solicitors for respondents, *J. B. & H. Scott*, for *Thompson, Hughes, & Mathison*, Birkenhead.

Court of Appeal.

From Q. B. Div. (Vaughan Williams and Stirling, L.JJ.) — June 11.

HUMPHRYS *v.* POLLAK. (*a.*)

Contract—Infant—Illegitimate child—Contract to relieve mother for ever of all liability—Validity.

By a contract made between the plaintiff and the defendants, in consideration that the plaintiff, who was the mother of an illegitimate child, would place and allow the child to remain in the defendants' possession, the defendants promised to maintain and bring up the child as though she were the defendants' child, and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the child. The child was placed in the defendants' possession and maintained by them for some months, when they refused to maintain her any longer. In an action by the plaintiff to recover damages for breach of contract,

Held, that the contract was one which the law would not enforce.

Appeal from an order of Day, J., at chambers striking out the statement of claim and dismissing the action as frivolous and vexatious.

The statement of claim was as follows:

"1. The plaintiff is a single woman and the mother of an illegitimate female child called Ivy.

"2. On or about Saturday, the 14th day of July, 1900, in consideration that the plaintiff would place in and leave in their possession the said child for the period of one month on trial, and in the event after the expiration of the said month of the defendants' approving the said child and determining to keep her the plaintiff would still allow her to remain in the defendants' possession after the expiration of the said month the defendants promised and agreed with the plaintiff to maintain and bring up the said child as though she were the defendants' child and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the said child.

"3. The plaintiff, on the faith of the said agreement, placed and left the said child in the possession of the defendants for the period of one month on trial, and after the expiration of the said month the defendants approved the said child and determined to keep her, and the plaintiff continued on the faith of the said agreement to allow the said child to remain in the possession of the defendants and was always ready and willing in pursuance of the said agreement to allow the said child to remain in their possession, yet the defendants by letter dated the 28th of November, 1900, refused any longer to maintain the said child.

"4. The plaintiff, by reason of the defendants' said breach of agreement, has been and will be put to expense in maintaining her said child."

Then followed particulars of the expenses up to date.

Day, J., affirming the order of the master, struck out the statement of claim, under ord. 25, r. 4, as disclosing no reasonable cause of action, and dismissed the action as frivolous and vexatious.

The plaintiff appealed.

H. J. Turrell, for the plaintiff.—The statement of claim discloses a good cause of action. It may be assumed for the purposes of the argument that the rights of a mother over her illegitimate child are the same as over her legitimate child. The mother has imposed on her obligations which bring with them corresponding rights: *Barnardo* v. *McHugh*, 40 W. R. 97, [1891] A. C. 388; *Reg.* v. *Gyngall*, [1893] 2 Q. B. 232. But the mother, by this contract, does not seek to get rid of any of those obligations. The mother has a perfect right to make an agreement with another person that the latter shall maintain the child. There is nothing against public policy or illegal in such a contract. The mother does not by it get rid of or seek to shift upon another person her obligation to maintain the child. That is the contract which the plaintiff has made in the present case, and the mother can claim damages for breach of it. At any rate, the court will not stop the action at this stage in this summary way.

He also cited *In re Lloyd*, 3 Man. & G. 547; *Reg.* v. *Nash*, 31 W. R. 420, 10 Q. B. D. 454.

Montague Lush, for the defendant.—This action is not maintainable. It is against public policy to allow a mother by contract to relieve herself "for ever" from the obligations which the law imposes on her with respect to her illegitimate child. The contract

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

is against public policy. Moreover, there is no consideration for the contract. The defendants have got nothing by it. They have a right to the child only as long as the mother chooses to leave it with them.

Turrell replied.

VAUGHAN WILLIAMS, L.J.—In my opinion the order of Day, J., is right. I do not at all say that there might not be an arrangement by which the parent, when going, say, abroad, could entrust the care of the child to some person who would undertake it, and I have no doubt that if that were done for a consideration, and there was a breach of that undertaking, an action would lie. We have not to decide any abstract question here, but merely whether this statement of claim discloses a reasonable cause of action or not. To my mind it is clear that it does not. The statement of claim in its earlier part alleges that in consideration that the plaintiff would place the child in the defendants' possession for one month on trial, and, in the event of the defendants determining to keep the child, to allow her to remain in the defendants' possession after the expiration of the month, the defendants promised, &c. Pausing there, that seems to me a little vague. Does it mean that the plaintiff is to allow the child to remain in the defendants' possession for ever, or until the child attains the age of sixteen years, or for how long? I should have thought that that was an illegal consideration for the mother to give, because it might be contrary to the interests of the child to remain with the defendants. I need not, however, inquire as to the exact meaning of those words, because the statement of claim goes on to state the promise on the part of the defendants the breach of which is complained of. The words are: "The defendants promised and agreed with the plaintiff to maintain and bring up the said child as though she were the defendants' child, and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the said child." That seems to me to be clearly a promise which cannot be enforced. The moment one arrives at the conclusion that the mother owes a duty to the child, in other words, has a responsibility towards it, a promise by anyone to relieve her from that duty and responsibility cannot be enforced in a court of law. Has, then, the mother a duty towards towards the child. In spite of the observation of Maule, J., in *In re Lloyd*, in my opinion at common law the mother owes a duty to her illegitimate child, for the legislation upon the subject has not created the duty, but merely recognizes and defines it. However that may be the series of statutes beginning with the Poor Law Act, 1834 (4 & 5 Will. 4, c. 76), s. 71, do impose a duty on the mother of an illegitimate child. The statement of claim in the present case is based upon the assumption that the mother can divest herself of that duty. In my opinion she cannot do so, and the statement of claim discloses no cause of action.

STIRLING, L.J.—I am of the same opinion. The statement of claim alleges that in consideration that the plaintiff, the mother of an illegitimate child, would allow the child to remain in the defendants' possession, the defendants promised and agreed with the plaintiff to maintain and bring up the child as though she were the defendants' child, "and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the said child." Now it is clear from the opinion of House of Lords in *Barnardo* v. *McHugh* that the mother of an illegitimate child is subject to certain obligations in regard to it, and by reason of those obligations she is invested with certain rights, one of which is the right to the custody and maintenance of the child. That right is given to the mother to enable her to discharge the duties imposed in respect of the child, and for the benefit of the child. That being so, it seems to me to be impossible for a mother to divest herself of those rights in favour of another person. The contract in the present case is that the child is to remain in the possession of the defendants, for the purpose of enabling the defendants to treat the child as if it were their own child, and for ever to relieve the mother from all liability and responsibility in conection with its bringing up. By the contract therefore the defendants undertake the duties of the mother, and take the benefits arising from those duties. That is a contract which the law will not enforce.

Appeal dismissed.

Solicitors for the plaintiff, *Seeley & Son.*

Solicitors for the defendants, *Bower & Parkes.*

High Court of Justice.

Chan. Div. Cozens-Hardy, J. — March 2, 16; April 27.

HARRISON v. HARRISON. (*a.*)

Will—Construction—Life interests—Gift over—"Survivors"—Intestacy.

A testator settled shares in his business upon his three sons A., B., and C. respectively for life with remainder to their children who should attain twenty-one or marry, and in case either of the said sons should die and "no child or other issue of such of them so dying shall acquire a vested interest in the shares hereby settled upon them respectively under the trusts or powers aforesaid," then the share of such son or sons "shall be held for the benefit of the survivor or survivors of them, my said sons."

A. and B. died before C. They left issue. C. died leaving no issue.

Held, that there was an intestacy as to C.'s share.

The third rule in In re Bowman, 37 *W. R.* 583, *dissented from.*

Hodge *v.* Foot, 34 *Beav.* 349; In re Arnold's Trusts, 18 *W. R.* 912; *and* In re Walker, 28 *W. R.* 91, *considered.*

This was a petition by the sole trustee of the will of Benson Harrison, sen., to determine who, upon the proper construction of the said will, became entitled upon the death of Benson Harrison, jun., to personal estate, in which under the said will the said B. Harrison, jun., was entitled to a life interest.

Benson Harrison, sen., died on the 25th of November, 1863. By his will dated the 5th of March, 1859, and subsequent codicils, he bequeathed his eight and a-half shares in the business of Harrison, Ainslie, & Co., to trustees upon trust to carry on and manage and conduct the said business in conjunction with the other partners, and as to three and one-half shares to hold "for all or such one or more exclusively of the others or other of the children or remoter issue of my said son Matthew Benson Harrison (such issue to be born in his lifetime) at such age or time or respective ages or times, if more than one, in such shares and with such future executory or other trusts for the benefit of the said children or issue, or some or one of them, with such restrictions and in such manner as my said son M. B. Harrison shall by any deed or deeds, sealed and delivered, with or without power of revocation and new appointment, or by will or codicil

(*a.*) Reported by J. H. DAVIES, Esq., Barrister at-Law.

and extending past the hamlet of Monkswood and other parishes to a red post at the lower end of a place called Redlands Pool.

He had let the fishery to the Usk Fishery Association, who granted tickets or licences to their members and others to use the fishery, and to walk along the banks of the river for the purpose.

The defendant had lately become the owner and occupier of land called Pont Sand Pit situate upon the left bank of the river, and extending from a mile below Usk Bridge for about 700 yards down towards Redlands Pool, and his land thus adjoined part of the river over which the several fishery was claimed.

He disputed the right of the plaintiff to the several fishery, and to the right of way in question, and claimed to fish, and did fish, in the half of the stream adjoining his land. He also took some steps to prevent the licensees of the association from coming upon his land to fish.

The plaintiff thereupon brought this action claiming (1) a declaration that he was entitled to the bed of the river from Maen-y-Wrath to Redlands Pool, and to the several fishery therein, and to a right of way along the banks of the river within the limits aforesaid for the purpose of fishing; and (2) an injunction to restrain the defendant from fishing, or from hindering the enjoyment by the plaintiff, his lessees and licensees, of the several fishery.

The plaintiff's title to the fishery commenced with a lease of the 1st of September, 1516, granted by King Henry VIII. to the Earl of Worcester (the original being in Latin) of "our fishery in our waters or rivers of Uske and Seyn, in our lordship of Uske and Caerleon, and the members of the same lordships, parcel of our Earl of March, and all our weirs (*gurgites*) in and upon the waters or rivers aforesaid, and in every of them, and all and singular profits of and in the waters or rivers aforesaid, and of and in the weirs aforesaid, in anywise arising, accruing, and to us in anywise belonging," followed by a grant of the manor of Wondy (which was situate upon the left bank of the river), and of certain other lands, the whole to be held for twenty years, at a certain rent. Subsequent documents, and especially a survey made in A.D. 1652 of the Crown possessions, showed that the fishery so leased extended between the limits claimed by the plaintiff. Successive leases of the property were subsequently granted to the Earls of Worcester, or the Dukes of Beaufort (as they subsequently became), and later to the Hanburys and the Leighs, till in March, 1839, the Crown granted it in fee to Mr. Capel Hanbury Leigh, the then lessee, through whom the plaintiff claimed.

As showing that the plaintiff could not have the several fishery which he claimed, the defendant gave evidence to show that there were other fisheries existing in that part of the river, though these other fisheries did not exist in any part of the river opposite the defendant's lands, being, at least as regards two of them, above the bridge of Usk. One was called the Monkswood fishery, and belonged to the Duke of Beaufort, as was alleged under a grant of confirmation from the Earl of Pembroke in March, 1223, to the abbey of Tintern; and Mr. Page, a record expert, was called and gave evidence obtained in his searches as to the early history of this fishery. Another of these fisheries was the Trostrey fishery, which was found mentioned in a minister's account of the year 1546-7. A third fishery was the Edlogan fishery, which was said to be held with the manor of Edlogan, which belonged to the plaintiff.

The defendant also brought evidence to show that the owners or occupiers along the river had exercised acts of ownership over it in various ways, as by driving stakes into the bed for the purpose of preventing erosion of the banks (a process known as "goretting"), by taking from the bed of the river gravel brought down in flood time, and by erecting fences a short distance within the water, forming a pen, to prevent cattle who went down to drink from straying along the river.

The learned judge found that the right of way had been in fact exercised along the fisherman's path over the Pont Sand Pit land for at least fifty-seven years previously.

Neville, K.C., Ingpen, K.C., and *P. S. Stokes*, for the plaintiff.—The plaintiff has a several fishery in the river, and must consequently be presumed to own the bed of the river: *Hindson* v. *Ashby*, 45 W. R. 252, [1896] 2 Ch. 1, at p. 11; *Ecroyd* v. *Coulthard*, 46 W. R. 119, [1897] 2 Ch. 554, 570; *Attorney-General* v. *Emerson*, [1891] A. C. 649, 40 W. R. Dig. 90. He also owns the bed by virtue of the grant of the weirs (gurgites), as that carries the soil of the river not only where they are erected, but also of that part of the river for the fishing of which they are used: see Hale in *De Jure Maris*, ch. 5; Willes, J., in *Malcomson* v. *O'Dea*, 12 W. R. 178, 10 H. L. Cas. 593, p. 619; and Lord Selborne in *Neill* v. *Duke of Devonshire*, 31 W. R. 622, 8 App. Cas. 143. The plaintiff claims the right of way along the banks as appendant or appurtenant to the bed of the river. If the court should be of opinion that he does not own the bed, then he claims the right of way as appurtenant to the several fishery. Coke's *dictum*, Co. Litt. 121*b*, that an incorporeal hereditament cannot be appurtenant to an incorporeal hereditament is not good law, and the passage is unintelligible. The only question is whether the two are or are not incongruous, as stated in the note of Messrs. Hargrave and Butler to the passage. Nothing can be more congruous than the right of way here claimed and the several fishery. The acts of the adjoining owners in taking gravel, driving in stakes &c., were done either upon sufferance or for the purpose of preventing the banks being washed away.

Warmington, K.C., H. Terrell, K.C. and *A. J. Allen*, for the defendant.—The plaintiff's claim is to have a several fishery up to Maen-y-Wrath. This is disproved by the existence of the other fisheries in that part of the river. A several fishery is the exclusive right of fishing, and therefore cannot co-exist with another several fishery: *Holford* v. *Bailey*, 13 Q. B. D. 426. It is proper to consider the existence of these other fisheries, although above Pont Sand Pit, with reference to the rights of plaintiff: *Jones* v. *Williams*, 2 M. & W. 326. Moreover, the grants of the plaintiff do not give him a several fishery, but only a fishery. He has at most only a free fishery. A grant of a fishing water cannot pass the soil: Co. Litt. L. 1, c. 1, s. 1, 4*b*. The acts of the adjoining owners (among other things) show that the plaintiff does not own the bed of the river. He does not, then, claim a right of way as appurtenant to any land, and it cannot be claimed as appurtenant to a several fishery, as an easement must be claimed as appurtenant to land. Coke's *dictum* already cited is good law, and there is no case to the contrary. A several fishery, for instance, cannot be claimed as appurtenant to a right of pasturage: see judgments of Willes, J., and Brett, J., in *Edgar* v. *Commissioners of Fisheries*, 23 L. T. Rep. 732, 19 W. R. C. L. Dig. 33.

They also referred to *Smith* v. *Andrews*, [1891] 2 Ch. 678, 40 W. R. Dig. 90.

Neville in reply.—The word "several" is not necessary to the grant of a several fishery. It occurred in neither of the grants in the cases of *Malcomson* v. *O'Dea* and *Neill* v. *Duke of Devonshire*. The words here "Our fishery in our waters of Uske"

are apt and proper words for the grant. As to the other fisheries above Pont Sand Pit, they may coexist with the plaintiff's fishery: *Seymour* v. *Lord Courtenay*, 5 Burr. 2814. But, if not, and if the Crown could not grant the plaintiff's predecessors a several fishery above the town of Usk, the grant would be good as regards the river adjoining Pont Sand Pit, as the grant would operate to pass what the Crown was able to grant: see the judgment of Lord Selborne in *Neill* v. *Duke of Devonshire*, 31 W. R. 622, at p. 624, 8 App. Cas., p. 153.

BUCKLEY, J.—I think the plaintiff is entitled to whatever was originally granted by the Crown in 1516, and the first question is, What was the subject of the grant? The plaintiff claims a several fishery. A several fishery means the exclusive right to fish in a given place: *Malcomson* v. *O'Dea*; *Holford* v. *Bailey*. It may exist either apart from, or as incident to, the ownership of the soil over which the river flows. But since *Attorney-General* v. *Emerson* it must be taken as settled that where a several fishery is proved to exist the owner of the fishery is presumed to be the owner of the soil unless there is evidence to the contrary, whether the river is a navigable one (*Hindson* v. *Ashby*), or neither public nor navigable: *Foster* v. *Wright*, 4 C. P. D. 438, and *Ecroyd* v. *Coulthard*. Now did the grant pass a several fishery, and as a result the bed of the river? And again, did the bed of the river pass under the grant of "the weirs," with the result of giving the grantee the several fishery over the river as owner of the bed? As regards the second question the word used in the grant of 1516 and the subsequent deeds is "*gurgites*." As to this Hale says, in his *De Jure Maris*, ch. 5, speaking of a fishery arising from the propriety of the soil: "Such are gurgites, weares, fishing places, borachiae, stachiae, &c., which are the very soil itself," and Coke, Co. Litt., L. 1, c. 1, s. 1, 5*b*, says: "In the same manner gurges . . . consisteth of water and land, and therefore by the grant thereof by that name the soile doth pass." Again, Willes, J., in advising the House of Lords in *Malcomson* v. *O'Dea*, referring to the passage in Co. Litt., says that "gurges" may stand for "pool," and is of wider significance than "wear"; and Lord Herschell, in *Attorney-General* v. *Emerson*, speaking of the words used by Lord Hale in the above passage, says they "all have this in common, that they are constructions or erections by which the soil is more or less permanently occupied," and in *Neill* v. *Duke of Devonshire* Lord Selborne says, "Weirs ('kidelli' or 'gurgites') were the usual words in ancient documents for appropriating and enjoying several fisheries in tidal waters." I think that from the use of the word "gurgites" in the documents there was a grant of the corporeal hereditament in the soil upon which the weirs were constructed; but beyond this I think that it must be inferred, if nothing appears to the contrary, that it was a grant of the soil over which the river ran, and upon which there was the right to construct weirs for the purpose of taking fish.

As to whether the grant passed a several fishery apart from the use of the word "weirs," the question is whether you must have the word "several." I think not. In neither of the grants of fisheries in the cases of *Malcomson* v. *O'Dea* and *Neill* v. *Duke of Devonshire* do you find the word "several" used. You find a grant of the right of fishing, or the grant of the weir, or something of that sort, and from that the inference follows that what is granted is a several right.

Now as regards the difficulties raised by the defendant as to the possibility of this fishery, because of the existence of other fisheries on the river. He is entitled to say as against the plaintiff that the fisheries of Monkswood, Trostrey, and Edlogan, or some of them at any rate, exist. Now, is the existence of these fisheries, Monkswood and Trostrey, being as they are over a portion of the river, which does not join the defendant's land, admissible on the question I have to decide. If any authority is necessary, I should refer to *Jones* v. *Williams*. I have to regard all the rights shown to exist in respect of the property over which the plaintiff claims his several fishery for the purpose of ascertaining whether he is entitled to several fishery anywhere. I would also say this, that the rights claimed with regard to the Monkswood and the Trostrey fisheries do not appear to be either partial or limited, so as to be capable of existing concurrently with a several fishery of the plaintiff in the same parts of the river, as would otherwise be the case: see *Seymour* v. *Lord Courtenay* and *Ecroyd* v. *Coulthard*. But I have only to do with the river opposite Pont Sand Pit, where there is no other fishery. And if the Monkswood and Trostrey fisheries are inconsistent with any other several fishery in those (other) parts of the river (about which I say nothing), I do not think this fact would oblige me to say that there cannot be a several fishery in the river opposite Pont Sand Pit. Suppose that in A.D. 1232 the Crown gave the Abbey of Tintern a several fishery, or some right of fishery in the upper part of the river, and therefore had not a several fishery to give the Earl of Worcester in 1516 in that part of the river, am I to infer that the grantee under the grant of 1516 did not get a several fishery at Pont Sand Pit because the grant included the upper part of the river where the previous fishery was given? I think not. I think that there would have been a valid grant of the Pont Sand Pit fishery, even although the grant did not operate to give any several fishery higher up: see the judgment of Lord Selborne in *Neill* v. *Duke of Devonshire*.

Now as regards the acts of ownership said to have been exercised upon the soil of the river such as goretting, taking gravel, and erecting fences, I refer them to the absence of any objection on the part of the owner of the bed of the river to acts which did him no harm, and were reasonably convenient, or necessary, if you will, for the protection and enjoyment of the property of the riparian owner: see observations of Lord Selborne and Lord O'Hagan on *Neill* v. *Duke of Devonshire*, 31 W. R., pp. 628, 633, 8 App. Cas., pp. 156, 170.

As regards the right of way claimed, if the plaintiff has the soil in the river opposite Pont Sand Pit, there is no difficulty; but, supposing I am wrong in so holding, the question would arise whether the plaintiff could claim his right of way as appurtenant to his fishery. The passage in Co. Litt. says that prescription does not make anything appendant or appurtenant to another unless it "agree in quality and nature to the thing whereunto it is appendant or appurtenant." Pausing there I should understand that to mean that the corporeal thing must be appendant to the corporeal thing, and the incorporeal to the incorporeal thing, but he adds "as a thing corporeall cannot properly be appendant to a thing corporeall, nor a thing incorporeall to a thing incorporeall." I cannot help thinking that the language somehow must have gone wrong there. But there is a note to the above *dictum* to this effect: "This position is not universally true. It sometimes fails as to things appurtenant. Return of writs, or a leet, may be appurtenant to an hundred; so may waif and stray to a leet; and yet in those instances both subjects are incorporeal. The true test seems to be the propriety of relation between the principal and the adjunct,

which may be found out whether they so agree in nature and quality as to be capable of union without any incongruity": Co. Litt., edited by Charles Butler (A.D. 1832), 121*b*, note 7. I adopt that note as giving the true and real test for a case of this kind, and if I were wrong in holding the fishery right corporeal I should hold that, if the plaintiff had not the bed of the river, he had this right of way as appendant or appurtenant to his several fishery. One is clearly congruous to the other. You can scarcely enjoy the one without the other. But, as I have said, the question does not arise. Under these circumstances I grant an injunction, not as regards the whole distance asked for the statement of claim, but to restrain the defendant from trespassing upon the river and fishery within a moiety of the bed of the river where it adjoins his lands, and from interfering with the enjoyment by the plaintiff, his lessees, licensees, and assigns, of that portion of the bed of the river, and from interfering with his right of way over the Pont Sand Pit lands for the purpose of angling and fishing.

Injunction granted.

Solicitors for the plaintiff, *Foyer & Hordern.*

Solicitors for the defendant, *Thos. White & Sons.*

K. B. Div.
(Ridley and Bigham, JJ.) June 14.

REX *v.* DYMOCK AND ANOTHER.
REX *v.* MOGER AND ANOTHER. (*a.*)

Animal—Dog—Dangerous and not under proper control—Order for destruction—Form of order—Conviction for disobedience—Dogs Act, 1871 (34 *&* 35 *Vict. c.* 56), *s.* 2.

The appellants obtained rules nisi *for* certiorari *to quash two orders that had been made by justices for the destruction of two valuable dogs, on the ground* (1) *that the justices could under section* 2 *of the Dogs Act,* 1871, *only make an alternative order either to destroy or to keep under proper control the dog in question;* (2) *that the first order was bad in form, since there was no adjudication that the dogs were not under proper control;* (3) *that the second order was bad, as it wrongly cited the first order.*

Held, discharging both rules, that an order for the destruction of a dangerous dog need not contain an adjudication by the justices that the dog was not under proper control, nor by section 2 *of the Dogs Act,* 1871, *need the justices give the owner of the dog the option of keeping the animal under proper control before ordering its destruction.*

Pickering *v.* Marsh, 22 *W. R.* 798, 43 *L. J. M. C.* 143, *followed.*

Rule *nisi* for a *certiorari* to quash a conviction of the appellant under section 2 of the Dogs Act, 1871, made under the following circumstances:

Major Davis, residing in Bath, was the owner of several dogs, including two Scotch deerhounds of great value.

On the 21st of April these deerhounds attacked a Mr. Seers, knocked him down and bit him. Mr. Seers thereupon laid a complaint against Mr. Davis under section 2 of the Dogs Act, 1871, and at the hearing of the information evidence was given that the same dogs had bitten other persons, and the justices made an order directing them to be destroyed.

The order, after reciting the complaint that the dogs were dangerous and not under proper control, set out an adjudication merely that they were not under proper control.

Three days later the same dogs bit another person.

On another information the appellant was convicted of not obeying the order for destruction, and was fined £2.

The new order recited the old one, as it had contained an adjudication that the dogs were dangerous and not under proper control.

The appellant then obtained rules *nisi* to quash these orders on the grounds (1) that the justices could under section 2 only make an alternative order either for the owner to destroy or to keep the animal under proper control; (2) that the first order was bad in form, since there was no adjudication that the dogs were not under proper control; and (3) that the second order was bad, as it wrongly recited the first order.

Section 2 of the Dogs Act, 1871, provides that "any court of summary jurisdiction may take cognizance of a complaint that a dog is dangerous and not kept under proper control, and if it appears to the court having cognizance of such complaint that such dog is dangerous the court may make an order in a summary way directing the dog to be kept by the owner under proper control or destroyed, and any person failing to comply with such order shall be liable to a penalty not exceeding twenty shillings for every day which he fails to comply with such order."

R. M. Bray, K.C., and *Bodkin* showed cause against the rules.

Foote, K.C., and *Colam* appeared to support them.

THE COURT discharged both rules.

RIDLEY, J.—The respondents obtained these two rules to bring up two orders made by the justices on the ground that the first order was bad because the justices should have given the owner of the dogs the option of keeping them under proper control instead of ordering them to be destroyed in the first instance. It was said that there was an obvious omission in the second part of section 2 of the Act of 1871. The section speaks of a complaint "that a dog is dangerous *and* not kept under proper control" and then goes on to say that "the court may make an order directing the dog to be kept by the owner under proper control *or* destroyed." Here the justices made an order that the dogs should be destroyed, and it is said that the order is bad because it is not alternative. That is a point of substance; but whatever may have been the intention of the Legislature, the point has already been decided adversely to the objection in *Pickering* v. *Marsh,* 22 W. R. 798, 43 L. J. M. C. 143, the head-note being that under the Dogs Act, 1871, s. 2, a court of summary jurisdiction may order a dangerous dog to be destroyed without giving the owner the option of keeping it under control. It is not contended that the facts in that case are distinguishable from those before us now, and therefore we must hold that that objection to the order is one that should be overruled. Then it was said that the order was bad in form, because it did not state that the dogs were not kept under proper control, and again, the words of the section—"that a dog is dangerous and not kept under proper control"—were cited to us. What the order did contain was a recital that a complaint had been laid against Major Davis alleging that the dogs were dangerous and not kept under control, and then an adjudication that the dogs were dangerous, and that Major Davis was the owner. It was objected that the order ought to have averred that the justices had found the dogs were not under proper control. No doubt the justices must find that as a fact before they can make an order for the dogs to be destroyed, but it is not necessary for them to state it in the order, because it would be sufficient to follow the words of

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the statute in drawing up the order, under which statute the justices had jurisdiction. The third point—namely, that the conviction does not correctly recite the order—is one wholly without merit and can at once be dismissed.

Both rules therefore will be discharged.

BIGHAM, J.—I entirely agree.

Solicitors, *Gribble & Co.*, for *Newton Fuller*, Clerk to the Justices, Bath; *Belfrage & Co.*, for *Ricketts, Son, & Vezey*, Bath.

K. B. Div.
(Ridley and Bigham, JJ.) June 11.

NEW RIVER CO. (*Appellants*) *v.* HERTFORD UNION ASSESSMENT COMMITTEE AND OTHERS (*Respondents*). (*a.*)

Local government—Rating — Rateable value — Waterworks — Intake — Payments made under statutory obligation for user of intake—Cost of land and works —Assessment.

Held, that the proper principle of assessment on the authority of Liverpool Corporation *v.* Llanfyllin Union, [1899] 2 *Q. B.* 14, 47 *W. R. Dig.* 148, *was for the valuer to see what the site and construction of the works cost, and then to take a percentage on the capital amount so expended as representing the rent a hypothetical tenant would give; and to exclude the amount paid and payable by the company under their Acts for the user of the intake as being no part of the cost of construction, nor a condition precedent to their construction.*

Rating appeal.

Special case stated by the Court of Quarter Sessions of Hertford in respect of the rating of the property of the New River Co. at a point where the water was taken from the River Lea.

The question for decision was whether the company ought to be rated as it always had been hitherto on the value of the land occupied by the intake and its structural value, or whether there should be added a sum in respect of the value of what was described as the user of the intake by the flow of water over it.

The case stated the following facts:

The company appealed against a rate whereby they were rated in the sums of £787 plus £3,280 gross, and £650 plus £3,180 rateable value. The history of the appellant company and of their right to take water from the River Lea is contained in their charter, with rights conferred upon it by numerous private statutes dating from 3 Jac. 1, c. xviii. to take water from (among other sources) the River Lea. By 18 & 19 Vict. c. cxcvi. (the last of these statutes) all the water in that river except what was needed for navigation was vested in the New River Co. and another water company, and the New River Co. was, in consideration of receiving this water, to pay to the River Lea Conservators the capital sum of £42,000 to be spent in specified improvements in the navigation of the River Lea, and an annual sum of £1,500.

The parish of St. John urban, in respect of which the rate in question was made, was formed under the Local Government Act, 1894, and comprised a portion of the previously existing parish of St. John, Hertford (the part within the borough of Hertford), and in addition thereto a part of the liberty of Little Amwell (such part as was within the borough aforesaid).

From 1876 to 1894 the appellant company's property in the said parish of St. John was rated at £350, and in the said liberty of Little Amwell at £500, and those figures had not been materially altered since 1859.

Upon the new parish of St. John urban being formed, the property of the appellant company therein was rated at £350 in respect of that portion which was in the parish of St. John and at £300 in respect of that portion which was taken from the old liberty of Little Amwell.

The portion left in the old liberty of Little Amwell, which had then been constituted the new parish of Little Amwell, was rated at £200.

The rating of the property of the appellant company in the new parish of St. John urban therefore stood at the same valuation as in 1876.

Until January, 1900, the said property of the appellant company in the parish of St. John urban had never been assessed at more than £650 rateable value.

In January, 1900, by a supplemental valuation list subsequently confirmed by the assessment committee a further sum of £3,180 was added to the rateable value in the assessment of the said property in the occupation of the appellant company under an entry in which the company were rated for property described as "intake from the River Lea."

On the 24th of May, 1900, the rate in question was made in accordance with the said supplemental valuation list.

The following is a copy of the said rate:—

No.	Name of Occupier.	Name of Owner.	Description of Property rated.	Name or Situation of Property.	Estimated Extent.	Gross Estimated Rental.	Rateable Value of Buildings, &c.	Amount of Rate at 1s. 2¼d. in the £ on Agricultural Land and 2s. 6d. in the £ on other hereditaments.
				a. r. p.	£	£	£ s. d.
132	New River Company	New River Company	Chadwell Spring — portion of the New River guage-house, sluice, and appurtenances	Kings Meads	5 2 38	787	650	78 10 10
653	New River Company	New River Company	Intake from River Lea	Kings Meads	—	3,280	3,180	384 5 0

The appellant company, while admitting that these

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

sums of £42,000 and £1,500 might be *primâ facie* evidence as to the measure of the value of the works, contended (1) that the company was overrated, (2) that the company did not occupy any rateable hereditament in the parish coming within the description of intake from the River Lea, and (3) that no rateable hereditament coming within that description had any existence in the said parish.

For the respondents it was contended—(1) That beyond the rating of the intake at its structural value and value as land it ought to be rated in an additional sum as having an enhanced value in respect of the user made of it by taking water from the River Lea into the channel of the appellant company; (2) that the sums of money which the appellant company had paid under the said statutes were evidence that the land and the structure erected thereon had some additional value beyond the structural value thereof in respect of the user made of them as aforesaid, and that such additional value was sufficiently great to support the rate appealed against; (3) that the additional payments directed by section 25 of the Lea Conservancy Act, 1900, were evidence to show what (in the opinion of Parliament at the date of the passing of that Act) the user of the intake was worth to the appellant company.

The question for the court was whether the said hereditament was rateable upon the principle contended for by the respondents. If it was so rateable the judgment was to stand; if not, then either the gross and rateable values were to be reduced respectively to the sums of £787 and £650, or the court was to make such other order herein as it should think just.

Marshall, K.C., and *R. D. Muir*, for the appellants.

Ryde, for the respondents.

RIDLEY, J.—This is a case raising a question of considerable importance, but in my opinion it is covered and concluded by authority. The law seems well settled and the principle last recognized in *Liverpool Corporation* v. *Llanfyllin Union*, [1899] 2 Q. B. 14, 47 W. R. Dig. 148, we think applies. The principle laid down there was that in cases such as this the valuer was to see what the site and construction of the works cost, and then to take a percentage on the capital amount so expended as representing the rent a hopothetical tenant would give. The same principle is to be traced in the judgments given in *Reg.* v. *Mile End Old Town*, 10 Q. B. 208—namely, that in rating cases like the present it is not the amount of rent the hypothetical tenant would in fact give that has to be considered; but the rough way is to see what the site and the construction of the works cost, and to take a percentage on the capital amount so expended as representing the rent which a tenant would give. It is impossible to argue that that principle does not apply to the present case. In my opinion it is not right to say that the sum which had been added by reason of the user of the water is a part of the cost of construction and ought to be taken into account. The amount paid and payable by the company under their Acts is no part of the cost of construction, nor a condition precedent to their construction, and is therefore not an element to be taken into consideration. The rateable value must be reduced to £787 gross, and this appeal allowed with costs.

BIGHAM, J., gave judgment to a like effect.

Appeal allowed; leave to appeal granted.

Solicitors, *Thompson & Debenhams; J. N. Mason & Co.*, for *Sworder*, Hertford.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) May 8.

COLLINS (*Appellant*) v. THE HORNSEY URBAN DISTRICT COUNCIL (*Respondents*). (*a.*)

Local government—Street—Naming of new street by local authority—Right of owner of the estate—Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c.* 34), *s.* 64.

The appellant, the owner of a building estate situate within the respondents' district, laid out a new street and submitted plans thereof and of the houses he proposed to erect in such street to the respondents, who approved of the same. The appellant on the plans named the street "Midhurst-avenue," and also put up a board with such name affixed thereon at one end of the street. After several of the houses had been erected the respondents proposed calling the street "Collingwood-avenue," and put up a board on one of the houses with that name upon it. The appellant objected to the latter name and removed the board put up by the respondents. On an information preferred against the appellant under section 64 *of the Towns Improvement Clauses Act*, 1847, *the justices convicted him.*

Held, that section 64 *gave the local authority the right to decide and fix up the name of a new street, and that the appellant had committed an offence under that section in removing such name.*

Case stated.

This was an appeal from the decision of the justices sitting in petty sessions at Highgate, who convicted the appellant upon an information preferred against him by the respondents for defacing the name of a street contrary to the provisions of the Towns Improvement Clauses Act, 1847.

The appellant was the owner of the Fortismere estate, a building estate at Fortis Green. Early in 1899 he submitted to the respondents plans showing the positions and names of certain proposed new streets on the estate, together with notice of his intention to lay out and construct the same. One of the proposed street was named "Midhurst-avenue" on the plans.

On the 10th of July, 1899, the appellant received from the respondents notice of approval.

In the following August the appellant submitted to the respondents plans and descriptions of sixty-two dwelling-houses to be erected in the said street, which was named "Midhurst-avenue" on those plans also, and on the 14th of the same month he received from the respondents notice of approval.

On the 25th of September the appellant began to erect dwelling-houses in the said street, which had not then been formed, but only marked out with sticks. The street was formed subsequently. At the date of the information ten of the houses had been completed and twenty-six were in the course of erection. The name "Midhurst-avenue" was put up by the appellant in the street at one end thereof by means of a notice board affixed to a post. The street had not been known by any other name than that of Midhurst-avenue when the respondents proposed to call it "Collingwood-avenue," but had, subsequently to the 13th of September been referred to as "Midhurst-avenue in leases and agreements of tenancy relating to houses therein and also in an agreement between the appellant and the respondents as to sewerage and other works on the estate.

Adjoining the estate were the grounds of a house belonging to a Mr. Arnold, which had been known for

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

many years as "Midhurst," and Mr. Arnold objected to the proposed street being called "Midhurst-avenue." No other street in the district was so named and no confusion or inconvenience would have arisen from it being so named. On the 24th of September the respondents wrote to the appellant suggesting the street should be called "Collingwood-avenue." The appellant gave notice in writing that he objected to the street being so called. On the 5th of November the respondents resolved that the street should be called "Collingwood-avenue," and they informed the appellant that they intended to put up that name in the street. The appellant disputed the right of the respondents to do so, and said he would remove the name if affixed to his property in the said street. On the 27th of November the respondents affixed a board with the name "Collingwood-avenue" thereon to a house at the end of the said street, of which house the appellant was the owner. The appellant on the same day caused this board to be removed.

At the hearing before the justices the respondents contended: (1) That they were entitled to determine the name by which a new street in their district was to be known; (2) that they determined the said street was to be known by the name of "Collingwood-avenue," and were entitled accordingly to cause such name to be put up on the appellant's said house; (3) that they were entitled to alter the name if they thought proper, and to cause another name to be put up; (4) that the appellant was not entitled to pull down or efface the name put up by them.

The appellant contended that the respondents had no power to alter the name of the street contrary to the wishes of the owner, and that what they had done was *ultra vires* and illegal.

The justices were of opinion that the respondents had power under section 64 of the Towns Improvement Clauses Act, 1847, to determine the name of the street, and to put up a board bearing such name on the said house, and that the appellant was guilty of an offence under that Act in causing such name to be defaced.

Section 64 of the Towns Improvement Clauses Act, 1847, provides as follows: "The commissioners shall, from time to time, cause the houses and buildings in all or any of the streets to be marked with numbers, as they think fit, and shall cause to be put up or painted on a conspicuous part of some house, building, or place at or near each end, corner, or entrance of every such street the name by which such street is to be known; and every person who destroys, pulls down, or defaces any such number or name, or puts up any number or name different from the number or name put up by the commissioners shall be liable to a penalty not exceeding forty shillings for every such offence."

Naldrett, for the appellant.—The local authority are not entitled to alter the name of a street contrary to the wishes of the owner, and therefore the respondents in acting as they have done here have acted in an illegal manner, and what they did was *ultra vires*. The conviction was therefore wrong and should be quashed.

Alexander Glen, for the respondents.—The local authority is the proper authority to determine the name of a new street. The respondents never accepted the name given to the street by the owner, and even if they had done so they would still have a right to change it. Section 64 expressly imposes the duty upon the local authority of putting up the name of a street and imposes a penalty upon any person who shall pull down or deface such name; similar provisions are to be found in section 145 of the City of London Sewers Act, 1848 (11 & 12 Vict. c. cclxiii.), and in sections 32 & 33 of the London Building Act, 1894 (57 & 58 Vict. c. cxxiii.). The present case is quite distinct from *Anderson* v. *Lord Mayor and Corporation of Dublin*. 15 L. R. Ir. 410, 34 W. R. Dig. 112, for Chatterton, V.C., therein says at p. 422, "I express no opinion as to the naming of new streets, which plainly involves a different consideration." That case was one relating to an existing street, the present case relates to a new street. The appellant had no right to take the law into his own hands and pull down the board on which the name was put up by the local authority, but should have taken proper legal proceedings.

Counsel also cited *Day* v. *Brownrigg*, 27 W. R. 217, 10 Ch. D. 294.

Naldrett replied.

Lord ALVERSTONE, L.C.J.—In my opinion the *Dublin case* is in no way an authority upon the point that is now before us. As was pointed out by Mr. Glen, the Vice-Chancellor expressly said he was not dealing with the case of new streets, as to which very different considerations might apply. In my opinion one can see at once that where you are dealing with altering the name of an old street it may cause very great inconvenience, and very great difficulty may arise if a new name is forced upon people, and therefore, as I have indicated in the course of the argument, if this case had rested on a right claimed by the local authority to challenge the existence of a well-known name of an existing street, speaking for myself—although I do not suppose it is absolutely necessary to decide it—I do not think they would have the right to do so.

I think the language of section 64 is very different to that employed in the sections in those other Acts to which Mr. Glen called our attention. I do not see under section 64 any right to change the name of an existing street. In this case, as I understand, in the latter part of 1899 the owner was minded to lay out his estate for building, and on his plans he called this proposed new street "Midhurst-avenue" and that was brought to the knowledge of the local authority, but they exercised no judgment upon it.

Some questions have been raised as to objections by someone, but we must take it that the board in fact determined, and that they *bonâ fide* determined, that the street ought to be called "Collingwood-avenue." They then put up a board with that name upon it. Now, having regard to the duty put upon the commissioners under the latter words of section 64, I think it was not open to the appellant to do what he has done here—namely, deface the name of the street, and then say he did it because he wished another name to be given to the street. I think if he has a right as owner or proprietor to call this place "Midhurst-avenue," that he should have enforced his right by taking proper proceedings to restrain the local authority from putting up the board. I think the statute does put upon the local authority in the first instance the duty to put up the name, and it imposes a penalty upon persons who pull down or deface that name. I do not think it was intended that the question whether the name was a rightful name or wrongful name should be decided in proceedings for defacing the name put up, *primâ facie* lawfully, by the local authority. In this case I gather that it was really a new street. One can well imagine cases arising—some of them were put by Mr. Glen—where if there were several owners in a street or several occupiers of land or owners of houses, serious difficulty might arise as to which would be the proper name, although I think it would be better if the matter were made clear with regard

to this particular class of district by words which would be analogous to words in the later Acts, such as the London Building Act. I do not think we can say as a matter of law that the local authority were wrong in putting up the name, and that the appellant was justified in painting it out when they had put it up. I think, therefore, that this appeal must be dismissed.

LAWRANCE, J.—I agree.

Appeal dismissed.

Solicitor for appellant, *A. M. M. Forbes.*

Solicitors for respondents, *Tatham & Hardy.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) } May 3.

LAW v. GRAHAM & BRADLEY. (a.)

Factory—Definition—Beer bottling works—Factory and Workshop Act, 1878 (41 *Vict. c.* 16), *s.* 93 (3).

Premises were used by the respondents for the purpose of washing bottles and bottling beer. Before the bottles were filled, which was done by manual labour alone, they were washed by manual labour with the aid of mechanical power.

Held, that the premises were not a factory within the definition of the term in section 93 (3) *of the Factory and Workshop Act*, 1878.

Case stated by justices of Newcastle-upon-Tyne.

At a petty sessions held at Newcastle-upon-Tyne on the 23rd and 30th of November, 1900, an information was preferred by John Law, one of her late Majesty's inspector of factories, the appellant, against Messrs. Graham & Bradley, of the Bigg Market, Newcastle, who were spirit merchants and beer dealers, the respondents, for that they on the 25th of October, 1900, being the occupiers of certain bottling works in Newcastle-upon-Tyne, the same being a factory within the true intent and meaning of the Factory and Workshop Acts, 1878 to 1895, did fail to have affixed at the entrance of the factory in the prescribed form the prescribed abstract of the Acts.

At the hearing of the information the following facts were proved or admitted:

The respondents were the occupiers of the premises referred to in the information, which they used solely for the purpose of washing bottles and bottling beer in their trade of wholesale and retail beer dealers. Before the bottles were filled with beer, which was done by manual labour alone, they were washed by manual labour with the aid of mechanical power. The bottles were washed inside by a rotary brush driven by a small gas-engine and were held in position by hand. The washing of the outside of the bottles was effected by manual labour only. Nothing was done to the beer itself to in any way alter its nature or character for the purpose of adapting it for sale. No process of any kind, in manufacturing or otherwise, was carried on on the premises beyond that of washing bottles and bottling beer as already described.

The respondents had not the prescribed abstract of the Factory Acts fixed at the entrance of their premises in the prescribed form, and if the premises came within the definition of a factory under the Factory Act, 1878, s. 93, sub-section 3 (c), then the respondents had infringed the provisions of section 78 of the Act.

The justices were of opinion that according to the true intent and meaning of sub-section 3 something must be done to the article itself for the purpose of adapting it for sale, and that even assuming filling the bottles with beer was adapting the beer for sale the premises were not a factory, inasmuch as the bottling was effected by manual labour alone without the aid of mechanical power.

They were also of opinion that no manufacturing process was carried on in the premises, as in the absence of any definition in the Act the phrase "manufacturing process" must be construed in its ordinary sense.

They accordingly dismissed the information.

Section 93 of the Factory and Workshop Act, 1878, says that the expression "factory" means "textile factory and non-textile factory, or either of such descriptions of factories," and non-textile factory means "(1) any works, warehouses, furnaces, mills, foundries, or places named in Part I. of the 4th schedule to this Act. (2) Also any premises or places named in Part II. of the said schedule wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there. (3) Also any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade, or for the purposes of gain, in or incidental to the following purposes or any of them—that is to say (a) In or incidental to the making of any article or part of any article; or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article; or (c) in or incidental to the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there."

H. Sutton, for the appellant.—The respondents' works are a factory within the meaning of the definition of that word in section 93 (3). They are premises wherein manual labour is exercised for the purposes of gain in or incidental to the making of an article—namely, bottled beer, and also in or incidental to the adapting for sale of an article—namely, beer. Those operations are both manufacturing processes in aid of which mechanical power is used. *Petrie* v. *Weir*, 2 Ct. of Sess. Cas., 5th series, p. 1041, is in point. There in premises where stone-dressing was carried on by hand a gas-engine was used to work a machine used by the workmen to sharpen their tools, and it was held that the premises were a factory within the Factory and Workshop Acts.

Travers Humphreys, for the respondents.—The respondents' premises are not a factory in the sense intended in section 93. The whole of the definition shows that no premises are intended to be included other than factories in the ordinary sense of a place where raw material is turned into a finished article. A perusal of the articles named in Schedule IV. confirms this view. The governing words of sub-section 3 are "wherein . . . mechanical power is used in aid of the manufacturing process carried on there." The pouring of beer, which is itself a finished article, into bottles cannot be said to be a manufacturing process in the ordinary sense. [The learned counsel was stopped.]

Lord ALVERSTONE, L.C.J.—In order that premises may be said to be a factory within the definition in sub-section 3 of section 93 two conditions must concur. The premises must belong to either of the categories (a), (b), or (c), and they must also come within the

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

last words of the section. In my opinion the respondents' premises were not used for making any article within (*a*), nor for repairing, ornamenting, nor finishing any article within (*b*), nor am I sure that they are used for adapting an article for sale within (*c*). But that is the only possible way of bringing the premises within the section, and it can only be done by taking a somewhat strained meaning of the words. But then you come to the words "wherein . . . steam, water, or other mechanical power is used in aid of the manufacturing process carried on there." Having regard to the former part of the section I do not think that the mechanical power used in washing the bottles was used in aid of the manufacturing process carried on in the premises. Therefore I think that the magistrates were right.

With regard to *Petrie* v. *Weir*, I do not wish to be understood as dissenting from it. The mechanical power used in the premises there under consideration might have had something to do with the stone dressing.

LAWRANCE, J., concurred.

Solicitors for the appellant, *Treasury Solicitor*.

Solicitors for the respondents, *Pyke & Parrott*.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) April 17.

ANDERSON *v.* COLLINSON. (*a*.)

Bastardy—Order of quarter sessions quashing affiliation order—Subsequent action for seduction by mother—Estoppel.

The fact that an affiliation order made (on the application of a girl who was the mother of an illegitimate child) by justices against the putative father has been quashed on appeal to quarter sessions, does not raise an estoppel as against such girl's mother in an action claiming damages for the seduction of the girl.

Reg. *v.* Glynne, 20 *W. R.* 94, *L. R.* 7 *Q. B.* 16, *considered and distinguished.*

Application for judgment or new trial by the defendant in an action for seduction remitted from the High Court and tried in the Darlington County Court, resulting in a verdict for the plaintiff with £250 damages.

The action was brought by the mother of the girl alleged to have been seduced, and the evidence given on behalf of the plaintiff was that the girl was seventeen years of age, and that from the age of thirteen the defendant, who was said to be a man of seventy, had repeatedly misconducted himself with the child.

The trial took place on the 7th of April, 1900, in the county court at Darwen before his Honour Judge Templar, with a jury, and the learned judge on the verdict entered judgment for the plaintiff.

Before the action was brought, the girl in October, 1899, had instituted bastardy proceedings in the petty sessional court against the defendant, and an order had been made by the justices adjudging him to be the father of the child. On the 8th of January the quarter sessions, upon appeal, allowed such appeal and quashed the order of petty sessions, holding that it was not proved that the defendant was the father of the child.

As a defence to the action the defendant pleaded that the plaintiff was estopped by the order of quarter sessions from claiming damages for seduction as the order of quarter sessions was a judgment *in rem* affecting the status of the parties, and therefore the present action could not be maintained; and that the result of the bastardy proceedings on appeal estopped the plaintiff from now alleging that the defendant was the father of the child.

The learned judge, however, held that the case must go to the jury, and entered judgment for the plaintiff in accordance with their findings.

The defendant appealed.

H. F. Manisty, K.C., for the defendant.—The decision of quarter sessions must be regarded as a decision *in rem*. The plaintiff is bound by it and is estopped from claiming damages for seduction: *Rex* v. *Inhabitants of Rislip*, 1 Lord Raym. 394, and *Reg.* v. *Glynne*, 20 W. R. 94, L. R. 7 Q. B. 16. Moreover, the learned judge excluded evidence which the defendant adduced consisting chiefly of medical testimony bearing upon the probabilities of the allegation. In the latter proceedings for damages for seduction evidence was given varying from that offered at the hearing of the summons for the affiliation order. The quashing of the order by the quarter sessions debarred all further proceedings.

J. A. Compston, for the plaintiff.—The judgment in the bastardy proceedings is a judgment *inter partes*, and therefore not an estoppel as against this action by the mother claiming damages for the seduction of her daughter, for she was no party to those proceedings.

He cited *Evans* v. *Evans*, 1 Rob. Ecc. 165; *Jenkyn* v. *Jenkyn*, 5 W. R. 43; and *Fraser* v. *Fraser*, 5 Notes of Cases 11, at p. 20.

H. F. Manisty replied.

Lord ALVERSTONE, L.C.J.—In this case we are pressed to allow the appeal on the authority cited to us of *Reg.* v. *Glynne*. In that case it was held that where on an appeal to quarter sessions an order of affiliation was quashed on the ground of the insufficiency of corroborative evidence the order of quarter sessions was a decision on the merits and was final, and fresh proceedings could not be taken before the justices. If, therefore, the present action had been brought by the girl the decision in that case might have been binding on us. But the girl being under age, the action is brought by the girl's mother, who was no party to the previous proceedings between the girl and the defendant. It is impossible for us, therefore, to say that the ordinary rule with regard to estoppel applying *inter partes* only does not apply here. All that *Reg.* v. *Glynne* decided was that where on appeal to quarter sessions an order of affiliation was quashed subsequent proceedings could not be taken by the girl against the putative father, the former proceedings acting as an estoppel as between the girl and the man. But that decision does not debar the mother from maintaining an action for seduction of her daughter. The county court judge has therefore come to a right conclusion, and this appeal fails.

LAWRANCE, J., concurred.

Appeal dismissed.

Solicitors for the appellant, *Iliffe, Henley, & Sweet*, for *T. M. Barron & Smith*, Darlington.

Solicitor for the respondent, *A. Toovey*, for *Edmundson & Gowland*, Masham.

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

IN BANKRUPTCY.

Q. B. Div. (Wright, J.) March 18; April 1.

In re RIGGS.
Ex parte THE TRUSTEE. (*a.*)

Bankruptcy—Landlord and tenant—Lease—Covenant not to assign—Proviso for re-entry on bankruptcy or breach of covenant—Receiving order and adjudication on lessee's own application—Forfeiture—Peaceable re-entry by lessor—Notice—Relief—Conveyancing Act, 1881, *s.* 14, *sub-sections* 1, 2, 6—*Conveyancing Act,* 1892 (55 & 56 *Vict. c.* 13)—*Bankruptcy Rules,* 1886, *r.* 190.

The filing by a debtor of his own petition and his application to be adjudged bankrupt, followed by receiving order and adjudication, does not constitute a breach of a covenant in a lease not to assign the demised premises.

Motion by the trustee in the bankruptcy of Riggs for an order declaring that the trustee was entitled to possession of certain leasehold premises known as "Riggs' Retreat," situate at Buckhurst Hill, in the county of Essex.

By an indenture of lease dated the 12th of November, 1896, J. W. Hobbs let to John Riggs the premises above-mentioned for the term of nine years from the 25th of March, 1897, at the rent of £168 5s. a year, payable quarterly. The lease contained a covenant by the lessee not to assign or underlet the premises without the written consent of the lessor, and a proviso for re-entry if the rent should be in arrear for twenty-one days, "or if the said John Riggs shall become bankrupt, or file any petition under the bankruptcy laws, or make any composition with his creditors, or upon any breach of the covenants herein contained the said J. W. Hobbs may re-enter upon the said premises, and immediately thereupon the said term shall absolutely determine." The lessor further agreed in the said lease that, on payment of the rent and performance of the covenants and conditions therein contained, he would at the expiration of the lease convey without any further payment or consideration whatever to the lessee the fee simple of the said premises free from incumbrances.

On the 18th of January, 1901, a receiving order was made against Riggs on his own petition, and on the same day he was adjudicated bankrupt on his own application under rule 190.

On the 22nd of January, 1901, Hobbs gave the following notice of his intention to re-enter, which he caused to be affixed to the door of the premises:

"To John Riggs, of 'Riggs Retreat,' Buckhurst Hill, in the county of Essex, refreshment contractor, and to all other parties whom it may concern.

"I, Joseph William Hobbs, of Oakhurst, Chingford, in the county of Essex, gentleman, hereby give you notice in pursuance of the proviso contained in an indenture of lease dated the 12th day of November, 1896, made between me of the one part, and you, the said John Riggs, of the other part, that I hereby re-enter upon the premises comprised in the said indenture of lease and determine the same in pursuance of the proviso in the said lease, you having become bankrupt and filed your petition under the bankruptcy laws, and I hereby take possession of the said premises with the appurtenances comprised in the said lease from you as from the date thereof.

"As witness my hand this 22nd day of January, 1901. "J. W. HOBBS."

(*a.*) Reported by P. M. FRANCKE, Esq., Barrister-at-Law.

On the same day Hobbs's agent entered and took possession of the premises without giving any notice under section 14 of the Conveyancing Act, 1881.

On the 15th of February the trustee demanded possession of the premises, which was refused. He thereupon launched the present motion asking for possession, or in the alternative for relief against any right of re-entry upon or forfeiture of the premises.

Muir Mackenzie, for the trustee.—The lessor had no right to re-enter without previously giving notice under section 14 of the Conveyancing Act, 1881: see *Horsey's Estate* v. *Steiger* 47 W. R. 644, [1899] 2 Q. B. 79; *North London Land Co.* v. *Jacques,* 32 W. R. 283; *Rogers* v. *Rice,* 40 W. R. 489, [1892] 2 Ch. 170; *Doe* v. *Bevan,* 3 M. & S. 353. [He was stopped by the court.]

Rowden, K.C., and *E. Ball,* for the respondent.—Firstly we say that the lessee is not entitled to relief after peaceable re-entry has been accomplished by the lessor: *Quilter* v. *Mapleson,* 31 W. R. 75, 7 Q. B. D. 672; *Locke* v. *Pearce,* 41 W. R. 369, [1893] 2 Ch. 271. Secondly, we contend that the filing by the debtor of his own petition and his application for adjudication operated as a breach of his covenant not to assign, and consequently no notice was required under the Conveyancing Act, 1881: *Croft* v. *Lumley,* 6 W. R. 523, 6 H. L. Cas. 672; *Avison* v. *Holmes,* 9 W. R. 550, 1 J. & H 530; *In re Amherst's Trusts,* 20 W. R. 290, L. R. 13 Eq. 464.

Muir Mackenzie, in reply, referred to *Ex parte Dawe, In re Moon,* 34 W. R. 752, 17 Q. B. D. 275.

Cur. adv. vult.

April 1.—WRIGHT, J.—This is an application by the trustee in bankruptcy of John Riggs for a declaration of his title to a lease of certain premises made to the debtor. The lease contains a covenant by the lessee and a proviso, which are in the following terms: [His lordship read the covenant not to assign and the proviso for re-entry, and continued: In January, 1901, the debtor filed his own petition expressly asking for adjudication, and on the 18th of January a receiving order was made; and on the same day, under the power given by rule 190, he was adjudicated bankrupt on that petition. By virtue of the adjudication the bankrupt's interest in the lease vested in the official receiver until some time early in February, when the trustee was appointed. On the 22nd of January the lessor entered upon the premises alleging that under the proviso for re-entry the lease was determined by the bankruptcy or petition. He did not before entry give the statutory notice which is required by section 14 of the Conveyancing Act, 1881, in cases to which that section applies.

The first question is whether under the Conveyancing Act, 1881—assuming the case to be one in which by sub-section 1 of section 14 of that Act the statutory notice is required to be given as a preliminary to the exercise of a right of re-entry by action under a proviso for breach of covenant or condition in a lease—the notice is necessary as a preliminary to re-entry without action. On this question I cannot entertain any doubt. Sub-section 1 of section 14 says that the right of re-entry or forfeiture "shall not be enforceable by action or otherwise unless or until the lessor serves on the lessee a notice specifying, &c." No mode of enforcing such a right otherwise than by action has been suggested except that of peaceable entry. And the language of sub-section 2, "the lessee may in the lessor's action, if any, &c.," indicates that entry without action is within the purview of sub-section 1. Nor has any reason been suggested why the notice is less necessary in the one case than in the other.

The only argument advanced in favour of the lessor's contention on this point is that in one or two cases, in particular in *Horsey's Estate* v. *Steiger*, 47 W. R. 644, [1899] 2 Q. B. 79, some expressions are found which in terms refer only to cases in which actions are brought; but in those cases actions had been brought, and these expressions seem plainly to refer only to the circumstances of the particular cases. If this view is right, then, according to the decision just cited, the trustee is entitled to succeed so far as this case depends on forfeiture for bankruptcy, because it was there held that section 14, sub-section 1, of the Act of 1881 is applied to re-entry under a condition for forfeiture for bankruptcy by section 2, sub-section 2, of the Conveyancing Act, 1892, with exceptions which do not cover this case.

The second and the real question is whether an adjudication of bankruptcy on the debtor's own petition asking for adjudication, although it does not directly justify the entry without notice, yet does so indirectly, as being or involving a breach of his covenant not to assign without the consent of the lessor. If it is, then sub-section 1 of section 14 of the Act of 1881 is excluded by sub-section 6 of the same section, which is not, as regards assignments, affected by the Act of 1892; and in that view the re-entry may have been effectual on the ground of the assignment, although not on the ground of the bankruptcy. On the construction of this lease and apart from authority, I should be of opinion that in this covenant the words "assign or underlet" are used in their ordinary or popular sense, and refer only to such assignments as are directly made by the lessee as distinguished from such assignments by law as result by the statute from a petition in bankruptcy followed by adjudication. This conclusion seems much strengthened by the fact that the proviso which immediately follows the covenant, expressly provides for the case of bankruptcy or of the filing of a petition by the debtor. And it would be strange if, notwithstanding the express mention of bankruptcy as a ground for re-entry, and the express obligation to give notice before re-entry on that ground, the obligation can be evaded on the ground that the bankruptcy operates in law as an assignment. It has, indeed, in several cases been held upon the construction of wills containing provisions for the defeasance of interests in case of assignment or incumbrance, that although bankruptcy upon the initiative of a creditor is not to be regarded as an assignment or incumbrance by the act of the debtor (see *Doe* v. *Bevan*, 3 M. & S. 353; *Lear* v. *Leggett*, 1 Russ. & My. 690; *Holland* v. *Cole*, 10 W. R. 563, 1 H. & C. 67; and *Doe* v. *Powell*, 5 B. & C. 308), yet the assignment which necessarily and inevitably resulted under the Insolvents' Relief Acts from a debtor's petition under those Acts did amount to a voluntary assignment or incumbrance or disposition: *Shee* v. *Hale*, 13 Ves. 404; *Rochford* v. *Hackman*, 9 Hare, 475. But in all the cases of that kind which I have found, the words used in the will were much larger than the mere word "assign." They have usually been the most comprehensive which the draftsman could find. For instance, in *In re Amherst's Trusts* they were "assign over, assure, mortgage, or in any manner incumber, or by any instrument in writing, parol agreement, or otherwise howsoever part from" the income. Moreover, all those cases except *In re Amherst's Trusts* were determined upon statutes under which the petition *ipso facto* effected an assignment of the debtor's property for the benefit of creditors; but under the Act of 1883, even upon a debtor's petition asking for adjudication, the adjudication does not follow automatically. The court has a discretion in the matter, and unless the court in its discretion adjudicates, the creditors may prefer to accept a composition. Therefore Cave, J., in *Ex parte Dawes, In re Moon*, held that the debtor's petition under the Act of 1883 did not of itself amount to an assignment. In that case the creditors had accepted a composition, so that there was no adjudication and no vesting of the debtor's property in a trustee; but the case seems to be an authority that the mere filing of a petition by the debtor is not of itself an assignment. And if so, then there is in any view no assignment until adjudication, and at that stage the matter has become actual bankruptcy, and therefore section 2 of the Act of 1892 applies, and requires the statutory notice. Lastly, if the filing of a petition by the debtor is not of itself an assignment until adjudication, then it is not of itself a ground of re-entry without the statutory notice. For either it is bankruptcy, in which case section 2 of the Act of 1892 applies, or, if it is neither assignment nor bankruptcy sub-section 6 of section 14 of the Act of 1881 does not apply, and therefore sub-section 1 of section 14 does apply, and the notice is necessary. I am of opinion, therefore, that the trustee is entitled to the declaration which he asks.

Application allowed.

Solicitors for the trustee, *Bramall, White, & Co.*

Solicitors for the respondent, *Lucas & Mitchell.*

Court of Appeal.

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) — July 8.

In re BALAGHAT GOLD MINING CO. (LIMITED). (*a*.)

Company—Register of members—Inspection—Copies—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.

A person paying a shilling for inspection of the register of members of a company, under section 32 of the Companies Act, 1862, is not entitled, without any further payment, to take copies on his own account. His only right with regard to copies is to be furnished by the company with copies on payment of sixpence for every hundred words required to be copied.

Boord *v.* African Consolidated Land and Trading Co., 46 *W. R* 150, 14 *Times L. R.* 116, *overruled.*

Appeal from an order of Day, J., allowing an application for leave to inspect and take a copy of the register of the shareholders of a limited company.

The applicant, who was the representative of an establishment organized for the purpose of obtaining information as to unclaimed dividends and of enabling members of the public to recover overpaid income tax, desired to inspect the register of the shareholders of the Balaghat Gold Mining Co. (Limited) and to make a copy of parts thereof.

He tendered a shilling to the registrar of the company as an inspection fee, and claimed to be entitled without any further payment to make the copies which he required on his own account.

The registrar refused to allow this, but expressed his willingness to supply the applicant with a copy of any part of the register on payment of 6d. for every hundred words.

Section 32 of the Companies Act, 1862, enacts as

(*a*.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

follows: "The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company hereinafter mentioned; except when closed, as hereinafter mentioned, it shall during business hours, but subject to such reasonable restrictions as the company in general meeting may impose, so that not less than two hours in each day be appointed for inspection, be open to the inspection of any member gratis, and to the inspection of any other person on the payment of 1s., or such less sum as the company may prescribe, for each inspection; and every such member or other person may require a copy of such register, or of any part thereof, or of such list or summary of members as is hereinbefore mentioned, on payment of 6d. for every 100 words required to be copied."

On an application at chambers, an order was made by a master that the company should allow the applicant to inspect and take notes or extracts from or a copy of the company's register of shareholders on payment of the fee of one shilling.

Day, J., affirmed the order of the master.

The company appealed.

Swinfen Eady, K.C., and *Martelli*, for the company.

Pollard, for the applicant, cited *Mutter* v. *Eastern and Midlands Railway Co.*, 36 W. R. 401, 38 Ch. D. 92; *Nelson* v. *Anglo-American Land Mortgage Agency Co.*, 45 W. R. 171, [1897] 1 Ch. 130; and *Boord* v. *African Consolidated Land and Trading Co.*, 46 W. R. 150, 14 Times L. R. 116.

A. L. SMITH, M.R.—In this case we must take the statute with which we have to deal and see what is its plain meaning. Decisions on other statutes which are somewhat like it, but not identical, are no help. No question is raised here with regard to the common law right to inspect public documents. The only matter to be considered is the meaning of a particular section—viz., section 32 of the Companies Act, 1862. Does that section, when it enacts that any member of the public may require a copy of the register of shareholders of a company, or of any part thereof, on payment of 6d. for every 100 words required to be copied, mean that any person may go to the office of the company and himself make a copy of the register on payment of nothing? I think the meaning is that he may require of the company a copy of what he wants, and that he shall pay 6d. for every hundred words which he so requires to be copied. The cases of *Mutter* v. *Eastern and Midlands Railway Co.* and *Nelson* v. *Anglo-American Land Co.* were not decisions on this section, and therefore do not govern this case. But I agree with what was said by Lindley, L.J., in the former case, that, when the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. The only judgment on which the applicant is entitled to rely is the judgment of North, J., in *Boord* v. *African Consolidated Land and Trading Co.* But I cannot agree with that judgment. I think that North, J., followed too closely the previous cases without having due regard to the particular statute with which he was dealing. In my opinion the applicant is not entitled to make copies from the register without payment of 6d. per folio.

VAUGHAN WILLIAMS, L.J.—I entirely agree. Counsel for the applicant desires to read section 32 of of the Companies Act as if it contained words such as are to be found in ord. 31, r. 15, of the Rules of the Supreme Court, with regard to the person having inspection being permitted to take copies. The section gives an express right to be furnished with copies on paying for them. I think the right to take copies without paying for them is excluded.

STIRLING, L.J., concurred.

Appeal allowed.

Solicitors for the company, *Francis & Johnson.*

Solicitor for the applicant, *A. R. O. Gery.*

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) — July 3.

MIRAMS v. OUR DOGS PUBLISHING CO. (LIMITED). (a.)

Penal action—Advertising reward for return of stolen property—No questions to be asked—"Any property whatsoever"—Dog—Larceny Act, 1861 (24 & 25 *Vict. c.* 96), *s.* 102.

Section 102 *of the Larceny Act,* 1861, *which makes it an offence to publish an advertisement offering a reward for the return of stolen property and stating that no questions will be asked, applies to the case of a stolen dog.*

Application by the defendants for judgment or a new trial in an action tried before Darling, J., and a jury at Manchester Assizes.

The action was brought by a common informer to recover a penalty under section 102 of the Larceny Act, 1861. The section enacts as follows: "Whosoever shall publicly advertise a reward for the return of any property whatsoever, which shall have been stolen or lost, and shall in such advertisement use any words purporting that no questions will be asked, or shall make use of any words in any public advertisement purporting that a reward will be given or paid for any property which shall have been stolen or lost, without seizing or making any inquiry after the person producing such property, or shall promise or offer in any such public advertisement to return to any pawnbroker or other person who may have bought or advanced money by way of loan upon any property stolen or lost the money so paid or advanced, or any other sum of money or reward for the return of such property, or shall print or publish any such advertisement, shall forfeit the sum of £50 for every such offence to any person who will sue for the same by action of debt to be recovered with full costs of suit."

It was proved, in support of the plaintiff's case, that the defendants printed and published in a journal, of which they were the proprietors, called *Our Dogs*, an advertisement as follows: "£4 Reward. Stolen or strayed on Sunday, the 16th of August, a white fox-terrier dog, with black head, very short tail, no spots on body, answers to the name of Tony. Anyone returning the same to 'Lyncroft,' Fog-lane, Didsbury, Manchester, will receive the above reward. £2 reward will be given for any information in case the dog is dead. No questions will be asked."

At the trial the jury returned a verdict for the plaintiff for a penalty of £50, and the learned judge gave judgment accordingly.

The defendants applied for judgment or a new trial.

Rowlatt, for the defendants.—This case does not come within section 102 of the Larceny Act. The section deals with an advertisement offering a reward for the return of any stolen or lost property, and it says that such advertisement must not contain a statement that no questions will be asked. According to the natural meaning of this advertisement the

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

words "No questions will be asked" refer only to the latter part offering a reward of £2 for information in case the dog is dead, and do not refer to the first part offering a reward of £4 for the return of the dog. Secondly, section 102 does not apply to the case of a stolen or lost dog. It belongs to a group of sections, consisting of sections 100, 101, and 102, which are headed "As to restitution and recovery of stolen property," but which do not apply to such property as dogs. Dogs are dealt with by an earlier group of sections—viz., sections 18-22.

Holloway, for the plaintiff, was not called upon to argue.

A. L. SMITH, M.R.—This is an action by a common informer claiming a penalty from the defendants under section 102 of the Larceny Act, 1861, for having published in a newspaper an advertisement offering a reward for the return of a lost or stolen dog, which stated that no questions would be asked. Two points were taken on the part of the defendants. The first point was that, according to the true meaning of the advertisement, it did not contain a statement that no questions would be asked in case the dog should be returned, but only a statement that no questions would be asked if the dog should happen to be dead. In my opinion the true meaning of the advertisement is that, if the dog should be returned, a reward of £4 would be paid, and that, if the dog was dead and could not be returned, and information was given to that effect, a reward of £2 would be paid, and that in either case no questions would be asked.

The other point taken was that section 102 of the Larceny Act does not apply to an advertisement offering a reward for the return of a stolen dog. In my opinion nothing could be clearer than this section. It begins with these words: "Whosoever shall publicly advertise a reward for the return of any property whatsoever which shall have been stolen or lost." How can it be said that a dog does not come within the words "any property whatsoever"? I cannot see any reason for whittling down the section, or saying that the words "any property" do not include dogs. Speaking for myself, I should be inclined to say that there is no class of stolen property to which this section is more applicable than stolen dogs. It is said that dogs are dealt with by other sections. That may be so, but in my opinion the learned judge at the trial was right in refusing on that ground to cut down the effect of this section.

VAUGHAN WILLIAMS and STIRLING, L.JJ., concurred.

Appeal dismissed.

Solicitor for the plaintiff, *Richard Hewlett*, for *Arthur Mirams*, Brighton.

Solicitors for the defendants, *Woodcock, Ryland, & Parker*, for *Markland & Whitehead*, Manchester.

High Court of Justice.

Chan. Div.
Kekewich, J. } June 4.

In re SARAH DALRYMPLE.
BIRCHAM *v.* SPRINGFIELD. (*a.*)

Will—Devise of freeholds upon trust to one for life subject to condition of residence—Trust upon breach of condition to sell and pay one-third only of income to devisee for life—Settled Land Act (45 & 46 *Vict. c.* 38), *s.* 51—*Gifts of legacies to males and females—Direction to pay legacies, devises, and bequests in favour of females free of legacy duty—Gift of residue to males and females as tenants in common.*

S. D. by her will devised certain freeholds to trustees upon trust for T. S. for life, subject to a condition of residence, and in case T. S. should cease to reside there, then on trust to sell and invest the proceeds and pay one-third of the income thereof to T. S. for life, and the remaining two-thirds to other persons therein mentioned.

Held, that the provision was such as to induce the tenant for life to abstain from exercising his powers under the Settled Land Act, 1882, *within the meaning of section* 51, *and was void.*

After giving certain legacies to males and females the testatrix declared that all legacies, devises, and bequests thereinbefore or thereinafter given or made in favour of females should be free of legacy duty, the residue being given to three males and three females as tenants in common.

Held, that the legacy duty in respect of the shares of the females in the residue were to be paid out of their respective shares.

Originating summons.

Sarah Dalrymple by her will dated the 19th of December, 1897, after giving certain pecuniary legacies to males end females, devised her freehold house called Thorpe Lodge to trustees "upon trust . . . to allow my nephew Thomas Osborn Springfield the full use and benefit thereof during his life or so long as he shall actually and continuously reside there, and I express my strong desire that he will so reside there, and I have given him the use and benefit thereof as aforesaid in the confident expectation that he will so reside there unless considerations of health or of means, and possibly other circumstances which I cannot now estimate may prevent his complying with my desire in this respect, and upon trust from and after the death of the said Thomas Osborn Springfield or in his lifetime in case in the judgment of my same trustees or the survivor of them or other the trustees or trustee for the time being of this my will of the same class whose decision on the subject shall be final, and no purchaser from whom shall be concerned or at liberty to make any inquiry on the subject, he shall cease actually or continuously to reside in the said house to an extent sufficient to comply with my desire in that behalf as hereinbefore expressed, to sell the said house and premises and estate . . . and to invest the moneys arising from such sale in such manner as is hereinafter mentioned with regard to investments, and in case such sale shall be made in the lifetime of the said Thomas Osborn Springfield by reason of his so ceasing to reside as aforesaid, or of my said trustees or trustee so deciding as aforesaid, then upon trust during his life to pay one equal third part of the income of such investment to him the said Thomas Osborn Springfield for his own use and benefit," and to pay the remaining two third parts to certain other persons therein named.

The will also contained the following declaration: "I declare that all legacies, devises, and bequests of this my will hereinafter or hereinbefore given or made to or in favour of females shall be for their respective sole and separate use and free of legacy duty." The residuary gift was to six persons, nominatim, three males and three females "as tenants in common."

The testatrix died on the 24th of March, 1900.

Shortly after her death T. O. Springfield intimated to the trustees that he was unable to live at Thorpe Lodge, and requested them to sell the property.

(*a.*) Reported by H. CLAUGHTON SCOTT, Esq., Barrister-at-Law.

The questions that arose for determination were (*inter alia*) whether T. O. Springfield was entitled for life to the whole or to one third part only of the income derived from the purchase-moneys of Thorpe Lodge, and whether the legacy duty on the shares in the testatrix's residuary estate given to the female legatees was payable out of shares of the male legatees in the same fund.

George Cave, for the trustees.

Warrington, K.C., and *R. J. Parker*, for T. O. Springfield.

W. F. Hamilton, K.C., and *H. B. Howard*, for the female residuary legatees.

Renshaw, K.C., and *Lyttelton Chubb*, and *P. O. Lawrence, K.C.*, and *Galbraith*, for the male residuary legatees.

KEKEWICH, J., said: If the argument of Mr. Warrington is correct it leads to a very curious result. The limitation of Thorpe Lodge to T. O. Springfield for life or so long as he should actually and continuously reside there is the exact equivalent of the old example in the text-books of an estate given to one for life or until he should return from Rome. It can hardly have been the intention of the eminent lawyers who framed and introduced the Settled Land Act to turn all such conditional limitations into estates for life. But the point has been settled by Pearson, J., and I cannot distinguish this case from *In re Paget*, 33 W. R. 898, 30 Ch. D. 161. The report of that case is, perhaps, not strictly accurate, as one would imagine there must have been some words giving F. H. Paget a life estate. The question there tried was whether the condition of residence was good, and the possibility of a breach of the condition was eliminated from the summons. So the learned judge had before him the precise point raised by this case, and he applied section 51 of the Settled Land Act, making no distinction between a tenant for life and one who is given the powers of a tenant for life under section 58 of the Act. He therefore held the condition void. On the other hand, in *In re Haynes*, 36 W. R. 321, 37 Ch. D. 306, North, J., held that a condition of residence till sale, there having been no sale, was not within section 51. With great respect to the decision of that learned judge, I do not understand the position he took up. Still, it is evident that he did not intend to differ from *In re Paget*, and I shall follow that case, though the result is extraordinary. The defendant therefore is entitled for life to the whole of the income of the proceeds of sale.

As to the second point his lordship said: No question can arise whether or not the gift of residue is a "legacy," for the direction is that "all legacies, devises, or bequests" given in favour of females are to be "free of legacy duty." A gift of a legacy free of legacy duty means, I take it, that the duty is to be paid before the residue is calculated. Hence there is great difficulty in saying that the legacy duty should be paid upon a share of the residue. It might be given in an entirely different manner, but in order to do so here you would have to construe these words in two different ways. In one instance they would mean that the duty was to be payable out of the residue, in the other that it was to be paid by the males in exoneration of the females. I arrive at this conclusion with great hesitation, because the testatrix distinctly says that all are to be free of legacy duty, and I am so construing it that some of the "legacies, devises, and bequests" are not to be free. But I am helped in this, that the residuary gift is to the males and females as tenants in common, and though it is not given to them "in equal shares," yet I think that must be implied. Each female must bear her own share in respect of her residuary gift.

Solicitors, *Satchell & Chapple; Bloxam, Ellison, & Co.*

Chan. Div. } Byrne, J. } May 7.

In re CLARKE.
CLARKE *v.* CLARKE. (*a.*)

Will—Charity—Gift to the Corps of Commissionaires—Gift to an institution not charitable—Gift to members of voluntary institution as such—Perpetuity.

The Corps of Commissionaires is a society existing to find employment for discharged or disabled soldiers and sailors. The institution is self-supporting. A gift to the committee for the time being of the Corps of Commissionaires to aid in the purchase of their barracks, or in any other way beneficial to that corps, held to be valid on the grounds that (1) *if the institution was a charity the gift was good;* (2) *in so far as the institution was not a charity the gift was good, as the governing body could deal with it in any way they pleased, and the gift did not tend to a perpetuity.*

Summons.

This was an originating summons in which the administrator *de bonis non* with the will annexed of the testator William H. S. Clarke sought (*inter alia*) the determination of the following question, "Whether a gift in the will of the remainder of the testator's share of his father's property to the committee for the time being of the Corps of Commissionaires was a valid bequest and passed to the committee for the time being of the said corps?"

The defendants to the summons were the residuary legatee under the will of the testator, a specific legatee under the said will, one of the testator's next-of-kin, and the commanding officers and trustees of a fund known as the officers' endowment fund, and as such representing the Corps of Commissionaires.

The facts of the case were as follow: The testator, who was formerly a lieutenant in the 7th Madras Light Infantry, duly made and executed his last will bearing date the 9th day of August, 1873, which, omitting the formal parts, commenced as follows: "The share of my father's property which comes to me at my mother's death I give, devise, and bequeath to the undermentioned persons severally." Then followed a list of persons to whom pecuniary legacies were given, and the will continued: "The remainder of my share of my father's property I give, devise, and bequeath to the committee for the time being of the Corps of Commissionaires in London to aid in the purchase of their barracks or in any other way beneficial to that corps. Should my mother be living at my death I leave all my personal property to her." And testator appointed J. Cleghorn his executor.

The testator died on the 23rd of April, 1876.

Cleghorn disclaimed the trusts of the will and administration was granted to the defendant's mother, Mrs. Charlotte Clarke.

The testator's interest under his father's will did not vest in possession until the death of the said Charlotte Clarke, which occurred on the 10th of February, 1899.

On the 11th of December, 1899, letters of administration *de bonis non* of testator were granted to the plaintiff.

The testator's interest in his father's estate amounted to about £5,000.

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

The constitution and composition of the Corps of Commissionaires was as follows: Shortly after the Crimean War the institution was founded by Major (afterwards Sir Edward) Walter. His original intention was to furnish wounded and discharged soldiers and sailors with suitable occupation without any outside assistance. Subsequently the institution was developed into a means of providing work for able-bodied soldiers and sailors also. Hence an endowment fund was opened in 1863 to which legacies, subscriptions, and donations had since been made. The corps was said to be self-supporting so far as the men were concerned, and all the employees were bound to contribute to the general funds and to the sick fund, and also to open an account at the savings bank and to pay an amount into the same monthly or quarterly. Nothing was charged against the men for officers' salaries or general expenses.

Premises were first established for the corps by Sir E. Walter in Exchange-court, Strand, and paid for from a private benefaction. Subsequently a large block of premises were acquired for it between the Strand and Maiden-lane, and it was intended eventually to utilize the whole amount for barracks and other buildings for the men. These premises were paid for out of the funds of the body.

The endowment fund was formed because Sir E. Walter considered that it would be too heavy a burden on the men to charge them with the maintenance of the staff. The design or object of the endowment fund was declared to be as follows: "The endowment fund of the Corps of Commissionaires is designed for the payment of the officers of staff and such other objects connected with the institution as may, in the opinion of the board, require assistance, provided such object is not contrary to any fundamental principle of the corps." The scheme, which was adopted in June, 1863, provided that the income of the endowment fund should be devoted by the board to the following purposes: (1) Payment of officers of staff; (2) offices for adjutant and staff; (3) allowance for out-quarter divisions consisting of thirteen men and upwards, not exceeding 10s. per man. Any surplus to be invested to form the nucleus of a fund for building permanent barracks. It appeared that a considerable sum had been accumulated by this means though more was needed before the complete building scheme which was intended could be carried out.

The property and administration of the corps was vested in a board of governors consisting of two permanent trustees, a board of management of eighteen officers, and an executive committee of seven. The executive committee superintended the investment and application of the funds and appointed officers and fixed their salaries. A certain proportionate sum calculated according to the number of members of the corps was carried from the endowment fund of the corps to its general fund.

The above statements as to the objects and character of the corps were verified in an affidavit by its adjutant.

Norton K.C., and *Marcy*, for the administrator.

Rowden, K.C., and *Maughan*, for the residuary legatee.—The corps is not entitled to take the legacy. It cannot be said that there exists such a legal entity known to the law as a Corps of Commissionaires: *Carne* v. *Long*, 8 W. R. 570, 2 De G. F. & J. 75; *In re Amos, Carrier* v. *Price*, 39 W. R. 550, [1891] 3 Ch. 159; *In re Dutton*, 27 W. R. 398, 4 Ex. D. 54. The corps, further, is not a charity. It is not an institution to relieve poverty, for poverty is not one of the essentials of membership in it. It is not either necessary that the members should be sick, wounded, or maimed soldiers. The gift being a gift to an institution which is not charitable is void as tending to a perpetuity: *Thompson* v. *Shakespear*, 8 W. R. 265, 1 De G. F. & J. 399.

Stamp, for one of testator's next-of-kin.

Levett, K.C., and *Stewart Smith*, for Corps of Commissionaires.—The gift is good on two grounds. First of all, it may be urged that the corps is a charity. There is certainly in its conception the idea of relieving soldiers. This idea is certainly charitable. In the alternative, suppose the institution not to be a charity. It is a good gift to an association which can deal with it as it thinks fit and is not prevented from disposing of the corpus: *Cocks* v. *Manners*, 19 W. R. 1055, L. R. 12 Eq. 574.

G. Cave, for another beneficiary.

Rowden, K.C., in reply.—The gift cannot be treated as one to the individuals who compose the corps. It cannot be said that an institution is a charity because it has some features in common with a charity.

Cunnack v. *Edwards*, 45 W. R. 99, [1896] 2 Ch. 679; *Hunter* v. *Attorney-General*, 47 W. R. 673, [1899] A. C. 309; *In re Clark's Trusts*, 24 W. R. 233, 1 Ch. D. 497, were also referred to.

Cur. adv. vult.

BYRNE, J.—The question is whether a gift in the will of the testator is good or bad as tending to create a perpetuity. [His lordship read the words of the bequest, and continued:] It is common ground that if the legacy is one to or in favour of a charity it is good. Although the original intention of the founder of the Corps of Commissionaires, Sir Edward Walter, as stated by him in a letter printed in the rules and regulations of the corps, appear to have been to found a charity, I do not think that as subsequently and at present constituted the corps can be so considered. It is a voluntary association with a somewhat special constitution for the benefit of able-bodied and disabled soldiers and sailors alike, mainly supported by the subscriptions of the members, and intended for their benefit. [His lordship stated the character of the corps as appearing in the evidence, and continued:] It is, I think, established by the authorities that a gift to a perpetual institution not charitable is not necessarily bad. The test, or one test, appears to be, Will the legacy when paid be subject to any trust which will prevent the existing members of the association from spending it as they please? If not, the gift is good, and this is so also if the gift be construed as a gift to or for the members of the association. On the other hand, if it appears that the legacy is one which by the terms of the gift, or which by reason of the constitution of the association in whose favour it is made tends to a perpetuity, the gift is bad. Two cases were especially relied upon against the validity of the bequest. The first was *In re Dutton*. In that case the testator gave and bequeathed the capital as well as the income of the proceeds and investments of his trust estate unto the trustees for the time being of the Tunstall Athenæum Mechanics' Institution to be applied by them towards the building fund in connection therewith. This bequest was held invalid on the ground that the money could not be appropriated among the members of the society. The second case was *In re Amos*. There the gift was "I give, devise, and bequeath unto Thomas Price the property known as 27, Bath-terrace, the condition to be as follows: that the property be left to him for his life and the life of his heir, after which it becomes the property of the Boilermakers and Iron Ship Builders Society." The testator also gave £5 a year to the Boilermakers' Benevolent Fund. North, J., said

that the gift here was a gift beyond all question tending to a perpetuity. It was not intended for the benefit of the particular individuals constituting the society at the time. Such a construction would be entirely contrary to the testator's intention. These two decisions are therefore distinguishable from the present case on the ground that the gifts there created or tended to create perpetuities, as they could not be divided among the members of the institution thereby intended to be benefited. In some other cases, like *Thompson* v. *Shakespear* and *Carne* v. *Long*, the plain intention of the testator as expressed in the will was not merely to maintain an institution, but to maintain it throughout all time. It was, says the Lord Chancellor in *Thompson* v. *Shakespear*, the intention of the testator that the institution "should exist in *secula sæculorum*." No such intention appears in the present case. In support of the validity of the gift the leading case relied on was *Cocks* v. *Manners*. In that case there was a gift to the Dominican Convent at Carisbrooke payable to the superior for the time being, and Wickens, V.C., in giving judgment, says, L. R. 12 Eq., at p. 585: "The question remains whether the gift to the Dominican Convent, which seemed to me not charitable, is void for perpetuity. It is argued that it is a gift in trust for the purposes of a perpetual institution, and therefore on a perpetual trust, and *Carne* v. *Long* is relied upon. That case does not, I conceive, decide that a gift to a perpetual institution not charitable is bad—for instance, a gift to a club, or to a limited company; but merely that the gift in question was bad; it was a gift to which the trustees could only give effect by holding the property, which seems to have been all real estate, for ever, and applying the income according to the rules. Nothing of that sort is directed here; the gift is ordered to be paid to the superior for the time being, and the superior, when she receives it, will be bound to account for it to the convent—to put it, so to speak, in the common chest; but when there it will be subject to no trust which will prevent the existing members of the convent from spending it as they please. It would, I hold, be an extreme stretch of the rule against perpetuity to hold that it applied to a case of this sort." These observations seem to me to be particularly applicable to the present case. The question has also been considered in several Irish cases in *In re Delany's Estate*, 9 L. R. Ir. 226, 31 W. R. Dig. 217; and in *In re Wilkinson's Trusts*, 19 L. R. Ir. 531. In the last-mentioned case the following gift was held valid, "I will, leave, and bequeath the sum of £1,000 to Miss Sarah Anne Spain, superioress of the Convent of Mercy at Kilkee, County Clare, to and for the purposes solely of the said convent, or to such other person as may be superioress of the said convent at the time of my decease." In the judgment *Delany's case* and the case of *Cocks* v. *Manners* are referred to, and it was decided that the gift was valid as there was nothing to prevent the superioress from disposing of the money. In *Bradshaw* v. *Jackman*, 21 L. R. Ir. 12, 36 W. R. Dig. 227, there was a bequest to Mary, superioress of St. Anne's Convent of Mercy, Mohill, in trust for the community of the said convent. The Master of the Rolls says: "I think the community of the convent of Mohill means the persons for the time being who are members of that convent, and that if the money were once paid over to or in trust for them there is nothing in the wording of the gift to impose on the legatees any obligation to retain it in specie, or to retain or invest it for the future members of the community. They could spend it or invest it consistently with the terms of the bequest, and that is enough." Looking at the constitution of the Corps of Commissionaires, I see no intention that, apart from some particular funds, it is intended to be a perpetual or permanent institution in the sense indicated in some of the authorities. Of course its founder hoped that it would last for many years, just as when a club is founded it is hoped and intended that it shall be more or less permanent; but that is not the kind of permanency which is sufficient to make a gift to an institution of this kind void for perpetuity. Looking at the form of the gift, it is a gift "for the purchase of barracks," and, having regard to the constitution of the corps, it seems to me that the governing body could deal with the barracks just as they pleased; but the gift does not stop there, it goes on "or in any other way beneficial to that corps," so there is a complete discretion to the governing body to apply the gift in any way they may think best for the benefit of the institution. The solution of the question may be shortly stated thus: "If and so far as the objects of the institution are charitable the gift is good, and if and so far as they are not charitable, still it is a good gift according to the authorities, as it does not create or tend to create a perpetuity, because it is in the power of the governing body to deal with the bequest as they like. I am not concerned in the way in which they may deal with it." His lordship made a declaration that the gift under the will to the Corps of Commissionaires constituted a valid bequest.

Solicitors, *H. J. North; Tyrrell Lewis, Lewis, & Broadbent; Soames, Edwards, & Jones; Spencer, Chapman, & Co.*, for *Kinneir & Co*, Swindon.

K. B. Div.
(Kennedy and Phillimore, JJ.) June 20.

DAVIDSSON *v.* HILL. (*a.*)

Negligence—Injury causing death—Alien—Negligence of British subject—Cause of action outside jurisdiction—Fatal Accidents Acts, 1846 *and* 1864 (9 *&* 10 *Vict. c.* 93; 27 *&* 28 *Vict. c.* 95).

An action will lie in England, under the provisions of the Fatal Accidents Acts, 1846 *and* 1864, *by the widow of an alien whose death has been caused on the high seas when navigating a ship of his own country, against an English owner of a British ship whose servants have negligently caused the collision and consequent death.*

Adam *v.* The British and Foreign Steamship Co., [1898] 2 *Q. B.* 430, 47 *W. R. Dig.* 139 *disapproved.*

Point of law.

An action was brought by the plaintiff, a widow, to recover damages from the defendants for the death of her husband, who had been killed owing to the negligence of the defendants or their servants.

The case was set down to be heard upon a point of law arising upon the following agreed statement of facts:

Between 2 and 3 a.m. on the 11th of August, 1900, a collision occurred on the high seas between the defendants' steamship *Exeter City* and the Norwegian barque *Ratata*. Shortly after the collision, and in consequence thereof, *The Ratata* sunk, and Johan Davidsson, a Norwegian subject, employed as sailmaker on board *The Ratata*, and another man, also a Norwegian subject, were drowned.

The collision and the consequent drowning of Johan Davidsson were solely caused by the negligent

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

navigation of *The Exeter City* by the defendants' servants.

The plaintiff, Josefina Davidsson, is the lawful widow of Johan Davidsson, deceased, and brings this action under the provisions of 9 & 10 Vict. c. 93 and 27 & 28 Vict. c. 95, on behalf of herself and the six children lawfully begotten of herself and Johan Davidsson, deceased, to recover compensation for his death. There is no executor or administrator of Johan Davidsson, deceased.

The question for the court was whether upon the facts stated above the plaintiff was entitled to recover damages in this action.

Section 1 of the Fatal Accidents Act, 1846 (Lord Campbell's Act), enacts "That whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

Hamilton, K.C. (*Stokes* with him), for the plaintiff.—If the deceased had not been killed, but only injured, he would have had a right of action. The decision of Darling, J., in *Adam* v. *British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, 47 W. R. Dig. 139, is against the plaintiff's claim, but the current of decisions before that case was opposed to that decision: see *The Guldfaxe*, 17 W. R. 578, L. R. 2 A. & E. 325; *The Explorer*, 19 W. R. 166, L. R. 3 A. & E. 289; *The Franconia*, 25 W. R. 796, 2 P. D. 163; *Harris* v. *Owners of The Franconia*, 2 C. P. D. 173, 25 W. R. Dig. 209; *The Vera Cruz*, 32 W. R. 783, 33 Ib. 477, 9 P. D. 88, at p 96, 10 App. Cas. 59; *Colquhoun* v. *Heddon*, 38 W. R. 366, 24 Q. B. D. 149; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 3 W. R. Dig. 155; *Routledge* v. *Low*, 16 W. R. 1081, L. R. 3 H. L. 100; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. 517.

Balloch (*Laing, K.C.*, with him), for the defendants.—It must not be assumed that the Legislature legislates for foreigners unless express words are used showing that such is its intention: see *Cope* v. *Doherty*, 6 W. R. 537, 695, 4 K. & J. 367, 2 De Gex. 614; *The Wild Ranger*, 11 W. R. 255, Lush. 553; *The Amalia*, 13 W. R. 111, Br. & Lush. 151; *The Zollverein*, 4 W. R. 555, Swab. 96; *General Iron Screw Collier Co.* v. *Schurmans*, 8 W. R. 732, 1 J. & H. 180. Before the Fatal Accidents Act, 1846, the plaintiff would have had no right of action by English law or by the law maritime as administered in England. No express words including foreigners having been used in the Act it cannot be held to apply to foreigners.

KENNEDY, J.—In this case I am of opinion that the plaintiff is entitled to our judgment. If the deceased seaman, who came to his death through the negligence of the defendants' servants, had been a British subject, no doubt, in my view, could have arisen as to the right of the widow to maintain such an action as the present. The action is an action in tort. The defendants, whose servants occasioned the death, are British subjects, and were at the time navigating the British ship, the property of the defendants. Their negligence, and the consequent death of the seaman by drowning, which give rise to the claims, both took place on the high seas, "which," to quote the language of Brett, L.J., in the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, 31 W. R. 445, 10 Q. B. D. 521, at p. 537, "is the common ground of all countries," and therefore, as he proceeds to state, the well-known rule in the case of actions of tort with regard to the exclusive jurisdiction of a foreign country does not apply. Does it make any difference that the deceased was not a British subject, but a Norwegian subject? The contention put forward on behalf of the defendants is that the foreign nationality makes all the difference. Now, in considering how this stands, it is, I think, not irrelevant to point out that, if the deceased had only been damaged by the negligence of the defendants' servants and not drowned, he could have presented an action for negligence in the High Court of Justice if it be assumed, as it properly must be in order to test the right, that the presence of the defendants in this country, and therefore within the jurisdiction, had prevented any technical difficulty arising as to the service of the proceedings against them. He could equally have maintained his action if, circumstances being otherwise the same, the defendants, instead of being British subjects, had been foreigners: see the judgment of Brett, L.J., in the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.*, at p. 537, and the judgment of Sir Robert Phillimore in *The Leon*, 29 W. R. 916, 6 P. D. 148, citing the earlier decisions of Dr. Lushington in *The Wild Ranger* and *The Zollverein*. If this be so, it would seem to be rather a strange thing that the foreign nationality of the sufferer by another's negligence in no way prejudices his right of action here if he is only hurt and not killed, yet that, if he is killed, it should form, the circumstances being otherwise identical, an absolute bar to any relief of the sufferer's family under these Acts. The Acts are Acts the express object of which is to create a liability to an action for damages whenever the act, neglect, or default which causes the death is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. It is contended, however, by the defendants that such is the law, and the ground upon which it is based is that the Fatal Accidents Acts, 1846 and 1864 (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95), must be understood as applicable only to British subjects and those persons, whatever their nationality, who are actually within the territorial jurisdiction of the British Crown. The deceased man, Johan Davidsson, was a Norwegian subject, and, as I understand the statement of counsel, had his home with his family in Norway. The defendants properly rely on a recent decision of my brother Darling in *Adam* v. *British and Foreign Steamship Co.* and there is no doubt we cannot decide in favour of the plaintiff in the present case without disagreeing with Darling, J., in regard to that judgment. It becomes, therefore, my duty respectfully to consider the grounds upon which it is based and to state why I feel myself compelled to differ from his decision. The circumstances were substantially identical with those of this case. The learned judge in his judgment agreed that "there can be no doubt that had the deceased man been an English subject the action would have lain, notwithstanding that the negligence and death both occurred upon the high seas." He decided against the plaintiff, on the ground, as he stated at p. 433, that "it is a principle of our law that Acts of Parliament do not apply to aliens, at least if they be not even temporarily resident in this country, unless the language of the statute expressly refers to them." In a later passage in his judgment, at p. 434, the proposition is stated in a somewhat modified form, "The intention of the Legislature is to be collected from the statute, and I see no implied, and certainly no express, intention to give to foreigners out of the jurisdiction a right of action which even British

subjects had not until the passing of 9 & 10 Vict. c. 93." In support of the proposition thus laid down my brother Darling cites passages from the judgments of Dr. Lushington in *The Zollverein*, of Jervis, C.J., in *Jefferys* v. *Boosey*, and of Lord Esher in *Colquhoun* v. *Heddon*. I venture to think that it is very important, in order to judge rightly of the applicability of these expressions of judicial opinion to other cases, to pay careful attention to the kind of case which in each instance gave occasion for the utterance of them. Before proceeding in this direction I will only remark in passing that in *Routledge* v. *Low* Lord Westbury expressed his dissent from the reasoning in *Jefferys* v. *Boosey*, the sum of which he states to be "the conclusion that a British statute must be considered as legislation for British subjects only unless there are special grounds for inferring that the statute was intended to have a wider operation"; and that Lord Brougham in his judgment in *Jefferys* v. *Boosey*, 4 H. L. Cas., at p. 970, states the law in more guarded terms than those quoted from the judgment of the Chief Justice. "Generally," he says, "we must assume that the Legislature confines its enactments to its own subjects over whom it has authority, and to whom it owes a duty in return for their obedience. Nothing is more clear than that it may also extend its provisions to foreigners in certain cases, and may, without express words, make it appear that such is the intendment of its provisions. But the presumption is rather against the extension, and the proof of it is rather upon those who would maintain such to be the meaning of the enactments." If, now, we look at the cases in which the judicial *dicta* in question have been uttered, we find, in my opinion, that the statutory enactment under consideration was one which related to matter of a special and exceptional kind. In *Jefferys* v. *Boosey* the Act under consideration was 8 Anne, c. 19, creating special and peculiar property in literary productions called copyright; in *Colquhoun* v. *Heddon* the statute was an income tax Act; in *The Zollverein* the principal statutory provision in view was section 296 of the Merchant Shipping Act, 1854, which imposed a duty in regard to navigation, which, as not being imposed by the maritime law, could not be held in the Court of Admiralty to bind a foreign vessel. So, again, in the case of *Cope* v. *Doherty* the statutory provisions under consideration, the Merchant Shipping Act, 1854, Part IX., were provisions of a peculiar character in so far as they placed a restriction, limiting liability, upon the general law of nations. Under that general law the owners of a ship injured by the negligent navigation of another are entitled to full damages; but to hold the provisions of the Act which created this peculiar restriction as intended to apply to foreigners would be, as Wood, V.C., puts it in his judgment, "an attempt on the part of the British Parliament to legislate for foreigners by taking away those rights and privileges which they enjoy by the general law, which gives full compensation for damages." The basis of the claim to which the Fatal Accidents Acts give statutory authority is negligence causing an injury, and that is a wrong which I believe the law of every civilized country treats as an actionable wrong. They create, no doubt, a new cause of action (see *per* Lord Selborne and Lord Blackburn in *The Vera Cruz*), for previously the relatives of the deceased would not in England sue the wrongdoer, the measure of damages is not the same as in an action by the injured man, and his death is an essential constituent of the right of action. None the less, as I venture to think, is it true to say that in substance the purpose and effect of the legislation is to extend the area of reparation for a wrong which civilized nations treat as an actionable wrong; indeed, the right of redress given is, in a sense, according to the decisions of the Queen's Bench (Blackburn and Lush, JJ.) in *Read* v. *The Great Eastern Railway Co.*, 16 W. R. 1040, L. R. 3 Q. B. 555, and the Queen's Bench Division in *Griffiths* v. *Earl of Dudley*, 30 W. R. 797, 9 Q. B. D. 357, so far identified with the right of the injured man that, if death ensues after he has sued and recovered damages, the relations have no cause of action under this legislation. It seems to me, under all the circumstances and looking at the subject-matter, more reasonable to hold that Parliament did intend to confer the benefit of this legislation upon foreigners as well as upon subjects, and certainly that as against an English wrongdoer foreigners might maintain an action under the statutes in question. It is not necessary to decide whether the action could be maintained in the English courts in the case of death occurring through negligence in a collision on the high seas when both parties were foreigners, or when the wrongdoers were foreign and the sufferer English. Here the plaintiff seeks to enforce her claim against an English subject, and I cannot see why she should not do so. If she cannot enforce her claim, we should have this anomaly, as it seems to me—if a foreigner and an Englishman serving on the same ship were both drowned on the high seas by the same collision negligently caused by an English vessel, the widow of the one could, and the other could not, obtain from the owners of the ship in fault that reparation which our legislation in these statutes has declared to be just. Let me add that the view which I take has the weighty authority of Sir Robert Phillimore in *The Explorer* after argument. The decision in *The Explorer* was no doubt overruled by the Court of Appeal and the House of Lords in *The Vera Cruz*, but, as I understand the judgment of the House of Lords, on a different point altogether—viz., that the Court of Admiralty had no jurisdiction to entertain an action *in rem* for loss of life under Lord Campbell's Act. And it is not, I think, wholly undeserving of notice that in the case of *The Bernina*, 35 W. R. 214, 12 P. D. 58, 36 W. R. 870, 13 App. Cas. 1, which was litigated in 1886-87—*i.e.*, two years after the decision in *The Vera Cruz*, and was carried up to the House of Lords, one of the two successful claimants of damages under Lord Campbell's Act in an action *in personam* against the owners of the wrongdoing ship was one Habiba Harone Toeg, of Baghdad, the mother of Moses Aaron Toeg, a passenger on a ship from London to Bushire, who lost his life in the collision caused by the negligence of the defendants' servants in the course of the voyage, and who, as I presume from his name and his mother's nationality, was himself a foreigner. No question of her right to recover on the ground of nationality either of herself or of the deceased was raised by the defendants, and, therefore, the case is not in any sense a decision in favour of the right.

PHILLIMORE, J.—I agree with the judgment of my learned brother. We have had to determine whether a foreigner the widow of a foreign seaman, killed on the high seas when navigating on board one of the ships of his own country by a collision between his ship and a British ship, can maintain an action in England against the English owners of the British ship for the negligence of their servants in causing the collision and death.

I start with the proposition that if the man had not been killed, but only injured, he during his life could have maintained an action for damages, such an action being maintainable by the *lex fori* and by the *lex loci delicti commissi*, whether the *locus* be regarded as English or British territory or as the

the high seas over which maritime law or maritime law as administered in this country prevails. As regards English or British territory this is common knowledge. That such a tort would also be actionable by the law maritime as administered in this country is shown by *The Ruckers*, 4 Ch. Rob. 73, and by other cases which I am about to cite. I have no doubt that other countries administer the law maritime in the same way. For some proof of it I cite the observations in the American cases of *The Belfast*, 7 Wallace 624; *Ex parte Gordon*, 14 Otto 515. This not being an action *in rem*, it is not necessary to show that the High Court of Admiralty would, while there was such a separate court, have had jurisdiction. But I have no doubt that it would. The principle of the decision in *The Zeta*, [1893] App. Cas. 468, and the reasoning of Lord Herschell, in whose judgment all previous cases are cited, the language of my brother Bruce in *The Theta*, [1893] P. 468, and the settled practice of the Admiralty Division to allow in proper cases such actions *in rem* have concluded the question, the true key to which might have been found long ago in the language of Dr. Lushington in *The Sarah*, Lush. 549.

I have hitherto not considered one possible *lex loci*, the law of the foreign ship, in this instance that of Norway. If such a tort were not actionable by the law of Norway, it would be necessary to consider which was the law applicable, whether that of the British ship on which the act of negligence was committed or that of the Norwegian ship on which the act was felt, or whether, as his death was in the sea by drowning, general maritime law as administered in the English courts should apply. This matter underwent great discussion in *Reg.* v. *Keyn*, 2 Ex. D. 63, 25 W. R. Dig. 87. It will be found treated of in the separate judgments of Lindley, J., at p. 98, of Denman, J., at pp. 101 to 107, Brett, J., at p. 148, Bramwell, J., at p. 150, Lord Coleridge, C.J., at p. 158, and of Cockburn, L.C.J., at pp. 232 to 238. It would be necessary also to consider the case of *The Leon*, 29 W. R. 916, 6 P. D. 148, but till it is otherwise pleaded and proved I take the law of Norway to be the same as our own.

Having thus established my first proposition, that an injured man could have maintained during his life an action for damages in such a case as the present, I come to apply the Fatal Accidents Act, 1846. [After citing section 1 of the statute, his lordship proceeded:] These words are wide enough; and no one doubts that they apply to foreigners in England or to British seamen, as against British shipowners on the high seas. There is the *lex fori*, and if the tort be held to be done on the British ship the *lex loci*. It has not been pleaded that the law of Norway differs in this respect from ours; and I leave, as before, the possible consequences of such a state of things out of consideration. If the *lex loci* be the law maritime, I am not sure that it must not now be held that the injury done to the relatives of the dead man by killing the bread winner is to be deemed an actionable tort by the law maritime. The reasoning of the Supreme Court of the United States in the case of *Ex parte Gordon*, and the fact that by the law of Scotland, and, I believe, now the law of many civilized countries—*e.g.*, the United States, France (see Zachariæ (ed. 1878), vol. 4, p. 17), and Germany, as I am informed, this action lies, lead me to think that if at one time this tort was not actionable by the law maritime it may yet well be actionable now.

I have still to consider the decision and reasoning of my brother Darling in *Adam* v. *British and Foreign Steamship Co.* That decision is in point, and if we decide now in favour of the plaintiff we must disagree with it. It rests mainly, I think, upon the principle that Acts of Parliament are to be deemed not to apply to non-resident aliens unless the court is compelled so to apply them. There are a number of decisions upon the construction of the Merchant Shipping Act of 1854, which set forth this principle as applicable to the construction of statutes imposing a burden upon a foreigner. Perhaps the strongest of these is *Cope* v. *Doherty*; but even in this case the reservation of Knight Bruce, L.J., at p. 621, would make me pause. On the other hand, where it is a case of giving a remedy to a foreigner, the decision of Dr. Lushington in *The Milford*, Swab. 362, and the constant practice which has followed up that decision is the other way. The latter position is, I think, sound. Our courts are not only open, but open equally to foreigners as to British subjects; and foreigners who have the benefit of the English common law have also the benefit of English statutes. At any rate where a statute brings the English law into harmony with the law of the foreigner as in the case of *The Milford*, I think this must be so. If an Englishman on board a foreign ship or a foreigner on board a British ship is run down by a British ship upon the high seas it seems almost certain that an action would lie. Are the representatives of a foreigner on board a ship of his own nationality whose national law would probably give them at least as good a remedy as that given by the Fatal Accidents Act to be deprived of their right to recover because they must have recourse to statute law instead of to unwritten common law? I think not. Is the law to be different for a Scotch owner of a British ship, and can it be that as against the owner in this case, if he were a Scotchman, the foreigner could maintain an action because the law of *solatium* is part of the common law of Scotland, but as against an English owner he cannot, because the Fatal Accidents Act is a statutory addition to the common law of England? I think not. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Stokes & Stokes.*

Solicitors for the defendants, *Ince, Colt, & Ince.*

C. C. R.
(Lord Alverstone, L.C.J., and Mathew, Wills, Grantham, and Bigham, JJ.) — May 18.

REX v. COSNETT. (*a*.)

Criminal law—Obtaining goods by false pretences—Parting with possession—Goods loaded on prisoner's van before false pretence—Cheque for balance dishonoured.

The prisoner agreed to purchase a quantity of old iron from the prosecutor, and paid a deposit of ten shillings. The next day he came with a cart and man to fetch the iron away, and said, "I will pay you the remainder of the money when I have loaded the iron." The iron having been placed in the cart, the prisoner returned to prosecutor's house and gave him a cheque for the balance, which was subsequently dishonoured.

Held, that there was evidence upon which the jury might find that the goods were obtained by false pretence, as the prosecutor did not intend to part with the goods until after he had received the cheque.

Case stated by the deputy-chairman of the Worcestershire Quarter Sessions on the trial of an indictment

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

against Thomas Cosnett, the defendant, at the April quarter sessions.

The indictment charged the defendant with obtaining 1 ton 5 cwt. of iron from the prosecutor by false pretences.

The prosecutor was a farmer and had about his premises a quantity of old iron which the defendant, on the 1st of January last, agreed to buy for £1 17s.

The sum of ten shillings was paid on account, and the balance was agreed to be paid when the iron was fetched away.

No part of the iron was taken away, but on the following day the defendant called at the prosecutor's house with a pony and cart accompanied by another man. The defendant said, "I have come for the iron. Shall you be about presently? I will pay you the remainder of the money when I have loaded the iron." After a short interval, during which the prisoner left for the purpose of loading the iron, he returned to the house and said he wished to write a cheque. The prosecutor said, "Surely you don't want to write a cheque for that small amount?" The prisoner replied, "I am well known in Pershore," and mentioned the names of two gentlemen, one of whom was known to the prosecutor. On the prosecutor's stating that the defendant was a stranger to him, he replied, "I have a banking account and it will be all right," and he then wrote out a cheque for £1 7s. drawn on Messrs. Lechmere & Co.'s bank at Tewkesbury, which he handed to the prosecutor.

The prosecutor stated in evidence that he only parted with the iron on the representation that the cheque was all right. When the defendant went into the house to write the cheque the iron was not completely loaded. There were a few pieces on the ground which his assistant put on to the cart, but by the time the prosecutor and the defendant came out of the house, after the cheque had been delivered to him, the cart and its load had just reached the public road, and were subsequently taken away by the defendant.

The cheque was dishonoured; and it was proved that though the defendant had at one time had a small account at the Tewkesbury Bank, which was opened on the 3rd of August, 1899, such account was closed on the 31st of October, 1899, by order of the managers, and that notice of the closing of the account was communicated to the defendant.

The jury found, in answer to questions put to them, (1) that the intention of the parties was that the iron should remain the prosecutor's property till the whole of the purchase-money had been paid; (2) that the prosecutor had not parted with possession or control of the goods at the time when the cheque was tendered; (3) that the defendant was aware that his banking account had been closed in October, 1899, and that the cheque which he drew would not be honoured; (4) that the prosecutor parted with the iron by means of the false statements made to him with reference to the banking account and cheque; and (5) that the defendant intended throughout to defraud the prosecutor. They accordingly returned a verdict of guilty.

The question for the opinion of the court was whether, upon the facts and the finding of the jury, the defendant was rightly convicted.

Sherwood, for the defendant.—There is no evidence to support a conviction, because the property in the iron had already passed when the cheque was tendered. If the defendant committed any offence it was that of obtaining credit by means of fraud within the mischief of section 13, sub-section 1, of the Debtors Act, 1869: see *Reg.* v. *Jones*, 46 W. R. 191, [1898] 1 Q. B. 119.

J. B. Matthews, for the prosecution, was not heard.

THE COURT gave judgment for the Crown.

Lord ALVERSTONE, L.C.J.—It was argued by Mr. Sherwood on behalf of the defendant that there was no evidence that the defendant had obtained the iron by means of a false pretence, because he said it was a fair inference to draw that before the cheque was passed all the iron was in the cart, and was in the possession of the defendant's man. He submitted that on that hypothesis the first, second, and fourth findings of the jury could not be supported. I cannot agree with him. The facts were that there was a contract for the sale of the iron. Ten shillings was paid on account at the time, and the balance was to be paid when the iron was fetched away. It was not suggested that the payment of the 10s. was sufficient to entitle the defendant to the goods, but it was argued that the property had passed before the payment of the balance. The facts were that when the defendant came to fetch the goods he said he would pay when he had finished the loading. While the loading was in progress he wrote the cheque for the balance, and delivered it to the prosecutor. It is clear that the prosecutor would not have allowed the iron to go out of his possession unless something had been said about payment. In my opinion there is evidence on which the jury could find as they did.

MATHEW, J.—I agree. I only desire to add that in my judgment there is abundant evidence that the loading of the cart was never intended to be a parting by the prosecutor with the possession of the goods.

WILLS, GRANTHAM, and BIGHAM, JJ., concurred.

Solicitors, *Robbins, Billing, & Co.*, for *Curtler, Davis, & Curtler*, Worcester, for the prosecution; *A. A. Maund*, Worcester, for the defendant.

Prob. Div. & Adm. Div. Admiralty. } May 18; June 14.

"THE SWINDON." (*a.*)

Admiralty—Jurisdiction of county court and Trimming Board Committee—Coal Trimmers' Union.

Where a committee of a Coal Trimmers' Union held that a certain vessel was, according to their bye-laws, a "self-trimmer," the effect of which was to bind her to a certain tariff rate of the board's,

Held, by the county court (and affirmed by the Divisional Court), that the question was one of law, and was within the jurisdiction of the county court and not of the Trimmers' Union.

This was an appeal from the county court of Glamorganshire, holden at Cardiff on the 11th of January, 1901.

The plaintiffs, Messrs. Millers & Corys, of Cape Verde Islands, claimed a sum of £75 11s. 4d. for trimming 2,948 tons of coal at 3½d., amounting to £42 19s. 10d., and for 2,843 tons at 2¾d. amounting to £32 11s. 6d.

The defendants were the owners of the steamship *Swindon*, and paid into court £30 3s. 3d. in settlement of the plaintiffs' claim.

The direct issue between the plaintiffs and the defendants was the tariff rate to which the steamship *Swindon* was liable, and this gave rise to a question of the respective jurisdictions of the county court and a committee of the Coal Trimmers' Union.

The facts were as follows: *The Swindon* is a steel screw steamship of 5,750 tons, and is known as a

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

"self-trimmer"—that is, she is so constructed as to her hatches and the height of her deck, above the level of her coal when ladened down to her load-line, as to save labour in trimming her coal.

On the 24th of April, 1900, the Trimming Board decided that the vessel was a "self-trimmer."

On the 17th of March, 1900, *The Swindon* was chartered by the defendants to the plaintiffs, and by paragraph 4 of the charter-party the cargo of the vessel was to be trimmed by men appointed by the charterers at the tariff rate of the port.

The defendants before the learned county court judge contended that the question as to whether the vessel was a self-trimmer or not was wholly within the province of the Trimming Committee, and that the county court had no jurisdiction in the matter.

The learned judge held that the question was one entirely of law, and one in which the county court was seised of jurisdiction, and gave judgment for the plaintiffs for £66 7s. 1d. with costs, but stayed execution pending an appeal being lodged within a fortnight.

The defendants appealed.

Abel Thomas, K.C., and *Montague Lush*, for the appellants, contended that there was no such thing as a "self-trimmer"; absolutely it was a matter of degree. Furthermore, inasmuch as the respondents had agreed to accept the tariff rate of the port, they had *ipso facto* agreed to allow the authority of the port to determine what the rate should be; if, therefore, the county court judge was to take a ship out of the board's classification the tariff itself would be thereby upset.

Eldon Bankes, K.C., and *Bailhache*, for the respondents, contended that the tariff rate of the Trimming Board had no legislative or contractual effect whatever, and was no more than an arrangement made to avoid disputes, and it was stated at the end of the tariff book, which was before the court, that "the charges for any self-trimmers not in this list must be fixed by the Disputes Committee."

BARNES, J., in delivering the judgment of the court, said: This is an appeal from the decision of the county court judge at Cardiff holding the plaintiffs entitled to recover from the defendants the sum of £66 7s. 1d. for the expense of trimming a cargo of coal in the steamship *Swindon* at Cardiff in April, 1900. *The Swindon* was chartered by her owners, the defendants, to the plaintiffs by charter-party of the 17th of March, 1900, to load at Cardiff, Penarth, or Barry a cargo of coal for St. Vincent, Cape Verde Islands, at 10s. 3d. per ton freight, which was to be in free of trimming and certain other charges, and the charter-party provided that the cargo was to be trimmed by men appointed by the charterers at the tariff rate of the port. The vessel was loaded with a cargo of coal at Cardiff under the charter-party in April, 1900, and almost 1,250 tons were trimmed by the trimmers. The trimming was paid for by the plaintiffs, and their case was that they were entitled to be paid by the defendants the above-mentioned sum of £66 7s. 1d., being the tariff rate of the port at 2¾d. per ton for trimming the cargo of the said vessel, treating her as a one-decked vessel. The defendants' counterclaim was that the vessel had been held by the Trimming Committee, a board at Cardiff, to be what is termed a "self-trimmer," and that all that they were bound to pay was the sum of £30 3s. 3d., which is at the rate of 1¼d. per ton fixed by the board; and they paid this sum into court. It was admitted that, if the vessel was to be treated as a self-trimmer, the defendants had paid enough into court, but that if the vessel was not to be treated as a self-trimmer the plaintiffs were entitled to succeed. The learned county court judge held upon the evidence given before him that the vessel was not a self-trimmer, and that the Trimming Board had not jurisdiction to hold that she was. The first point is whether the parties are bound by the decision of the committee of the Trimming Board. The only stipulations between the parties are those referred to in the charter-party, the effect of which is that the defendants have to pay for the trimming at the tariff rate of the port. The question, then, is what was the tariff rate of the port for this vessel. The trimming tariff has been arranged between the coal shippers and the Cardiff, Penarth, and Barry Coal Trimmers' Union, as in the little book which was before the court. This provides in the first instance that on and after the 15th of December, 1890, the charges for trimming coal and coke on board sailing and steam vessels within the port of Cardiff would be in accordance with certain scales set out therein, and the charge in these scales for *The Swindon*, treating her as a one-deck vessel, is 2¾d. per ton. It appears that after the tariff had been in existence for some years vessels denominated self-trimmers came into use, and then a further agreement was made. That agreement is to be found on p. 7 of the tariff book, and is as follows: "It is hereby agreed by and between the undersigned representatives of the coal shippers and of the Cardiff, Penarth, and Barry Coal Trimmers' Union that supplemental to the terms of the tariff arranged and bearing date the 15th of December, 1890, in respect of steamers denominated self-trimmers that rates shown on attached schedule, being those now paid, shall apply to steamers already known as frequenting the port, and that such steamers shall be classified, according to the rates paid, into groups, and any new steamers or boats not included in this list, but which may be of the same type as regards the work involved in trimming, shall be included in the corresponding group." The book then gives a list of self-trimming steamers with the charges opposite each, and has at p. 27 the following clause: "The charges for any self-trimmers not included in this list must be fixed by the Disputes Committee." It is under these provisions that the defendants contended that, the Trimming Board having held that the vessel is a self-trimmer, and that the rate to be paid was 1¼d., they, the defendants, are liable for no more. How the matter came before the Trimming Board is not very clear. It would seem that the trimmers demanded of the plaintiffs the higher rate as if the vessel were not a self-trimmer, and according to some of the witnesses the master of the vessel told the trimmers to go on at the usual rate. All that is to be found from the evidence with regard to the matters coming before the board is that the owners appear to have applied to the committee called the Trimming Board to have *The Swindon* held to be a self-trimmer, and it seems to have been assumed in argument that, if the board had jurisdiction under the provisions aforesaid to decide this matter, the tariff rate has been properly paid by them at 1¼d. per ton for *The Swindon*, and the case was argued before us really upon the construction of the clauses of the tariff book above mentioned. The county court judge's opinion is contained in the following passage: "After considering it before, and considering it again to-day, I can see it is clear (I have not the slightest doubt about it) that, in the event of any question arising as to the proper classification of such steamer, or any other question which affects the application of the tariff generally, on the best consideration I can give to it, that only means what rate is to be paid, and, before the Trimming Committee can determine what rate is to be paid, somebody, and not the Trimming Com-

mittee, must determine in the case whether a vessel is denominated a self-trimmer or not." We are of opinion that he is right. The tariff book gives rates for vessels generally, and these contain the above-mentioned clause about self-trimmers, which may be considered as exceptions from the general rates. Certain vessels are specified as "self-trimmers," and such steamers are to be classified according to the rules into groups, and then any new steamers or boats not included in the list, but which may be of the same type as regards the work involved in trimming, shall be included in the corresponding group, but all that the committee have power to decide is any question as to the proper classification of such steamer. There is no clear and definite wording which gives the committee power to say whether the vessel is a "self-trimmer" or not, but their powers appear to be confined to fixing the rate for a vessel which is a "self-trimmer." This may be inconvenient, and it certainly seems desirable that such questions relating to contentions as are necessary to be determined in such a case should be decided by a committee of experts, but, according to our reading of the rules, the decision of what is a self-trimmer has not been left to the committee. The wording of the clause on p. 27 also justifies these views. Grounds were urged before us for holding on the one hand that it was, and on the other hand that it was not, intended that the committee should have the power contended for by the defendants. Whatever the intention may have been, we cannot go beyond the tariff rules themselves. We do not consider that the words "any other question which affects the application of the tariff generally" gave the power contended for by the defendants. Having regard to the collocation and the fact that the powers connected with new steamers had been already dealt with, and that this general clause may have effect given to it in relation to other points in the tariff, we cannot consider that it was intended to confer a power which had not been expressly conferred when any new self-trimmers were being dealt with. The judge of the court below had then to determine whether in fact the vessel was a "self-trimmer." We see no ground for differing from him, having regard to the evidence given. The plaintiffs gave evidence to the effect that the vessel required as much trimming as any ordinary vessel, and the defendants attempted to meet this by certain evidence as to the loading of a sister ship on a special occasion, which the county court judge has dealt with fully in his judgment. Whether or not a vessel is a "self-trimmer" appears to be a question of degree, and the defendants do not appear to have given any adequate evidence as to what constituted a "self-trimmer" or made any attempt to give evidence of sizes of hatches, details of constructions, or to properly compare *The Swindon* with other vessels which are treated as "self-trimmers." Whether might have been the result if such evidence had been given, we are of opinion that, upon the evidence which was before the court in the present case, the vessel has not been brought within the part of the tariff which relates to "self-trimmers," and the ordinary tariff rate contended for by the plaintiffs must be paid. The appeal must be dismissed with costs.

Abel Thomas asked for leave to appeal, inasmuch as the court's decision affected hundreds of vessels.

JEUNE P., gave leave to appeal on the question of law.

Solicitors, *Botterell & Roche*, for *Vaughan & Roche*, Cardiff; *Downing, Bolam, & Co.*, for *Downing & Handcock*, Cardiff.

House of Lords.

From C. A. (England). Dec. 14.

LYSONS v. ANDREW KNOWLES & SONS (LIMITED).
STUART v. NIXON & BRUCE. (a.)

Master and servant—Employers' liability—Accident—Compensation—Average weekly earnings—Employed less than two weeks—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *Schedule—Loading and unloading a vessel.*

It is not necessary for a workman to be two weeks in the service of his employer in order to be entitled to the benefit of the Workmen's Compensation Act, 1897.

The 1*st section of the Act gives the compensation; the schedule the method of computing it.*

Where a stevedore was killed on a vessel whilst engaged in placing the beams which support the hatchway, and this took place after the cargo had been stowed from the wharf or quay.

Held (Lord Lindley *dissenting*), *that the process of loading was not then completed within the meaning of the Act.*

Decisions of the Court of Appeal (48 *W. R.* 408, [1900] 1 *Q. B.* 780, *and* 48 *W. R.* 598, [1900] 2 *Q. B.* 95) *reversed.*

Appeal from Court of Appeal (A. L. Smith and Collins, L.JJ., Romer, L.J., doubting) (48 W. R. 408, [1900] 1 Q. B. 780).

The appellant was a pitman in the employ of the respondents, who were owners of a colliery, and was engaged as a pieceworker at six shillings a day.

He began work on a Tuesday and did a day's work. The next day was a holiday.

On Thursday he again went into the pit to do a day's work, and while working was injured by the fall of a piece of coal.

On Friday he was paid six shillings for the first day's work and on the Friday following six shillings for the second day.

The appellant claimed compensation for the injury sustained.

The county court judge considered that as appellant had earned twelve shillings within a period of seven days, that sum must be taken as his average weekly earnings; the Court of Appeal, however, held that it was necessary for a workman to have been at least two weeks in the service of his employer in order to be entitled to compensation

The first schedule to the Act, sub-section 1 (*b*), is as follows: "The amount of compensation under this Act shall be, when total or partial incapacity for work results from the injury, a weekly payment during the incapacity, after the second week, not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but, if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

Joseph Walton, Q.C., and *Atherley Jones, Q.C.* (*Richard Smith* with them), for the appellant.—Schedule I., section 1, dealing with the amount of compensation, refers to the amount only, and not to the liability. Section 1 of the Act gives compensation in all cases, as provided by schedule. [Earl of HALSBURY, L.C.—The schedule often contains a good deal of enactment.] Unless contained in words average weekly earnings, there are no conditions save those set out

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

in section 2. If so, it is obscure and covertly. However workmen may contract, the industry is to bear this burden. The word average is not strictly employed. The amount is not to depend on a mere chance. In case of death he is not deprived of the £150 even assuming you cannot get an average weekly earnings. The narrow construction excludes all classes of day labourers, &c., which is an immense qualification of the Act.

C. A. Cripps, Q.C., and *F. H. Mellor*, for the respondents.

Joseph Walton, Q.C., replied.

THE HOUSE deferred giving judgment until after argument in the next case—*Stuart* v. *Nixon & Bruce.*

In this appeal the workman, a stevedore's labourer, was killed on the fifth day by an accident after continuous employment at daily wages.

His widow, the appellant, claimed compensation.

The Court of Appeal (Collins, Vaughan Williams, and Romer, L.JJ.) (48 W. R. 598, [1900] 2 Q. B. 95), considered the case governed by *Lysons* v. *Andrew Knowles & Sons.*

There was a further question as to whether the deceased was engaged in loading the vessel which is dealt with in the judgments.

Joseph Walton, Q.C., and *Leslie Scott*, for the appellant.

Ruegg, Q.C., and *A. G. Steel*, for the respondent.

Earl of HALSBURY, L.C.—In these cases I think it is impossible not to recognize the fact that the Act of Parliament which your lordships are called upon to construe is one which from time to time presents difficulties of construction. I am not surprised that the Legislature, having a somewhat difficult problem to solve, has used language which does require consideration to give it its true signification. From time to time it was met in the course of manufacturing this Act of Parliament with difficulties that were sought to be solved by the use of words which were, perhaps, not the best chosen, and which have raised some difficulties in the construction of the Act.

The broad proposition, of course, was that the Legislature intended that there should be compensation given to every workman in certain trades when an injury happened to him in the course of his employment, subject to certain exceptions which are not relevant to the question now under debate. The language in which the right was given must be looked at, I think, with care to see whether the language was (as it appears in the first instance) intended in its universality, or was intended to be cut down, as is contended, to a very limited right by sections or phrases in the schedule. Certainly, whatever other difficulty there may be in construing the language as it stands, it would be, I think, more difficult still if we were to introduce these qualifications upon the right.

Now, in the view which I suggest to your lordships, I think the language is simple enough, and if one looks at what I might call the framework of the legislation which is intended to be applied, I think there is not so much difficulty as has been contended with regard to this particular provision. The language is this: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." That I regard as the affirmative or leading enactment. What follows appears to me to be equivalent to a statement that the mode in which that compensation is to ascertained and determined is to be according to the method and manner provided for in the schedule. The language itself (I do not want to undervalue the argument) is "liable to pay compensation in accordance with the first schedule to this Act." The first thing, I think, one has to do is to apply one's mind to what is the substantive intention and meaning of this statute. Does it mean that every workman, who is employed in one of the prescribed trades, shall be (subject to certain conditions not relevant to the matter now under debate) entitled to compensation? Or does it mean that only workmen shall be entitled to compensation in respect of whom it is possible to say that the periods of their employment and the mode in which they are paid will render it possible to establish an average weekly payment, so that anybody who comes outside that category is not entitled to any compensation at all? My lords, for my own part I cannot entertain a doubt that the Legislature did mean that every workman in the prescribed trades should be entitled to compensation, and I think that is the language which one would naturally expect to have been used by the Legislature if that was the meaning of the enactment. But now it is said that the language of the enactment is that he is to "be liable to pay compensation in accordance with the first schedule to this Act." It is to be observed that even upon that language it is not such compensation as is enacted in the schedule, but "in accordance with the first schedule to this Act"; and when we look at the first schedule of the Act, we find that there are a variety of provisions which are very intelligible indeed, if we take what I say is the leading enactment, that every workman is entitled to compensation.

But it is said: if a workman is not employed for at least two weeks, how can you average his earnings or his agreed earnings by an "average" which, when you have only got one term, is an impossible phrase. Well, my lords, for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be. And I think if one looks at the whole framework of the schedule it is intelligible enough why those modes of calculation were adopted. In the first place it will be remembered that no compensation is due to anyone unless he is disabled for a period of two weeks, the intention thereby being to exclude all trifling injuries. In the next place, assuming that the person is entitled to compensation during the period in which he is unable to work and support himself, the Legislature obviously had in its mind this, that the man was not to be left without provision during such period as he was laid up by reason of the accident, and they enacted that payment—it is described as a "weekly payment"—should be given to him. Then I suppose it occurred to everybody who was dealing with the mode in which the Act was to be administered, and considering how the relief was to be given, that you must in some way or another find out what was to be the weekly payment if it had relation to his earnings or wages. It was obvious, I should think, to anyone, that everybody is not paid by the week, that you cannot have

the exact thing made ready to your hand to enable you to find out how much the weekly payment is to be. You must split up that which is what I call the aggregate payment, whether it is by the year, or the month, or what not, into such proportions in relation to his weekly earnings that the week's payment, or rather, as it was described, the payment in respect of the week, should be arrived at. How was that to be done? It seems to me that the Legislature, in using the phrase that you must take the average of the earnings for the week, did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in the arithmetic he was not to get it at all; but it provided an artificial means of finding out what that quantum was to be, and that was no doubt by the use of the word "average."

I do not myself feel very much impressed by the discussion that we have had as to what the word "average" strictly means. I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another, or one week with another, that the Legislature used those words, and I think it is what everybody would understand by "average" that his earnings were so much—not his agreed earnings by contract, there it would be definite—that if a man was only employed at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid. That, my lords, seems to me to account for the language in which the Legislature has couched its enactment.

The alternative is this, that you are to suppose that the statute, giving a right in the language which I have read, intended to exclude the enormous class of day labourers and persons not in regular employment but only irregularly employed from time to time, unless you could strike the average of a fortnight's employment. Now, my lords, looking at the language of the statute and the mode in which what may be described as the initial right is given, I should shrink very much from such a construction, and I am unable to concur with the Court of Appeal. The Court of Appeal undoubtedly does say in words that they can give no account or reason why the statute should be so contrived, and that seems to me to be rather an admitted weakness in a construction when you are construing a statute, that you are compelled to say: I so construe it, but why I am wholly unable to conjecture. It appears to me that there is a very reasonable ground upon which you should adopt the construction which I have suggested to your lordships, and if that is so, the first case with which your lordships are dealing would be decided in favour of the plaintiff, reversing the order of the Court of Appeal.

The next case, *Stuart* v. *Nixon & Bruce*, raises a point which is peculiarly its own. In so far as it touches the question with which I have now dealt it is disposed of by what I have already said, but it raises also a point which is peculiarly its own. If I understand the facts (and it is not at all immaterial to consider what the exact facts found, or intended to be found, by the county court judge are), the fact is that the stevedore was engaged in loading this vessel—I will not say the loading was incomplete, because that would be assuming the question which I propose to deal with, but all the cargo was stowed in. The beams which form an essential part of the vessel and the hatchways, which are to preserve both the safety of the vessel and the safety of the cargo, had not been put in, and in the course of the operation of putting those beams in which form part of the necessary support of the hatchways, the person who was engaged in that operation, whose widow is suing here, was killed. He was engaged in the operation which I have described. Now, first of all, was he engaged in the action of "loading"? I should think very few people would describe the work he was then doing as anything else. It is true that at that particular moment he was engaged in putting in their place the beams which formed part of the covering of the vessel and not actual parts of the cargo which was being carried. When you find the word "loading"—I will deal presently with the other words upon which one of your lordships, I am afraid, entertains some doubt—I say, so far as the word "loading" is concerned, can anyone doubt that the whole operation was intended to be included within the words of the enactment? I should have thought it was impossible to doubt it. Nor do I entertain any difficulty about the stevedore being the person who was doing it. I could quite understand that if the crew was engaged in doing it it could be said that, although the joint action of the stevedore and the crew was "loading," yet the stevedore was not loading but the crew were in respect of this particular matter. First of all as regards the thing done, can it be reasonably contended that the putting in of the hatchway and completing the safety of the vessel and the safety of the cargo by this means was not a loading of the vessel? Would anybody say that if the stevedore had undertaken to completely load such and such a vessel, if he had left the hatches off and not put the beams in for the purpose of receiving the hatchways, he had completed his contract? It may be the same question, perhaps, but only a different form of putting it. I should myself entertain no doubt that it was part of the duty of the person loading the vessel to put on the hatchways just as much as to put in the bags in any particular part of the hold.

But then, my lords, comes this question. By a very similar application of the fashion of legislation by reference, the Legislature has made the use of certain machinery for loading or unloading to or from a wharf, &c., not machinery of a factory, but it has made it by statute a "factory" itself, and the person using the machinery is to be the person in control of the factory so as to establish the legal liability. I admit that the statement of that legislation is somewhat grotesque, but that is what the Legislature has done. The county court judge not unnaturally shrank from adopting what the Legislature has done, but I am afraid neither a county court judge nor your lordships' house have any right to criticize what the Legislature has done. We must administer the law as it is, and if the Legislature has thought proper to make machinery so used a "factory" your lordships must assume it to be a factory for the purpose of any decision at which your lordships can arrive.

Then there arises another and a more subtle point upon which one of your lordships, I think, entertains some doubt. The language of the statute is that the person so engaged must be either loading or unloading to or from a wharf. Now, the criticism as I understand it is this, that at the particular moment when this accident happened there was no operation that could properly be described as loading or unloading to or from a wharf. All the bags were in, and the only thing that remained to be done was that which I have described, and therefore the particular machinery which, only while

used in loading or unloading to or from a wharf becomes a "factory" with all the consequences incident thereto, was not at that moment a factory. That was the argument. But, my lords, to my mind that is putting far too narrow a construction upon the words of a statute which was passed before the Workmen's Compensation Act and which was intended to be a protection to the workmen in peculiarly dangerous operations. Amongst other things, one operation which the Legislature thought it right to protect was the operation of loading or unloading to or from a wharf. With respect to the other parts of this transaction no question is raised as to the Act applying; but the words "to or from a wharf" are suggested to exclude the particular moment when this transaction took place.

Taking a broad view of that question, I should have thought it was impossible to suppose that the Legislature intended to confine the protection of workmen to the exact moment when a bag was being either lowered from or to a wharf. Surely what they intended to protect the workmen from was the danger of an operation, in the ordinary course of such transactions when something is being done, not limited to the exact moment, but, speaking of the whole transaction—when the transaction is being effected of loading or unloading from a vessel to a wharf. Various points have been put in the course of the argument, and it has been, I think, with great force argued, Does anybody suppose that it is only while the machinery has actually a bag in its clutches that the Act applies? When it is swinging back again itself empty, or when it is descending into the hold to get a bag, although there is not a bag attached to it, is not that loading or unloading? Literally it is not, and if the same criticism is to be applied each of these transactions must be held to be outside the Act of Parliament, because at that moment no bag was either being loaded or unloaded. I cannot think that is the proper way to construe a statute passed with that object in such language. The loading or unloading must be treated as a whole transaction, as men in business in ordinary life would regard it. How was the man employed? He was employed in loading or unloading the vessel, although at the particular moment he may have been standing still and doing nothing. I think the words "loading to or from a wharf" are satisfied by the fact that the men were engaged in this transaction—I was going to say it was ancillary to the main transaction of loading or unloading, but I think that would be an inadequate statement of it, because I think it is part of the loading and unloading. It is part of the operations which the human labour is engaged in, in doing the very thing the Legislature contemplated as requiring this protection, and, therefore, I think this point also fails and that the plaintiff is entitled to judgment.

For these reasons I move that in both these cases your lordships should reverse the decision of the court below.

Lord MACNAGHTEN.—I am of the same opinion in both cases.

In the second case (*Stuart* v. *Nixon & Bruce*), as regards the question whether the workman who was killed was engaged in an employment to which the Act applies, I have only to say that I have no doubt that he was. He was employed in the process of loading from a wharf, and employed about machinery used for or in relation to that process. In my opinion the operation in which he was engaged at the time was part of the process, and the process was not complete until that operation was finished.

As regards the more substantial question at issue I must say that I do not feel pressed by the difficulty which presented itself to the Court of Appeal. In the first place it is important to bear in mind that the right to compensation is given by the Act, not by the schedule. The conditions which must have been fulfilled in order to support a claim to compensation are to be found in the Act itself. The Court of Appeal has added another condition which is not contained in the Act, which is not expressed in the schedule, but which it is said may be discovered there.

The right to compensation, as I said, is given by the Act, but the compensation is to be "in accordance with" the schedule. The words are not "as defined by the schedule," or "in the terms prescribed by the schedule," but "in accordance with the schedule." Those words, as it seems to me, import a certain latitude. The degree of latitude—if I may borrow the language of my noble and learned friend on the woolsack when discussing the same words in the Bills of Sale Act in *Thomas* v. *Kelly*, 37 W. R. 354, 13 App. Cas., at p. 511—it would be difficult if not impossible to define. But there is no such great difficulty in dealing with them in a concrete case. At least, they seem to convey a warning or an intimation that you are not to cling so closely to the letter as to defeat the declared purpose and object of the Act.

I have no doubt that if Parliament had intended to impose the condition which has been discovered in the schedule, the condition would have been inserted in the Act. But it would have been a most extraordinary thing if such a condition had been imposed. In the case of a workman working at a dangerous trade, I suppose the periods of the greatest danger are, first, the period at the commencement of his employment, before he is familiar with his work, and secondly, the period when he becomes so familiar with it as to be careless of danger. But of the two I suppose the commencement is the more dangerous. Now I cannot imagine that Parliament, when it was giving this boon to workmen, would have thought of saying no compensation shall be paid if the accident happens during the most dangerous period of the workman's employment. Still less can I suppose that Parliament would have left such a condition to be inferred from a single word in the schedule, and that word (to say the least) not used with perfect accuracy.

Turning now to the schedule, there are, I think, three things to be noticed. In the first place, I agree with Mr. Joseph Walton that where death results from the injury, and the workman has left dependants, the compensation must be at least £150. It is to be £150, or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident, not exceeding in any case £300. But if the workman has not served the full period of three years, and you cannot find a basis on which to calculate the hypothetical amount, the workman would, I think, still be entitled to the £150.

In the next place it is quite clear that the word "average," which has given rise to all this difficulty, is not used accurately. If the rule which the Court of Appeal has laid down were applied strictly, it seems to me that a workman who had served for a year at an unvarying rate of wages, and had earned his wages week by week, would not be entitled to compensation at all. You may add up his wages for a year and divide by fifty-two, but you would not get an average, because there would be no variations between which you would take the mean.

Lastly, the word "average," as was pointed out by Mr. Walton, and more fully by Mr. Scott, occurs in the 2nd sub-section, and it is, I think, plainly not used there in the sense attributed to it in the Court of Appeal. If this case happened—if a claim to com-

pensation was made by a person partially incapacitated, and if at the time of the claim he had returned to work and was earning just half what he was earning before, but had only been at work for one week, you could not take those earnings into consideration and make a set-off against the compensation claim, and that would plainly be unfair and unreasonable.

All this seems to show that the word "average" is used very loosely in the schedule. The obvious meaning, I think, is that you are to take a week's earnings as the unit of calculation; but if there has been a series of weekly earnings of different amounts, you are to take an average, and the unit will then be not an actual week's earnings, but a hypothetical week's earnings. You are to take one week with another, as my noble and learned friend Lord Robertson observed.

I am, therefore, of opinion that the judgment of the Court of Appeal must be reversed in both cases, and the claims of the appellants allowed with costs.

Lord SHAND.—I have no difficulty in concurring in both cases in the decision at which your lordships have arrived. I confess that in the earlier part of the argument I felt there was considerable force in the view which had been taken by the Court of Appeal, that one day's wages only does not, strictly speaking, give the means of striking an average, and that in a case where there was one day's work only it was very difficult to get at the average weekly earnings in the ordinary sense, because you require several occasions at a different or, it may be, at the same rate of wages, in order to enable you to strike an average. But I am satisfied that, for the reasons which have been stated by my noble and learned friends the Lord Chancellor and Lord Macnaghten, the term "average" is used not with strict accuracy, but loosely, in this statute. It appears to me that, as the Lord Chancellor said, if it had been intended to strike out of the Act men who were in the same employment under the same employer, and it may be who were present at the same accident, but who had only worked for one day, so that there should be no compensation for them, looking at the broad terms to which the Lord Chancellor has referred of the statute itself, it would have required a direct provision to that effect. It would not be lurking in the schedule, which merely fixes the rate of compensation to be given, that you would find an absolute exclusion of the right altogether. I go with the argument upon that point, that it would not be a matter to be taken as a mere inference, but would be found in the language of direct enactment.

In the next place, my lords, it appears to me that you read the provision quite fairly when you propose to get at "the average weekly earnings" by taking that which the man has made in the week in that particular employment, which is only the wages for a particular day.

On these grounds, and adopting the reasons given by the noble and learned lords who have gone before me, I am of opinion, although I think the question is attended with considerable difficulty, that the decision of the Court of Appeal ought to be reversed.

Lord DAVEY.—Your lordships have had before you in the course of this session, and earlier, several appeals on this extraordinarily ill-drawn Act, but I do not know that your lordships have had one of greater importance or greater difficulty than the one before you. The difficulty really arises from this, that the draughtsman has apparently not worked out on paper into legislative language the scheme which he had in his head, and it looks very much as if the Act had really been framed from notes of legislative intention, and had not been expanded into the proper legislative language. Cases which have arisen and cases which are likely to arise appear to have been contemplated, but apparently were supposed to be covered by the general language used in the Act. I have made that observation because I think that is the key to the difficult question of construction upon which the Court of Appeal have expressed their opinion.

Now, my lords, I turn to the examination of the Act, and I entirely agree with what has been said by my noble and learned friend on the woolsack, that you ought to construe this Act so as, as far as possible, to give effect to the primary provisions of it. In the first Act I find (I will not read it again; it has been already read) that the employer subject to the provisoes is made liable to pay compensation, and it goes on, "in accordance with the 1st schedule to this Act." Now, my lords, I confess I should not read those words, "in accordance with the schedule to this Act," as being restrictive of the obligation upon the employer to pay compensation. I should not consider that those words limited or restricted the right of the workman to receive compensation, or the obligation upon the employer to pay compensation, but as being intended to denote the manner and mode in which that compensation was to be carried into effect. You may substitute for the words "in accordance with the 1st schedule" the actual title of the 1st schedule, and then the meaning which I attach to it would be perfectly clear, "in accordance with the scale and conditions of compensation contained in the 1st schedule"; that is to say, it is an expression of the mode and scale on which the amount of compensation is to be ascertained; the *amount* of compensation, not the right to it, is to be ascertained, and of the conditions upon which, when it is ascertained, it is to be enjoyed.

The Court of Appeal have found that those words, having regard to the construction that they put upon certain words in the schedule which have been referred to, attach a condition, and a most material condition, to the right to compensation—namely, that no workman should be entitled to compensation unless he has been in the employment of his present employer for a period exceeding two weeks.

Now, my lords, if it were intended to restrict the compensation given by the Act to workmen engaged at least two weeks by the same employer, you would expect to find it in the Act, and you would expect to find it as a qualification of the right given by the Act; you would expect to find it in some way in limiting or qualifying the description of workman who is to be entitled to compensation. But you find nothing there at all, and even if I came to the conclusion that the construction put by the Court of Appeal on the schedule was the right one, I should say that this was a *casus omissus* which had been overlooked in framing the schedule, and that the right being given by the statute, there was nothing in the schedule to take away the right, and that the court must find some other means of arriving at the amount and conditions upon which it was to be enjoyed so far as the schedule was inapplicable to the case.

Now, my lords, if you turn to the schedule itself, what do you find? You find in the first place that it is intituled "Scale and Conditions of Compensation." I have referred to that. Then the first section in the schedule is "The amount of compensation under this Act shall be," &c., and the clauses which have been construed follow after that enactment. "The amount," your lordships observe, "of compensation shall be" so and so. Obviously the only object of those sections in the schedule was to fix the amount

of it, and not in any way to qualify or restrict or modify the right to compensation.

Then, going on with the 1st schedule, it was suggested that it might come under the term "Conditions," but that I construe to mean, reading it with the word "Scale," the conditions of enjoyment—not the conditions upon which the right is given, but the conditions under which the right given in the body of the Act is to be enjoyed. And I find, on looking through this schedule, numerous conditions; for example, in clauses 3 and 11 there are provisions for the workman's submitting himself for medical examination; in No. 5 the question as to who is a dependant is to be settled by arbitration; in 12 the weekly payments may be reviewed from time to time; by 13 they may be redeemed by the payment of a lump sum; and 14 provides that they shall not be capable of being assigned to any other person, so that you find the word "conditions" amply satisfied, and the character of the conditions which is intended is shown by the actual enactments contained in the schedule itself.

When I come to the words which have to be construed in both these cases I really have very little to say that has not already been said by my noble and learned friend on the woolsack and my noble and learned friend opposite (Lord Macnaghten). Shortly put, I think the draughtsman intended this: The draughtsman saw that in many cases the actual weekly wage would not always be of the same amount, and that therefore it was necessary in some cases, and probably in most cases, to take an average, and he has used a compendious formula or compendious expression which was intended to include the simple case as well as the more complicated case of the actual weekly wage being of a different amount. I do not say it is good drafting—I do not say that it is free from difficulty; but on consideration of all the circumstances I think that that is the proper way of construing it. The weekly earnings are to be the basis upon which the compensation is to be assessed. If you have the actual regular weekly earnings you do not want to inquire any further, but if the weekly earnings have differed in one week with another, then you require to strike an average in the ordinary way. As my noble and learned friend opposite has pointed out, if the weekly earnings were uniform throughout the year, you cannot talk of the average weekly earnings of a person who has had £1 a week throughout the year; you would not say his average wages were so and so, you would say his weekly wages were so and so. So it is impossible to attach the accurate and logical meaning of the word "average" to the enactment which you find in this schedule. Being of that opinion, I agree that the decision of the Court of Appeal should be reversed, and in one case the decision of the learned county court judge be restored. In the other case I do not know whether it must go back for a new arbitration, but the amount must be ascertained in some way.

With regard to the case of *Stuart* v. *Nixon & Bruce* I have only to add that I entirely agree with what has been said, that the injury to the workman was in the course of the process of loading the vessel from the quay. Notwithstanding that the actual putting of the goods into the hold has been completed, I think this was "relating to" "the process"—in fact, I find an admission before the learned county court judge that the process was incomplete without the putting in of these beams. I do not place much reliance upon that, because it is obvious that the county court judge understood it differently from its *primâ facie* meaning, but I think the admission is correct, and it is exactly the language which I should choose to adopt myself. If the two operations had been in fact severed and the one had been done by a contractor, and the other had been done by the master of the ship, that might not have been so; but where we find it done by the stevedore, I think it was done by him as part of the process of loading the ship.

Lord BRAMPTON.—Entirely agreeing as I do with the judgments which have been pronounced, I have no word to add. I agree with all that has been said by my noble and learned friends who have exhausted the case. I propose therefore to do no more than express my concurrence.

Lord ROBERTSON.—The interpretation clause of this Act defines "workman" in language of the extremest latitude as regards the nature of the contract under which he works, and in that section and in the rest of the Act as distinguished from the schedules there is no hint or suggestion that it is limited to persons who have worked for any particular period prior to the accident. The 1st section of the Act declares the employer to be liable to pay compensation in accordance with the 1st schedule to every workman who has sustained personal injury by accident arising out of and in course of the employment. Having regard to the subject-matter of the schedule and its place in the scheme of the Act, it would be most surprising if the schedule should prove to contain some limitation of the class of persons benefited. Mr. Scott is, I think, quite right in saying that the "conditions" laid down in the schedule are none of them conditions precedent to the right to compensation, but are all conditions of the exercise of the right by persons assumed to possess it. Now, the basis of the respondents' contention is the words "average weekly earnings," and ultimately the single word "average," and I think it wholly insufficient to support so considerable a burden. All that the Act itself says is that every workman injured in the circumstances stated is to get compensation in accordance with the schedule, and it is completely in accordance with the schedule that the man whose weekly earnings require no weekly arithmetical computation to reduce them to a definite standard of compensation should receive compensation according to that standard. Supposing the words had been "weekly earnings, taking one week with another," it would be far too literal to hold that because a man had only worked one week, he would be excluded; and the word "average" expresses nothing more than the same idea.

Lord LINDLEY.—Upon the main questions which have been argued before your lordships I agree with everything which has been said, and in particular I agree with the construction put upon the enacting part of the Workmen's Compensation Act and upon the expression "average weekly earnings" in the scale. To my mind the result arrived at by the Court of Appeal, to the effect that nobody can claim compensation under this Act unless he has been in the same employment for a fortnight, is startling and untenable.

With regard to the small point about the loading, I have the misfortune to be in a minority of one. But, my lords, I cannot bring myself to say that the accident which happened here was occasioned by a "factory," which means machinery loading or unloading from a wharf or quay. I do not say whether the loading or unloading was finished or not. I should say myself it was, as the county court judge held; but even if it were not, the process of loading or unloading *from a wharf or quay* was over and finished for ever. The accident happened by the use of a crane or a machine, not in completing that

which was, according to my understanding of the case, at an end, but in a totally different operation, which was putting down the cross-bars over the hold of the ship with a view to place the hatchways over it. That point is a very small one, and I have no doubt, as your lordships differ from me, I am wrong; but as I have an opinion, I thought it right to express it.

I take it for granted that the second case will not have to go back, because, as I understand the decision, the compensation must be £150.

LYSONS *v.* ANDREW KNOWLES & SONS (LIMITED).

Order of the Court of Appeal reversed, with costs here and below, and order of the county court judge restored.

Solicitors, *Radford & Frankland*, for *Bowden & Widdowson*, Manchester; *Rowcliffe, Rawle, Johnstone, & Gregory*, for *Fullagar & Hutton*, Bolton.

STUART *v.* NIXON & BRUCE.

Earl of HALSBURY, L.C.—In this case I do not propose to say anything further. I have already given my judgment. The county court judge, taking the view he did of the law, has not assessed compensation, and therefore it must go back because your lordships have not the power to assess the compensation here. If it were done here consistently with the judgment, the judgment must be for the sum which, according to your lordships' construction of the statute, must be the minimum sum. But I do not think your lordships have jurisdiction to enter into that question. The only judgment I can move is that the case be set back to the county court judge to find out, in pursuance of your lordships' judgment, the amount of compensation which ought to be assessed.

Order of the Court of Appeal reversed, with costs here and below; cause remitted to the county court judge to assess the amount of compensation.

Solicitors, *Crowders, Vizard, & Oldham*, for *G. J. Lynskey*, Liverpool; *William Hurd & Son*, for *Oliver, Jones, Billson, & Co.*, Liverpool.

Court of Appeal.

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) — June 28.

In re E. W. A. (A DEBTOR). (*a.*)

Bankruptcy — Receiving order — Judgment debt — Guaranty—Release of co-guarantor—Release of debt —Agreement not to sue.

The release of one co-guarantor operates as a release of the other co-guarantors, notwithstanding that the contractual liability has passed into a judgment.

The difference as regards co-debtors between the release of a debt and the release of liability to be sued, considered and explained.

Ex parte Good, In re Armitage, 25 *W. R.* 422, 5 *Ch. D.* 46, *distinguished.*

This was an appeal from Mr. Registrar Linklater, making a receiving order against the appellant.

It appeared that in September, 1899, the debtor and one B. had entered into a joint and several guaranty with the Capital and Counties Bank for the payment of the sum of £6,000 owing to the bank from the P. company.

In October, 1900, the bank recovered judgment against the debtor and B. jointly and severally for the sum of £6,000.

The bank presented a petition in bankruptcy against B. founded on the judgment debt, but before any order was made upon the petition terms were arranged between the parties and embodied in a document dated the 7th of March, 1901, which was signed by the solicitors of the bank and addressed to the solicitors of B. It was to the following effect: "We beg to acknowledge the sum of £2,500 and five bills of £100 each dated to-day payable at 2, 4, 6, 8, and 10 months respectively, in full discharge of all claims by the Capital and Counties Bank (Limited) against B. in connection with the Professional and Trades Papers Co. (Limited) and all guarantees given by him to the bank in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank, and we undertake to attend on the hearing of the bankruptcy petition to consent to the same being withdrawn or dismissed on terms that B. pay the costs."

On the 26th of March, 1901, the bank presented a petition in bankruptcy against the debtor, E. A. W., in respect of £3,000, the balance of the amount due on the judgment of October, 1900, the consideration for the judgment debt being alleged to be the amount due under the joint and several guaranty of September, 1899.

On the hearing of the petition the debtor opposed the making of a receiving order on the ground that he was not indebted to the bank, they having on the 7th of March, 1901, released the debt and discharged him from liability in respect of the judgment.

The registrar, however, made a receiving order.

The debtor appealed.

Reed, K.C., and *Arthur Sims*, for the debtor, contended that the document of the 7th of March ought to be strictly construed according to its terms and not with reference to surrounding circumstances, and being so construed it was a complete discharge of the debt: *Mercantile Bank of Sydney* v. *Taylor*, 41 W. R. Dig. 193, [1893] A. C., p. 317.

Hansell, for the bank, contended that the rule as to the release of one joint surety being the release of all did not apply where the contractual liability had passed into a judgment, and that where the reason of the doctrine ceased the doctrine also ceased: *Kendall* v. *Hamilton*, 28 W. R. 97, 4 App. Cas., p. 515. He also contended that on the true construction of the document of the 7th of March the bank did not intend to release the debt, but only to compromise the bankruptcy proceedings: *Ex parte Good, In re Armitage*, 25 W. R. 422, 5 Ch. D. 46; *In re Wolmershausen*, 38 W. R. 537.

Reed, K.C., replied.

The following cases were also referred to: *Cheetham* v. *Ward*, 1 B. & P. 630; *Nicholson* v. *Revill*, 4 Ad. & E. 675; *Ward* v. *National Bank of New Zealand*, 8 App. Cas., p. 764, 32 W. R. Dig 170; *Steeds* v. *Steeds*, 37 W. R. 378, 22 Q. B. D. 537; *Commercial Bank of Tasmania* v. *Jones*, 42 W. R. 256, [1893] A. C. 313.

RIGBY, L.J., said he concurred in the judgment about to be delivered by Collins, L.J.

COLLINS, L.J., said this was an appeal from a decision of the registrar who had made a receiving order against the appellant founded on a judgment which had been obtained against the appellant and B. as co-guarantors. The ground of the appeal was that the liability of the debtor had been discharged by the release of his co-guarantor. The debtor and B. had entered into a joint and several guaranty with the bank for the payment of the sum of £6,000 owing to the bank from the P. Co. and the bank had recovered judgment against the debtor and B.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

jointly and severally for the sum of £6,000. The bank presented a petition in bankruptcy against B. founded on the judgment debt, but before any order was made upon the petition terms were arranged between the parties and embodied in a document dated the 7th of March, 1901 [which his lordship then read]. After that arrangement the bank presented a petition in bankruptcy against the debtor in respect of the sum of £3,000, the balance of the amount due on the judgment; and the question now before the court was whether the document of the 7th of March, 1901, amounted to accord and satisfaction so as to get rid of the liability. It was contended on behalf of the bank that the release of one co-surety did not operate as a release of the other co-surety where the contractual liability had passed into a judgment. But his lordship did not see any reason for the distinction. There was only one debt, and the release of one operated as a release of both. The rule was just as applicable to a liability under a judgment as to a liability under a contract. The rule was well established, and it was too late now to contend to the contrary. The real point was as to the effect of the document of the 7th of March, 1901. Where you have a document which purports to be a release you may also have a reservation of right against other persons, so that the document only amounts to an agreement or covenant not to sue a particular individual; and if there had been any reservation of right in the document of the 7th of March, 1901, it would not have operated as a discharge of the debt. But it did not appear to his lordship that on the face of the document there was any such reservation. That being so, why should any limitation be put upon the operation of the document. It was said that the bank did not intend to release the debt, but that was not a sufficient ground for reading into the document something which was not there. It was no reason for limiting its operation to say that the legal consequences of the document went beyond the intention of those who framed it. It was also said that the surrounding circumstances ought to be regarded as qualifying the document. What were those circumstances? There were none except that the debtor had no means and B. was a person of some means. There was nothing but the fact that B. was able to pay a substantial sum; and there may have been good reason for the bank taking only half the amount due. Therefore there was nothing to lead fairly to the inference that the document was limited to the release of one person. Two cases were referred to on the question of surrounding circumstances, but when the facts of those cases were criticized they did not afford any ground for cutting down the operation of the document in the present case. In *Ex parte Good, In re Armitage*, there was a controversy as to whether there was any joint liability at all. But in the present case there was no such circumstance; and the case of *In re Wolmershausen* could be distinguished in a similar way. Their lordships could not, without straining the rules of evidence, limit the operation of the document in question, and they must therefore hold that the debtor's liability was discharged.

ROMER, L.J., agreed, but expressed a doubt whether the document of the 7th of March might not, having regard to the form of it and to the surrounding circumstances, have been construed not as a release of the debt but merely as a release of B. from his liability to be sued.

Appeal allowed.

Solicitors, *Steadman & Van Praagh; Cameron, Kemm & Co.*

From Chan. Div. (Rigby and Collins, L.JJ.) — June 13.

GRAHAM *v.* WROUGHTON. (*a.*)

Local government—Nuisance by sewage—Use of drain—Sewer—Notice—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.

Certain inhabitants of a village were in the habit of sending slops, &c., down what was originally a highway drain, which had become vested in the local authority. The defendant, without notice to the local authority, connected a water-closet with this drain and sent fœcal matter down it. He thereby created a nuisance on the plaintiff's land.

Held, that, even assuming the drain in question to be a sewer within the meaning of section 21 *of the Public Health Act,* 1875, *the defendant, not having complied with the statutory requirement as to notice, could not avail himself of the provisions of that section, and might be restrained by injunction from sending fœcal matter down the drain.*

This was an appeal from a decision of Byrne, J.

The facts were as follows: There had existed for many years in the village of Wetheral, in Cumberland, a covered drain, which ran along one side of the high road from a point near the post office in the village in an easterly direction, and passing under the garden of Mrs. Graham, the plaintiff in the action, emptied itself by a fall of nearly eighty feet into an old disused quarry, which was also the property of the plaintiff and adjoined her garden.

For many years this covered drain had been used solely for conveying surface or rain water and slops from some of the houses in the village adjoining the high road; but recently some of the inhabitants adjoining the road, and particularly the three defendants, had discontinued the use of cesspools, and now discharged solid sewage matter into this drain.

It was admitted that an intolerable nuisance was thereby caused to the plaintiff, who applied for an injunction to restrain the defendants from continuing to discharge drainage and filth into and upon her land from houses in their occupation through the drain in question.

Byrne, J., granted an *interim* injunction as against the defendants Wroughton and Platt, but not the third defendant Hendry, who had for some years past been discharging his drainage into the drain in question, giving them a month to make other arrangements.

The defendant Wroughton appealed.

The drain in question was originally a highway drain which since 1894 had become vested in the local authority.

By section 21 of the Public Health Act, 1875, "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority, on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications"

A. Glen and *Maughan*, for the appellant.—Byrne, J., relied on the case of *Kinson Pottery Co. (Limited)* v. *Corporation of Poole*, 47 W. R. 607, [1899] 2 Q. B. 41. That case, however, is inconsistent with other cases on

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

this question. It, in effect, read into section 21 the words "if the sewer is fit for the purpose." In any case it does not help the respondents, because here the sewer is fit to receive drainage and the nuisance is caused by its having its outlet on the quarry. The condition as to notice in section 21 does not apply to the present case.

They referred to *Ferrand* v. *Hallas Land and Building Co.*, 41 W. R. 580, [1893] 2 Q. B. 135; *Eastwood Bros.* v. *Honley Urban District Council, ante*, p. 308, [1901] 1 Ch. 645; *Brown* v. *Mayor of Dunstable*, 47 W. R. 538, [1899] 2 Ch. 378; *Kirkheaton Local Board* v. *Beaumont*, 52 J. P. 68; *Molloy* v. *Gray*, 24 L. R. Ir. 258, 37 W. R. Dig. 98; *Ainley* v. *Kirkheaton Local Board*, 60 L. J. Ch. 734, 40 W. R. Dig. 133; *Kirkheaton District Local Board* v. *Ainley*, [1892] 2 Q. B. 274, 40 W. R. Dig. 219; *Fordom* v. *Parsons*, [1894], 2 Q. B. 780; *Wheatcroft* v. *The Local Board of Matlock*, 52 L. T. Rep. 356, 33 W. R. Dig. 128; *Falconar* v. *South Shields Corporation*, 11 Times L. R. 223; *London and North-Western Railway Co.* v. *Runcorn Rural District Council*, 46 W. R. 484, [1898] 1 Ch. 561; *Croysdale* v. *Sunbury Urban District Council*, 46 W. R. 667, [1898] 2 Ch. 515; *Sykes* v. *Sowerby Urban District Council*, [1900] 1 Q. B. 584, 48 W. R. Dig. 104; *Metropolitan Board of Works* v. *London and North-Western Railway Co.*, 29 W. R. 693, 17 Ch. D. 246.

Levett, K.C., and *Read, contra.*—The appellant admits the existence of a nuisance, but claims the benefit of section 21 of the Public Health Act, 1875. He has not, however, complied with the statutory conditions imposed by that section. In any case his claim comes to this, that if a drain is in existence a man may send all his sewage into it, no matter what the drain was originally intended for. This is too wide a construction to place on the section.

Glen replied.

RIGBY, L.J.—I think this appeal must fail. I think that the order made is quite right, and that no grounds have been shown upon which we can set aside the judgment.

COLLINS, L.J.—I am of the same opinion. This case has travelled over a wide area upon the question of sewers and drains under the Public Health Act, but I think that when we come to the narrow point which has actually to be decided in this case, it will not be necessary to deal in any detail with those cases.

The point arises shortly in this way. There is in the village, to which this case relates, for anything that appears to the contrary, an adequate system of sewage, so far as fœcal matter is concerned. It seems that the practice there was to deal with that matter by privies and a cesspool, and in one case a private water-closet, but the general scheme which now exists there is perfectly adequate. There is also running along the highway a drain which it is admitted—at all events it is not denied, and the evidence is in favour of it—was originally simply a highway drain, and belonging as such to the highway authority which was not the local authority. That drain was subsequently, as far back as 1886, I think, improved at the expense of the vestry, still the highway authority, and persons occupying houses along that highway had, no doubt with the tacit assent of the highway authority, connected their houses with it for the purpose of sending down slops and that class of water. Such a state of things continued until the present local authority came into existence and took over the control of the highway—which, I think, was in 1894—and so things went on until 1900, when the appellant in this case, without any notice whatever to the local authority, made a water-closet on his land, and connected it with a communication which he already had with the highway drain, and which had been used for passing soapsuds and that class of liquid down the drain.

The appellant contends that he is justified in doing what he did by virtue of the Public Health Act, but what he has to meet in the first instance is this: The matter which he sends from his water-closet passes directly through the channel I have described into the bottom of a disused quarry, which is part of the plaintiff's premises, and, as far as I understand, immediately adjoins her garden and bowling green. The effect of that is to create, as the learned judge says, an intolerable nuisance. It is true that the plaintiff had to submit to an inconvenience which may have amounted to nuisance from the accumulation of soap-suds and that class of liquid in the quarry at the bottom of her garden, but what the appellant has done is to make that a nuisance of a very aggravated character by the passing down of fœcal matter from his water-closet directly into the quarry at the bottom of the garden, and supposing he had done that without the communication with the drain of the local authority, no one could question that he had committed a tort for which an action at the suit of the owner of the garden would lie against him. "But," he says, "I do not deny for a moment that a nuisance in which I have taken a part is created on the land of the plaintiff, but I am entirely discharged from any personal liability in respect of the matter, inasmuch as the channel by which I have conveyed that nuisance on to the land of the plaintiff partly consists of this highway drain, which I say is a sewer of the highway authority." In order to get the immunity that he claims under the Act of Parliament he must at least show that he has conformed to the conditions of the Act of Parliament, and he claims to have done so and says that he comes under section 21 of the Public Health Act, 1875. But the conditions of that section are those. [His lordship read the section, and continued:] He says "True it is I did not consult this local authority upon the matter at all. I knew, or might have known, because it was in evidence that in that small community other persons had tried to make these communications and assent had been refused. I did not ask them. I had no reason to suppose that they would assent to it. The statute obliges me to give them notice. I did not do it, and yet I claim immunity under the statute, for creating an intolerable nuisance on the land of the plaintiff." That seems a strong order, and in order to bring himself within the section he has first of all to show that the channel into which he has sent this fœcal matter is a sewer of the local authority. Mr. Glen's contention goes to this whole extent, that if a highway drain had been made simply for the purpose of collecting rain water to be used for drinking purposes afterwards, and although there was an efficient system for dealing with fœcal matter in the neighbourhood, the appellant might nevertheless pass his fœcal matter down into this channel which existed for the purpose of collecting and it may be distributing rain water for drinking purposes. That seems an extravagant construction of the statute, and one which I should shrink from unless driven to it by the absolute wording of the section.

Although there may be drains which come within the definition of a sewer under the Act, I think that it was not this class of sewer to which the provisions of the Public Health Act apply, enabling any person to pass the fœcal matter of his household into it. I do not think it is necessary to decide that as a matter of

law in this case; and I should certainly be very reluctant to throw any doubt upon the views taken by the learned judges on this question, because that does not arise in this case for this reason, that even if this were a sewer which the appellant had a right under the conditions of the statute to pass fœcal matter into, he has not performed those conditions, and therefore it seems to me that he stands naked against the action that the plaintiff brought.

On those grounds I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, *Foulger, Robinson, & Miller*, for *H. F. Leavers*, Carlisle; *Ullithorne, Currey, & Jennings*, for *C. B. Hodgson*, Carlisle.

Appeal.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) June 7.

PRICE & PRICE *v.* MARINE INSURANCE CO. (LIMITED). (*a*.)

Insurance (Marine)—Subject-matter of insurance—"Advances"—Security of freight—Freight payable pro rata*—Insurance against total loss only—Construction of policy.*

The master of an Italian ship at Pensacola obtained from the plaintiffs an advance for disbursements, giving as security a document by which he promised to pay £760 ten days after the arrival of the ship at Southampton, and pledged the ship and her freight.

The plaintiffs effected an insurance with the defendants upon "advances valued £775" from Pensacola to Southampton, and expressed to be "free of all average."

The ship was lost at the Azores but the cargo was saved, and by Italian law, subject to which the contract of affreightment was made, £790 freight pro rata *was paid.*

Held, that as there had not been a total loss of the freight, and therefore not a total loss of the charge on freight, the plaintiffs could not recover on the policy.

Appeal by the plaintiffs from a judgment of Bigham, J., in an action brought to recover a total loss on a policy of insurance effected by the plaintiffs with the defendants under the following circumstances:

In December, 1898, the Italian ship *Cinque* loaded at Pensacola for a voyage thence to Southampton.

The master required money for his disbursements, and he borrowed the amount from the plaintiffs, who took from the master a document, which was in the following terms: "£760 12s. 9d. stg. Pensacola, Fla., Dec. 30, 1898. Ten days after arrival at port of destination of the steel bk. called *Cinque*, of which I am the master, now lying at Pensacola, Fla., loaded with P.P. sawn timber and lumber, and ready to sail for Southampton, I promise to pay to the order of myself the sum of £760 12s. 9d. British sterling in approved bankers' demand bills on London value received for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel and freight, and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel, any other draft or obligation by me drawn at this point on said freight to be secondary to this. Signed in duplicate, one being accomplished, the others to stand void. TOMMASO RITTORI, Master of the Steel Bk. *Cinque*."

The effect of this transaction was to vest in the plaintiffs an insurable interest in the vessel and her freight, and the plaintiffs thereupon effected the policy sued on. It was a policy at and from Pensacola to Southampton, the subject-matter of the insurance being "advances valued £775," the risks were described in the customary way, and the insurance was against total loss only, being expressed to be "free of all average."

The vessel proceeded on her voyage, but she never reached her destination.

In February, 1899, she ran ashore at Azores and became a total wreck. The cargo was discharged, and the holder of the bill of lading obtained possession of it upon payment of £790, being freight *pro rata itineris*. By Italian law, subject to which the contract of affreightment had been made, such freight was in the circumstances payable.

The plaintiffs brought this action on the policy, and contended that there had been a total loss of the subject-matter of the insurance, inasmuch as their only right under the promissory note was to receive the money ten days after the arrival of the ship at Southampton, and the non-arrival of the ship involved the loss of their right to payment.

The defendants' case was that, as the shipowners had received £790 from the holder of the bill of lading at the Azores, there had been no total loss.

Bigham, J. (16 Times L. R. 481), gave judgment for the defendants on the ground that the plaintiffs did not merely get a charge payable at Southampton on the freight; they got a charge on all the freight the ship might earn on the insured voyage. The terms of the document showed that to be so, and inasmuch as the ship earned £790 which was paid to her owners at the Azores there had been no total loss of the subject-matterof the insurance.

Carver, K.C., and *T. E. Scrutton, K.C.*, for the plaintiffs.

Joseph Walton, K.C., and *J. A. Hamilton*, for the defendants.

A. L. SMITH, M.R.—There are certain passages in the judgment of my brother Bigham (see 16 Times L. R. 481) which I have a difficulty in following. Mr. Joseph Walton and Mr. Hamilton, however, did not consider it necessary for their argument to support the hypothetical propositions of the learned judge to which objection was taken by us when the judgment was read in this court, and it is only necessary therefore for me to say this, that in dismissing the appeal on the real question raised, we must not be understood to confirm and approve them.

The plaintiffs having made advances effected a policy with the defendants covering the risk of these advances. The policy was warranted free of all average. What does that mean? Why, that the underwriters undertook to insure against total loss and total loss only. The document which the master of the Italian ship gave to the plaintiffs was to the effect that he promised to pay £760 ten days after the arrival of the ship at Southampton, for the payment of which sum of £760 he pledged the vessel and freight. By that document, which may be described as a promissory note, the plaintiffs took four things—first, the personal obligation of the master; secondly, the liability of the owners; thirdly, a charge on the ship; and fourthly, a charge on the freight. These were the securities they took for the advance, and by the policy they effected with the defendants they insured those securities against total loss. The

(*a*.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

ship sailed for Southampton, but at the Azores she became a total wreck. If it had not been that the case is governed admittedly by Italian law, there would in the events which have happened have been a total loss of the freight also. But by Italian law *pro rata* freight, we are told, to the amount of £790 was earned by the ship. It seems to me in face of that statement as to Italian law and the actual payment of the money the plaintiffs cannot recover. I ask myself, Can it be said in that state of things that there has been here a total loss of the plaintiffs' securities which were covered by the policy? There was certainly a total loss of the personal obligation of the master and of the liability of the owners, and also of the charge on the ship. But there was not a total loss of the charge on freight. It follows, therefore, that the appeal fails, for I see no reason why the charge should be made conditional, though no doubt it was natural and reasonable to attach the condition of the ship's arrival to the master's personal obligation to pay.

VAUGHAN WILLIAMS and STIRLING, L.JJ., delivered judgments to the same effect.

Appeal dismissed.

Solicitors, *Thomas Cooper & Co.*; *Field, Roscoe, & Co.*, for *Batesons, Warr, & Wimshurst*, Liverpool

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High Court of Justice.

Chan. Div.
Byrne, J. } July 4.

In re YATES.
YATES *v.* WYATT. (*a.*)

Will—Construction—Annuity to maintain infants—Want of a trustee.

A testator by his will directed his trustees to pay to his widow during her widowhood an annuity until his daughter should attain twenty-one, to be applied by the widow in and about the maintenance and education of the said daughter. The widow died, leaving the daughter still an infant.

Held, that the widow was a trustee for the infant in respect of the annuity, and that the annuity continued to be payable notwithstanding that the widow had died.

By his will a testator directed "that my trustees shall out of the rents and dividends and annual income arising from my said real and personal estate pay to my said wife so long as she shall continue my widow such a sum as shall together with the income to which she will be entitled under the settlements made in contemplation of our marriage amount to the sum of £1,000 per annum by equal quarterly payments, the first of such quarterly payments to become due and be made at the expiration of three calendar months from my decease. And shall also pay to my said wife by like quarterly payments a further annuity of £300 a year until my daughter C. shall attain the age of twenty-one years, and to be applied by her my said wife in and about the maintenance and education of my said daughter. And shall also pay a further annuity of £300 per annum to my said wife by the like quarterly payments until my daughter K. shall attain the age of twenty-one years, to be applied by her my said wife in and about the maintenance and education of my last-named daughter, and I declare that the receipt of my said wife for the two said annuities of three hundred pounds shall exonerate my said trustees from all liability to see to the application thereof, and from any responsibility in respect of the misapplication or non-application thereof; and I direct that my said trustees shall (subject to the payment of the annuities hereinbefore bequeathed) accumulate the rents, dividends, and annual income arising from my said real and personal estate by investing the same and the resulting income thereof in some or one of the investments or securities hereinafter authorized" for the benefit of his daughters C. and K.

The testator's widow having died whilst C and K. were under twenty-one years of age (they were seventeen and fifteen respectively) the question arose whether the two annuities of three hundred pounds were still payable or had ceased on the death of the testator's widow.

J. G. Wood, for the infant annuitants.—There is here a trust to apply the annuities for the benefit of the testator's two daughters. If that be so then the rule applies that a trust shall not fail for want of a trustee. There is no authority or decision to act as a guide upon the point, but it is submitted that the annuities are still payable for the infants' benefit, notwithstanding the death of the widow.

George Henderson, for the representatives of the widow and next-of-kin of the testator.

Mark Romer, for the trustees.

BYRNE, J.—On the whole I think that these annuities are payable notwithstanding the death of the wife. [His lordship then read the material portions of the will, and continued:] The primary effect of the testator's will is to provide for his daughters until they should attain the age of twenty-one years, and he has constituted his wife a trustee for his daughters. He did not intend his wife to benefit. The clause exonerating the trustees from liability to see to the application of the annuities ceased on the death of his wife, and the direction to accumulate is subject to the payment of the annuities. The annuities have not ceased by reason of the death of the wife. I think I am justified in putting this construction upon this will.

Solicitors, *Bird & Eldridges*; *Nicholson, Graham, & Graham*

Chan. Div.
Cozens-Hardy, J. } May 15, 17, 23.

HARROLD *v.* PLENTY. (*a.*)

Company—Shares—Deposit—Equitable mortgage—Foreclosure.

Where a certificate of shares in a limited company was deposited as a security for the repayment of a debt owing to A.,

Held, that the deposit of the certificate amounted to an equitable mortgage, and that A. was entitled to a decree for foreclosure.

The defendant in this action had in March, 1897, deposited the certificate of shares in a limited company with the plaintiff Harrold as security for the repayment of £150 due to the plaintiff with interest at the rate of 6 per cent. per annum.

This plaintiff brought this action to enforce his security by sale or foreclosure.

The defendant made default in appearance.

(*a.*) Reported by R. LEIGH RAMSBOTHAM, Esq., Barrister-at-Law.

(*a.*) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Dighton Pollock, for the plaintiff, argued that the deposit of the share certificates was evidence of a contract to transfer by way of mortgage, and plaintiff was in the position of equitable mortgagee, not that of pledgee. His remedy was therefore to foreclose and not to sell.

Counsel referred to the following cases: *General Credit and Discount Co.* v. *Glegg*, 31 W. R. 421, 22 Ch. D. 549; *London and Midland Bank* v. *Mitchell*, 47 W. R. 602, [1899] 2 Ch. 161; *France* v. *Clark*, 32 W. R. 466, 26 Ch. D. 257; *Carter* v. *Wake*, 4 Ch. D. 605, 25 W. R. Dig. 161; *James* v. *James*, 21 W. R. 522, L. R. 16 Eq. 153; *In re Richardson*, 34 W. R. 286, 30 Ch. D. 396.

Danckwerts, K.C. (*amicus curiæ*).

The defendant did not appear.

COZENS-HARDY, J.—This action raises a question whether a person with whom certificates of shares in a limited company have been deposited by way of security is entitled to foreclosure, or whether his only remedy is sale. The defendant does not appear, but counsel who appears for the plaintiff has put before me all the authorities which might help the defendant in resisting foreclosure. The only material allegation in the statement of claim is that in March, 1897, the defendant deposited with Harrold a certificate for shares as security for the repayment to Harrold of the sum of £150 then owing to him from the defendant with interest thereon at the rate of 6 per cent. per annum. Now it is plain that a pledgee is in a very different position from an ordinary mortgagee. He has only a special property in the thing pledged. He may obtain a sale, but he cannot obtain a foreclosure. I do not think that this is properly a case of pledge. A share is a *chose in action*. The certificates are merely evidence of title, and whatever may be the result of the deposit of a bearer bond, such as that which Sir G. Jessel dealt with in *Carter* v. *Wake*, I think I cannot treat the plaintiff as a mere pledgee. The deposit of the certificate by way of security for the debt which is admitted seems to me to amount to an equitable mortgage, or in other words, to an agreement to execute a transfer of the shares by way of mortgage. The result is that the plaintiff is entitled to a judgment substantially in the form which would be given if, instead of certificates of shares, the documents had been title deeds of real estate or a policy of assurance.

Solicitors, *Maude & Tunnicliffe*, for *S. J. Knight*, Newbury.

Chan. Div.
Farwell, J. } May 21.

In re SANDBACH SCHOOL AND ALMSHOUSE FOUNDATION.

ATTORNEY-GENERAL *v.* EARL OF CREWE AND OTHERS. (*a.*)

Charity—Scheme—Construction—Parish—Privileged and non-privileged townships—Chapelries—Overseers—Tithe—Church rate—Private Act—Endowed Schools Acts, 1869 *to* 1874 (32 *&* 33 *Vict. c.* 56; 36 *&* 37 *Vict. c.* 87; 37 *&* 38 *Vict. c.* 87).

On the construction of an Act of Parliament and two schemes regulating charitable trusts for the benefit of "the deserving poor of the parish of Sandbach," in which parish there were, besides the parish church, two chapelries with chapels of ease, and thirteen townships, only six of which latter were privileged under the original foundation,

Held, that the word "parish" meant the whole ecclesiastical parish, including all the thirteen townships and the two chapelries.

The payment of the whole tithe to the incumbent of the parish church points to this as the true construction, and evidence as to the local levying of rates by different overseers and of funds for chapel repairs and as to the local election of churchwardens cannot avail to the contrary.

This was an originating summons taken out by the Attorney-General asking the court to determine what persons were eligible under the provisions of a scheme made by the Charity Commissioners for England and Wales, and approved on the 28th of November, 1887, regulating the Sandbach School and Almshouse Foundation, as satisfying the description of deserving poor of the parish of Sandbach as objects of that part of the endowment which was applicable for purposes not educational within the meaning of the Endowed Schools Acts, 1869 to 1874, and in particular whether the inhabitants of the hamlets or townships of Blackden, Cotton, Church Hulme, Cranage, Goostrey, Lees, and Tremlow, or any of them were so entitled.

The respondents were the governors of the foundation.

By an indenture of the 26th of June, 1673, certain lands purchased with moneys given for the use of the poor inhabiting within certain privileged townships or hamlets of the parish of Sandbach were declared to be held by the trustees in trust to make certain yearly payments (*inter alia*) for bread for poor persons inhabiting within those townships, and to apply the residue of the income for the poor thereof.

By indentures of lease and release dated the 27th and 28th of September, 1683, certain lands were granted to trustees upon trust to pay annual sums to the chapelries of Church Hulme and Goostrey, for the poor of those chapelries, and to pay the residue of the rents to the minister, churchwardens, and inhabitants of the privileged townships, to be distributed among the poor of the parish of Sandbach dwelling within the privileged townships.

In 1788 and 1798 further lands were conveyed to trustees upon the same trusts as to residue.

In 1848 a private Act (11 & 12 Vict. c. 11) was passed to provide for the better administration of both the non-educational charities and the educational charities, the latter of which consisted of an endowed school founded in 1718 for twenty poor children inhabiting within the parish of Sandbach, and not limited to inhabitants of the privileged townships. After reciting (*inter alia*) that it was expedient that all the charities should be embraced in one scheme and be under the management of the same trustees, and that it was proposed to establish a general school for the education of the poor of the said parish of Sandbach, it was enacted as follows:

"Section 1.—That all lands and premises then vested in any persons in trust for the consolidated charities and the school or either of them should be thereby vested in fifteen named new trustees discharged from the existing trusts and upon the trust therein expressed.

"Section 2.—That all money, stocks, funds, and securities then vested in or held by any persons upon trust for the consolidated charities and the school or either of them should be discharged from the existing trusts and held upon the trusts therein expressed."

Section 3 confirmed the scheme contained in Schedule A.

"Section 6.—That it should be lawful for the Court of Chancery to authorize and direct the said charities to purchase and hold in the town or

(*a.*) Reported by WARWICK H. DRAPER, Esq., Barrister-at-Law.

parish of Sandbach aforesaid one or more piece or pieces of ground suitable as a site or sites for the erection of the school and almshouses by the scheme directed to be established.

"Section 30.—That the expression 'the charity' should mean the consolidated charities of the town of Sandbach and the school of the said town as erected and administered under the authority of this Act."

The scheme contained in Schedule A provided by clause 1 for the appointment of fifteen trustees by the master to whom the cause stood referred, vacancies to be filled up by the trustees from parishioners of the parish of Sandbach residing within the said parish, or within fifteen miles of the boundaries thereof, and by clause 19 for the annual audit of the charity account, the same when audited to be deposited in some convenient place in Sandbach, and to be open to the inspection of any of the rated inhabitants of the parish, and to be published in one of the public newspapers circulating within the town and parish of Sandbach and county of Chester.

Clause 20 authorized the trustees to nominate fit and responsible persons within the town and parish of Sandbach to be treasurers of the charity.

Clause 23 directed the following annual payments out of income—viz., £1 to the Chapelry of Church Hulme and £2 to the Chapelry of Goostrey, to be respectively distributed amongst the poor of the said chapelries; £3 3s. to the clergyman of Sandbach for a sermon; 5s. each to the clerk and sexton of the same.

Clause 24 directed the payment of £200 per annum amongst "the deserving poor of the parish not receiving parochial relief," certain payments for educational purposes, and £200 a year for the support of the almspeople thereinafter mentioned.

Clause 28 directed a school for the education of boys to be established in the town of Sandbach, for which purpose proper premises should be purchased or erected within the town or parish of Sandbach.

Clause 29 directed that such school should be open to all the children of "the inhabitants of the parish of Sandbach generally," who should have attained the age of seven years, and should not be afflicted with any infectious distemper.

Clause 43 directed the erection of twenty almshouses in the parish of Sandbach for the reception of twenty poor persons who had been inhabitants and parishioners of the said parish, and qualified as thereinafter mentioned.

Clause 44 provided that all persons to be appointed to such almshouses should be selected from amongst proper objects and should have been resident within the said parish of Sandbach, and should have been householders assessed to and have paid rates for the relief of the poor of the said parish for a period of five years, or the widows or daughters of persons who had been such householders and paid rates for the said period of five years, or had been themselves householders and been assessed to and paid such rates for such a period of time as with the period their deceased husband or parent might have been assessed to and paid such rates would make up the full period of five years, certain limits of age being also imposed.

Clause 45 that the allowances to the almspeople should be £10 each per annum to be paid monthly.

Clause 58 provided that the residue and surplus of the income of the charity should be applied in aid or extension of any of the charitable purposes thereinbefore mentioned as to the trustees should seem meet.

Clause 59 provided that this scheme should be printed, and a copy furnished to every trustee, and that copies be deposited in the church and chapel of ease of the said parish.

The scheme of the 28th of November, 1887, made under the Endowed Schools Acts, 1869 to 1874, while making some variations in the provisions of the former scheme, made no change as to the qualification of persons eligible for the benefits of the non-educational charities.

By clause 2 it provided as follows: "Except as hereinafter provided the part of the endowment of the foundation to be henceforth applied for purposes not educational within the meaning of the Endowed Schools Act, 1869, and amending Acts shall be administered by the governing body, hereinafter called the governors, in as nearly as may be the manner in which such part would have been administered if this scheme had not been made. Such part shall be the existing twenty almshouses of the foundation, with their respective sites, and the following yearly payments, that is to say: To the chapelwardens of the Chapelry of Church Hulme the yearly sum of £1; to the chapelwardens of the Chapelry of Goostrey, the yearly sum of £2; to the clergyman of Sandbach for Wheelock's sermon the yearly sum of £3 3s.; to the clerk and sexton of Sandbach, the yearly sum of 5s. each; and for clothes, provisions, or coal for deserving poor of the parish of Sandbach the yearly sum of £200; for the maintenance of the twenty almshouse and almspeople of the foundation, including repairs, rates, taxes, insurance, and all other expenses of management relating exclusively to the almshouses and almspeople, the yearly sum of £350, in place of the yearly sum of £200 and of any other sums hitherto respectively applicable for this purpose; for pensions to persons, to be called out-pensioners, having the qualifications required in the persons to be appointed to the almshouses of the foundation, the yearly sum of £120 to be applied under regulations to be approved by the Charity Commissioners; and, so long as a yearly sum of £100, by clause 24 of the scheme contained in the Schedule A, annexed to the above-mentioned private Act, directed to be applied for the purposes of the Sandbach National Schools for girls and boys so long as in such scheme provided, shall under the conditions in that behalf laid down in such other scheme remain applicable for the purposes of those schools, such yearly sum of £100. Subject as aforesaid, the amendment shall be applied wholly for the educational purposes of this scheme."

Sir R. B. Finlay, A.G. (*Dibdin, K.C.*, and *Beaumont* with him), opened the facts of the case.

Jenkins, K.C., and *Austen-Cartmell*, for the respondents.—After the payment of the fixed charges the residue should go to the six privileged townships. At the time when the Act was passed the non-educational benefits were limited to these townships under the various deeds constituting the non-educational groups of charities. A distinction must be drawn between the ecclesiastical parish and the legal parish; here the scheme means the town as locally understood —*i.e.*, the six privileged townships—and this view is supported by the tests of the church rate payment and the payment for chapel repairs which are levied locally.

Dibdin, K.C., in reply.—There was no distinction in 1848 between an ecclesiastical parish and a rate district. After the Poor Relief Act, 1601 (43 Eliz. c. 2), overseers did indeed make a parish, but the Poor Relief Act, 1662 (14 Car. 2, c. 12), s. 21, was passed for the purpose of obviating the inconvenience of having one set of overseers for a very large parish, and simply provided the machinery for collecting the rates of the one mother parish, so that the "overseer" test is only to be applied under the law as it

stood before 1662: *Reg.* v. *Watson*, 16 W. R. 977, L. R. 3 Q. B. 762. That the Vicar of Sandbach here takes the whole tithe is strong evidence: *Reg.* v. *Clayton*, 13 Q. B. R. 354, 362. Nothing can be founded on the suggested church rate test nor on the custom of local people repairing a local chapel, which is common and obtains in the free churches: *Craven* v. *Sanderson*, 7 A. & E. 88. Similarly, the custom to elect churchwardens locally is frequent and proves nothing: *Green* v. *Reg.*, 1 App. Cas. 513, 25 W. R. Dig. 92; *Bremner* v. *Hull*, 14 W. R. 964, L. R. 1 C. P. 748; *Rex* v. *Marsh*, 5 A. & E. 468. The chapelries are still so described in the *Gazette*

FARWELL, J.—In this case the Attorney-General asks the court to determine "What persons are eligible under the provisions of the above-mentioned scheme regulating the above-mentioned charity made the 28th day of November, 1887, as satisfying the description of deserving poor of the parish of Sandbach as objects of the trusts of that part of the endowment of the said Sandbach School and Almshouse Foundation which is applicable for purposes not educational within the meaning of the Endowed Schools Act, 1869, and in particular whether the inhabitants of the hamlets or townships of Blackden, Cotton, Church Hulme, Cranage, Goostrey, Lees, and Tremlow, or any of them, are so entitled." That depends upon the construction not merely of the particular scheme referred to, which is dated 1887, but of the Act of 1848. That Act dealt with charities which had been founded many years before, some of them as far back as 1680, or thereabouts. There were two sets of charities dealt with. First of all there were eleemosynary charities dealing with the inhabitants of peculiar specified townships which were treated as portions, as in fact they were, of the parish of Sandbach. The other ancient charity dealt with a school; it was an educational charity. In my opinion it is plain that the eleemosynary charity dealt with six only out of the thirteen townships of which the parish of Sandbach consisted; there were fixed charges and the residue divided amongst the particular townships; but in my opinion it is equally plain that the educational charity dealt with the whole of the inhabitants of the whole parish of Sandbach. It appears to me, without going in detail into the statements in the deed, that the settlor is the Vicar of Sandbach, who is the son and heir of Francis Wells, of Sandbach, deceased, and that he settles the property that he puts in trust for the teaching of poor children in Sandbach aforesaid, and that he provides that instruction shall be given to twenty poor children, inhabitants within the said parish of Sandbach, who were to be taught and instructed in the reading of English only, and to be taught the Lord's Prayer, the Creed, the Ten Commandments, and the Church Catechism by heart, so that the ambit of that particular charity was the whole of the inhabitants of the parish of Sandbach committed to the care and custody of the vicar who was making that foundation and who thereby made provision for their instruction in godly knowledge. I have personally no doubt at all as to that being an educational charity for the benefit of all the inhabitants. Then the Act of Parliament dealing with these two matters takes up the report of the master in an information by the Attorney-General; the master having found that it was desirable that the funds and property of the several charities should be vested in one set of trustees and be administered in connection with and in aid of each other according to the provisions of one scheme.

I think Mr. Dibdin is well founded in his observation that it was intended to make a very considerable alteration, and in fact a very considerable alteration was made by the Act of Parliament. If it had been merely intended or desired to have a scheme *cy près* or a variation *cy près* the Court of Chancery could have done it without the intervention of the Legislature, but obviously what was intended was so drastic an alteration that the Legislature alone could give effect to it. I will not pause to remark on the various cases and recitals in the Act which render it plain to my mind that the parish of Sandbach is throughout treated of as a parish which includes within itself the six townships mentioned and other townships. The other townships are not mentioned by name, but it is quite plain to my mind on the general recitals of the Act that the parish of Sandbach is an entity consisting of divers townships, including among such townships the six which have been called in the scheme the privileged townships. Then the Act of Parliament proceeds first of all absolutely to discharge all the existing charitable uses and trusts and to enact a fresh scheme. [Here his lordship referred to the clauses of the scheme set out above.] Going back from clause 29 to clause 24 it appears to me that "the deserving poor of the parish" and "the inhabitants of the parish of Sandbach generally," so far as the parish is referred to, must be the same thing; and I think that is borne out when I come to look at clauses 43 and 44 when the scheme takes up the third head—namely, the other eleemosynary provision for "twenty almhouses in the parish of Sandbach for the reception of twenty poor persons who have been inhabitants and parishioners of the said parish and qualified as hereinafter mentioned." So there you have a distinction, as it were, drawn between inhabitants generally mentioned in clause 29 and inhabitants qualified as hereinafter mentioned in clause 43; and this is explained in clause 44 to be persons who have been resident within the parish of Sandbach and householders assessed to and who have paid rates for the relief of the poor of the said parish for a period of five years.

The argument presented has been this. It has been said that "parish" here may mean one of three things. It may mean either the ecclesiastical area, the ecclesiastical parish, or it may mean the various parishes or authorities in the nature of parishes to which rates are paid, or it may mean so much of the ecclesiastical parish as on the evidence has contributed towards church rates in the past while there were church rates and to repairs of the old parish church. In my opinion the cases and the Act of Parliament referred to by Mr. Dibdin show conclusively that the first and the larger sense is the only possible one; the ecclesiastical parish is, properly speaking, the whole parish and parish proper.

Now what are the tests which I can use to ascertain whether that is the meaning in this Act or not? In the first place I can find no words in the Act itself which point in any way to a limitation of the generality of the word "parish" in either of the ways pointed out by Mr Jenkins's and Mr. Cartmell's argument; nothing on the face of the document that I can see suggested it. Then what is relied upon is, first of all, this item of evidence. It is said that each of these townships has paid poor rates to their own overseers and have not paid to the overseers of the parish of Sandbach generally. That is conclusively answered by Mr. Dibdin's reference to the Poor Relief Act of 1662, which shows that it was the only possible way the rates could have been made, having regard to the magnitude of the parishes, and that Act of Parliament; separate overseers had to be appointed for each of the various townships and no argument at all can be founded on the existence of such separate overseers. Then against that on the other side there

is the point that the whole tithe is received by the vicar of the parish. That was considered to be a matter of very great importance in the case of *Rex* v. *Clayton*, and to my mind is almost conclusive, and when I couple that with the fact that persons living in the two chapelries which are said to include the excluded townships, have been in the habit, as it is plain on the evidence they have been, of being married in the parish church, having regard to Lord Hardwicke's Act it appears to me that that also is very strong evidence as to what is the meaning of the word "parish" as applied to Sandbach. Against that it is said that the church rates and repairs of the church have been borne by the inhabitants of the townships other than the seven who are now claiming to come in. That again I think is answered by the authority Mr. Dibdin referred to of *Craven* v. *Sanderson* because it is plain that such an arrangement as that under which the inhabitants of the parish church and the inhabitants of Chapels of Ease contributed each exclusively to the repairs of the place of worship within their own district is a legal and a possible one, and if that be so no argument can be founded on the fact which may be attributable and is attributable to such an arrangement. Then there are the Orders in Council which throughout treat the two chapelries in question as within the parish of Sandbach. In my opinion it is proved conclusively that the parish of Sandbach does include these two chapelries, and I can find on the Act of Parliament and the scheme nothing whatever which would show that the word "parish" means anything less than the whole parish of Sandbach, and I answer the question accordingly in that way.

Solicitors, *The Solicitor to the Treasury; Pritchard, Englefield & Co.*, for *Robert Bygott & Sons*, Sandbach.

Chan. Div. } June 25.
Wright, J. }

In re THE STATE OF WYOMING SYNDICATE (LIMITED). (*a.*)

Company — Winding up — Requisition to directors — Notice of meeting by secretary without authority — Effect on validity of resolution to wind up voluntarily — Companies Act, 1900, *s.* 13, *sub-sections* 1, 3, 5.

Where a requisition under section 13 *of the Companies Act*, 1900, *has been sent in to the directors calling upon them to summon a meeting of the company, the notice of the meeting, if given within the period of twenty-one days mentioned in the Act, can only be given by the authority of the directors at a meeting of the board, consequently a notice given within such period by the secretary of the company without the authority of the board of directors is invalid, and the proceedings of the meeting held in pursuance of such notice are of no effect.*

Quære, *whether the requisitionists could, after the expiration of the twenty-one days, call a meeting by notices signed by the secretary.*

Petition for compulsory winding up.

The above-named company was incorporated on the 14th of October, 1899, with a nominal capital of £150,000 divided into thirteen ordinary shares of £1,000 each and 200 deferred shares of £10 each; at the date of the petition the amount of capital credited as paid up was £4,000.

On the 25th of April, 1901, the following requisition was sent to the directors:

"The State of Wyoming Syndicate (Limited).

"To the directors of the above-named company.

"Take notice that we, the undersigned persons holding not less than one-tenth of the issued capital of the above-named company upon which all calls or other sums due have been paid hereby require you to convene an extraordinary general meeting of the above-named company for the purpose of considering, and, if thought fit, passing extraordinary resolutions as follows, that is to say:

"1. That it has been proved to the satisfaction of the meeting that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same, and accordingly that the company be wound up voluntarily under the provisions of the Companies Acts, 1862 to 1900

"2. For the appointment of a liquidator for the purpose of such winding up.

"Dated the 25th day of April, 1901."

This notice was signed by the requisitionists, among whom were W. Lees and W. Pinkney, two of the directors.

On the 29th of April, 1901, the following notice was sent from the offices of the company by the secretary without the authority of the directors:

"Notice is hereby given that an extraordinary general meeting of the above-named company will be held at the registered office, Finsbury House, as above, on the 10th day of May, 1901, at 2.30 p.m., for the purpose of considering and, if thought fit, passing extraordinary resolutions as follows, that is to say: [Here follow the resolutions set out above.]

"(Sd) A. B. WILKINS, Secretary."

At the meeting held on the 10th of May in accordance with the above notice, two of the directors —viz., W. C. E. Serjeant, the present petitioner, and W. Lees—the other requisitionists and many shareholders were present, and the above resolutions were passed, and were afterwards duly filed with the Registrar of Joint Stock Companies and advertised in the London Gazette. No confirmatory meeting was necessary. It was provided by one of the special articles of the company that two directors should constitute a *quorum*. With regard to the calling of meetings, the company was governed by Table A to the Companies Act, 1862, clause 32 of which says that "the directors may, whenever they shall think fit . . . convene an extraordinary general meeting."

On the 16th of May, 1901, W. C. E. Serjeant presented a petition for the compulsory winding up of the company, the petition alleging that the company was indebted to the petitioner in the sum of £736 16s. 3d. on a judgment debt.

The petition was opposed upon the ground that there was a voluntary winding up already pending, but the petitioner contended that the resolution passed was not valid because section 13 of the Companies Act, 1900, had not been complied with, in that the notice of the meeting had been sent out by the secretary without the authority of the board of directors before the period of twenty-one days allowed by the section had elapsed, during which period the directors were the only persons who were authorized to summon the meeting.

F. Gore-Browne, for the petitioner.—The secretary has no official position under the Companies Acts except as to making returns, and had no authority to issue the notice of the meeting. By section 13 of the Companies Act, 1900, sub-sections 1, 3, 5, the notice ought to have been issued by the board of directors. As it was not, it is invalid and the resolutions passed at the meeting are therefore of no effect: *In re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230, 48 W. R. Dig. 43.

(*a.*) Reported by W. MORRIS CARTER, Esq., Barrister-at-Law.

E. W. Martelli, for the liquidator and two of the shareholders.—If there is an irregularity, it has been condoned and the irregular act confirmed by all the shareholders, and it is contrary to the principles of equity to regard a mere irregularity in the internal affairs of the company, such as this is, as fatal to the validity of the proceedings. At the meeting two directors and all the shareholders who have found cash were present, and no objection on this point was taken. The *Haycraft case* was entirely different; there the approval of the directors was necessary, here they have no option or discretion, it is their duty to summon the meeting. I rely on *Browne* v. *La Trinidad*, 36 W. R. 289, 37 Ch. D. 1, p. 10; *Foss* v. *Harbottle*, 2 Hare 461; *Southern Counties Deposit Bank* v. *Rider*, 73 L. T. Rep. 374, 44 W. R. Dig. 32; *In re Bonelli's Telegraph Co., Collie's Claim*, 19 W. R. 1022, L. R. 12 Eq. 246.

WRIGHT, J., delivered judgment to the following effect: In my judgment it is clear in law that the meeting could not have been properly summoned on the day on which it was summoned except by the directors. It could not be summoned by the requisitionists because the twenty-one days limited by section 13 of the Act of 1900 had not expired. I need not decide whether the requisitionists could, after the expiration of the twenty-one days, call a meeting by notices signed by the secretary. But before that period had expired only the directors could call the meeting, and the secretary could not, without their authority, summon a meeting. This is admitted by Mr. Martelli, but he says there has been a mere irregularity in the internal affairs of the company which could have been immediately set right and would have been set right if the existence of the irregularity had been known, and that it is contrary to the established principles of equity to regard such a matter as this as an irregularity which is fatal to the validity of the proceedings. This is a serious question, and no one would desire to infringe on *Browne* v. *La Trinidad*, and the rules laid down in that and other cases. But I hesitate to apply the principles of those cases to a case like this. Nothing can be more important than the question whether a company should proceed to voluntary liquidation, especially when a petition for a compulsory winding-up order is pending against the company, and it seems to me that proceedings of this kind ought to be conducted with substantial propriety. I think that Cozens-Hardy, J., acted on this view of the law in *In re Haycraft Gold Reduction and Mining Co.*, where the question was whether the resolution for winding up was valid. He says ([1900] 2 Ch. at p. 236): "In the present case I cannot regard the omission to convene a board meeting to consider matters of such vital moment as a winding up of the company and the appointment of a liquidator as a mere irregularity," and he then goes on to point out that the winding up in that case was part of a scheme devised for an improper purpose. I am not for a moment suggesting that that is the case here. I think I should not be deciding in accordance with the decision of Cozens-Hardy, J., if I were to hold that in a matter of this kind a secretary could act entirely on his own authority. If he does summon a meeting without authority I do not think I ought to hold that a resolution passed at the meeting is valid. If it had been a mere question of informality with reference to the constitution of the board which summoned the meeting—for instance, some question as to whether there was a proper quorum present, I might have applied the principle of *Browne* v. *La Trinidad*, but I think I should be going too far if I held that it applied to the present case. No doubt two directors, the requisitionists, and many shareholders were present at the meeting, and there would have been great reason for the argument of Mr. Martelli, if there had been full knowledge of the irregularity and the directors had done anything to recognize the act of the secretary as their act. Then a different question would have arisen, but there is no question here of ratification, and I must hold that the meeting was improperly convened, and that no valid resolution for the voluntary winding up was passed. There will therefore be the usual compulsory order for winding up No imputation is made with regard to the secretary, and the gentleman named as voluntary liquidator must have his costs out of the assets.

Petition granted.

Solicitors, *Judge & Priestley; Robbins, Billing, & Co.*

K. B. Div.
(Ridley and Bigham, JJ.) June 20.

MATTHEWS v. STRACHAN. (*a*.)

Local government — Public health — Powers of local authority—Drainage of new house—Requirements "for the effectual drainage of such house"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 25.

Section 25 *of the Public Health Act*, 1875, *enacts that "it shall not be lawful in any urban district to erect any house unless and until a covered drain or drains be constructed of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house."*

Held, that in considering what is necessary for the effectual drainage of a house the urban authority are not entitled to take into consideration the general requirements of their district in regard to the means of disposing of the sewage.

An urban council, in order to facilitate the ultimate disposal of the sewage in its district, formed a scheme for conveying the sewage and the surface water by means of separate sewers and constructed separate sewers accordingly. With a view to carry out this scheme the council ordered a person proposing to build a new house to construct two main drains in connection with his house, one for conveying sewage only, to be connected with their sewage sewer, and the other for conveying surface water only, to be connected with their surface water sewer.

Held, that the order was bad.

Case stated by justices of Middlesex.

On the 20th of March, 1901, an information was laid by the respondent, clerk to the Urban District Council of Harrow-on-the-Hill, against the appellant charging that the appellant had newly erected a house in Lyon-road, in the Urban District of Harrow-on-the-Hill, without constructing such covered drains thereto as on the report of the surveyor of the urban district council of the district appeared to the council necessary for the effectual drainage of the house, contrary to section 25 of the Public Health Act, 1875.

The appellant erected the house in question between August and December, 1900.

Two sewers had been placed by the council in Lyon-road, both within 100ft. from the site of the house. One of these sewers the council desired and intended to be used for the reception and conveyance of surface water only. The other they desired and intended to be used for the reception and conveyance of sewage only.

(*a*.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

Bye-laws in relation, *inter alia*, to the drainage of buildings made under section 157 of the Public Health Act, 1875, were in force in the district. These bye-laws did not require that separate drains for surface water and sewage respectively should be laid for any building.

On the 22nd of January, 1900, certain regulations were issued by the council which purported to be made under section 21 of the Public Health Act, 1875, with reference to the mode in which the communications between drains and sewers were to be made.

One of these regulations prohibited surface water from being permitted to enter the council's sewer without the special sanction of the council.

Before erecting the house the appellant deposited plans of the same in accordance with the requirements of the above-mentioned bye-laws showing, *inter alia*, the method proposed to be adopted, and afterwards in fact adopted by him for the drainage of the house—namely, by a single drain which the appellant proposed to connect with the sewage sewer and intended for the discharge both of the surface water and of the sewage.

On the 21st of November, 1900, the council's surveyor made a report with reference to the house in which he stated that the requirements for the effectual drainage of the house were: "(*a*) One main drain of not less than four inches internal diameter for conveying sewage only to be . . . connected to the council's sewage sewer in Lyon-road . . .; (*b*) one main drain of not less than four inches internal diameter for conveying surface water only to be . . . connected to the council's surface water sewer in Lyon-road . . ."

On the 26th of November, 1900, the council took the report into consideration and after considerable discussion passed a resolution approving the plans submitted by the appellant subject to the requirements contained in the report as to the drainage of the house being carried out.

On the 27th of November a notice was sent to the appellant by the respondent requiring him to lay the drains in accordance with the surveyor's report. The appellant did not lay two drains for the drainage of the house as required by the notice and report, but laid one drain only for the drainage thereof in the manner shown in the plans deposited by him. The drain so laid by the appellant was in all respects in accordance with the requirements of the report and notice as regards the conveyance of sewage, but no separate drain whatever was laid for the conveyance of surface water, such surface water being conveyed to the soil drain in direct contravention of the council's requirements.

The council's surveyor was called as a witness before the justices. He admitted that the drain laid by the appellant would have been perfectly effectual if there had been only one sewer in Lyon-road and that his reason for reporting that separate drains ought to be laid, one for sewage only and one for surface water, was that it was desirable with a view to facilitating the ultimate disposal of sewage by the council that sewage only should be discharged into the sewage sewer and surface water only into the surface water sewer, and that there were separate sewers for sewage and for surface water in Lyon-road.

The justices held that they had no power to question the reasonableness of the requirements for the effectual drainage of the house either as regards the house itself or in connection with the general system of drainage in the district and convicted the appellant.

Section 25 of the Public Health Act, 1875, enacts as follows: "It shall not be lawful in any urban district newly to erect any house or to rebuild any house which has been pulled down to or below the ground floor, or to occupy any house so newly erected or rebuilt, unless and until a covered drain or drains be constructed, of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house, and the drain or drains so to be constructed shall empty into any sewer which the urban authority are entitled to use, and which is within one hundred feet of some part of the site of the house to be built or rebuilt; but if no such means of drainage are within that distance, then shall empty into such covered cesspool or other place, not being under any house, as the urban authority direct. Any person who causes any house to be erected or rebuilt or any drain to be constructed in contravention of this section shall be liable to a penalty not exceeding fifty pounds."

A. F. Jenkin (*McCall, K.C.*, with him), for the appellant.—The local authority under section 25 only had to consider what was necessary for the effectual drainage of the house, and they had no right to consider what was for the benefit of the inhabitants at large. If they desired to regulate the disposal of the sewage they should have made bye-laws under section 157.

S. G. Lushington (*Macmorran, K.C.*, with him).—The discretion of the local authority has been properly exercised, and it cannot be disturbed: *Smith* v. *Chorley Rural Council*, 45 W. R. 417, [1897] 1 Q. B. 678. The local authority were right in taking into consideration the fact that there were two existing sewers, as that affected the question as to what was necessary for the effectual drainage of the house.

RIDLEY, J.—I think that the magistrates were wrong. The point arises under section 25 of the Public Health Act, 1875. The appellant was convicted of erecting a house without constructing such covered drains thereto as on the report of the surveyor to the urban district council appeared to the council necessary for the effectual drainage of the house.

The surveyor made a report which did state on its face that the requirements for the effectual drainage of the house were a main drain for conveying sewage only to be connected with the council's sewage sewer and a main drain for conveying surface water only to be connected with the council's surface water sewer.

No evidence was called before the council when they considered the report and they acted upon the report alone. Before the justices the surveyor was called and he stated that the drain laid by the appellant would have been effectual if there had only been one sewer, and that his reason for reporting that separate drains ought to be laid was that it was desirable with a view of facilitating the ultimate disposal of the sewage that there should be separate sewers for sewage and surface water. I think we must take that as constituting the facts of this case. It may be that the attention of the council was not called to the circumstances which caused the surveyor to make his report as he did. The report, however, was founded on a misconception, and the surveyor acted beyond the powers given by section 25. Section 25 refers to "the effectual drainage of such house," and if you go beyond this you are asking the owner of the house to assist in carrying out a system of sewering the district.

The evidence given by the surveyor before the justices shows plainly that he was acting under a misconception.

No doubt the council are the masters of the situation, but if they go beyond the limits within which they have to exercise their discretion it is our duty to say so.

It appears to me that the words of section 25 have been carefully selected to indicate that what is to be considered is the effectual drainage of the house. It is possible that in order to secure the effectual drainage of the house it may be necessary to have more than one drain, not because the system of sewering adopted by the local authority requires more than one, but because the drainage of the house itself requires more than one, and it may be necessary for the same object that there should be separate connections with the sewers. In such a case it would not be beyond the powers of the local authority to make the requirements. But if the local authority allow themselves to consider what is for the benefit of the inhabitants in general in regard to the means of disposing of the sewage they are going beyond their powers. There is no liability upon the owner of a house in regard to those matters except as one of the ratepayers.

BIGHAM, J.—I am of the same opinion. Section 25 empowers the local authority to take into consideration certain matters mentioned therein, and these are the only matters which they are entitled to take into consideration. These matters relate to the size and materials of the covered drain, the level at which it is to be constructed, and the fall which is to be given to it. If the local authority are of opinion that these matters are as they should be, then the building of the new house may proceed. In this case the council have taken into consideration other matters than those referred to. I come to this conclusion by reading not only the evidence of the surveyor but his report. It is said that the council took into consideration nothing but what they were entitled to take into consideration, but the report shows that both the surveyor and the council took into consideration what they had nothing whatever to do with.

When one considers the facts one sees why these matters were considered. There was a scheme of drainage in the district by which the sewage and surface water were kept separate. No doubt it was a good and desirable thing that this system should be carried out effectually, but the cost of carrying it out must not be put upon the individual householder. It must be borne by the ratepayers. Here there has has been an attempt to throw upon an individual the expense of carrying out the general system of drainage adopted by the council. I think the council in exercising their discretion have travelled outside what the section allows. As for the words, "and the drain or drains, so to be constructed, shall empty into any sewer which the urban authority are entitled to use," I see nothing in them which gives the local authority power to direct into which sewer the drain is to empty. If the sewer is within 100 feet from the building that is sufficient, and the householder may drain into it. I do not think those words enlarge the powers of the local authority. The council have taken into consideration matters which they ought not to have considered and the appeal must be allowed.

Appeal allowed.

Solicitors for the appellant, *Burgess & Taylor.*

Solicitors for the respondent, *Fishers.*

K. B. Div. (Ridley, J.) — May 20; June 6.

ABRAHAMS v. BULLOCK. (a.)

Master and servant—Hire of horse, brougham, and driver from jobmaster at so much a week to include driver's wages—Brougham used by hirer's traveller for his rounds—Theft from brougham of jewellery through negligence of driver leaving carriage unattended—Master parting with control of servant—Control of hirer—Non-liability of jobmaster to hirer.

The plaintiff, a wholesale jeweller, hired from the defendant, a jobmaster, a horse, brougham, and driver for £3 a week, to include the man's wages. The brougham was for the use of his traveller.

The brougham was out one day and the driver left it unattended while he had his dinner. During his absence it was driven away, and jewellery to the value of some £460 was stolen.

Held, that, although the loss was due to the negligence of the coachman in leaving the brougham unattended, yet that, under the contract, the defendant did not accept the duty of taking care of the goods, and, therefore, was not liable for the loss.

This was an action brought by the plaintiff, a jeweller in a large way of business in the East End of London, to recover from the defendant, a jobmaster, £460, the agreed sum of certain jewellery alleged to have been lost through the negligence of the defendant's servant under circumstances that sufficiently appear from the judgment.

At the conclusion of the arguments the learned judge said the questions of law raised on the admitted facts did not in his opinion come within any of the authorities cited, and he would therefore take time to consider his judgment.

C. A. Russell, K.C., and *Sims Williams*, for the plaintiff.

Dickens, K.C., and *Schwabe*, for the defendant.

RIDLEY, J., read the following judgment: This is an action brought by the manufacturer of jewellery against a jobmaster to recover £460, an agreed sum, as the value of certain articles of jewellery lost owing to the alleged negligence of the defendant's servant. The main facts of the case are not in dispute, and they raise a very interesting and novel point of law. The admitted facts are as follow: On the 21st of June, 1898, the defendant wrote the plaintiff: "I shall be pleased to supply you with same brougham as you are having at £3 for the five days' work, payable monthly. Holidays or days it is not required to be allowed for. You can choose the brougham yourself, and I will keep the same coachman (Shed), paying him 18s. weekly, for five days, and will try and give him work the other two days with extra pay." The plaintiff's traveller, on behalf of the plaintiff, wrote to the defendant: "In accordance with your favour of the 21st inst., please start the brougham on Monday next." The letter also stated that the plaintiff had seen a brougham at Messrs. Alford's which he would like to have fitted up for the purpose of taking out goods. The brougham in question was fitted up, and was regularly used by Cohen, the plaintiff's traveller. About May or June, Shed's place was taken by a man named Mills, who continued to drive the brougham down to the time of the robbery. On the 24th of October, 1900, Cohen left the brougham outside the Thomas à

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

be a debt due from such member to the society . . .," *and by sub-section 2 "a registered society shall have a lien on the shares of any member for any debt due to it by him, and may set off any sum credited to the member thereon in or towards the payment of such debt." An industrial society, as long as it is carrying on business, may* bonâ fide *avail itself of the provisions of the above sub-section 2, notwithstanding that the society is at the time in financial difficulties and is wound up within three months of such time.*

This was an appeal by the liquidator of an industrial and provident society from the decision of the judge of the Glamorganshire County Court, who refused to set aside certain transactions whereby certain sums of money were refunded to a member of the society in respect of his shares therein, the society then being, to the knowledge of the managing committee, insolvent.

The facts fully appear in the written judgment of the court.

Herbert Reed, K.C., and *J. Sankey*, for C. Dovey, the appellant.—The society was in liquidation and had a number of outside creditors, and the liquidator seeks to bring in the respondent as a debtor and contributory to the society in the sum of £51 18s. 2d. for goods supplied to him. During the year 1898 the respondent was, from time to time, supplied with goods by the society, the committee debiting the amount standing to the respondent's credit as a shareholder with the price of the goods. At this time the amount of capital held by the respondent in the society was £54 19s. At the time these transactions took place the society was in financial difficulties, and therefore such withdrawals of capital by the respondent were invalid: *In re Sunderland Universal Building Society*, 38 W. R. 509, 24 Q. B D. 394. The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which avoids such a transaction as a preference.

Counsel cited also section 164 of the Companies Act, 1862 (25 & 26 Vict. c. 89).

S. T. Evans, K.C., for the respondent.—The decision of the county court judge was right. Section 164 of the Companies Act, 1862, does not apply here, as this is not a case of fraudulent preference. Section 164, although it uses the words "undue or fraudulent preference," does not extend the operation of section 48 of the Bankruptcy Act. 1883: *In re The Stenotyper (Limited)*. [1901] 1 Ch. 250. The respondent was not in the position of a creditor of the society. No steps were taken by the respondent to withdraw his capital under rule 16 of the society, which rule enables members to withdraw their capital at certain rates and on certain terms on giving notice to the manager. The committee were entitled under section 23 of the Industrial and Provident Societies Act, 1893, to deal with the business in the way they have done. The learned county court judge has found that the committee acted *bonâ fide* and that there was no undue preference, and his decision was right and should not be reversed.

H. Reed, K.C., replied.

Cur. adv. vult.

May 14.—Lord ALVERSTONE, L.C.J., read the following judgment of the court: This is an appeal from the decision of the learned county court judge of the Glamorganshire County Court upon a summons taken out by the liquidator of the "Hope of the Workmen's Industrial Provident Society" at Aberdare, to set aside certain transactions whereby four amounts were purported to be refunded to Richard Morgan in respect of his shares in the society. The following were the dates and amounts of the transfers or refundings impeached:

		£	s.	d.
1898.—21st February	... ...	4	19	0
,, 30th June ...	... ...	20	0	0
,, 20th July ...	... ...	12	8	3
,, 25th November	... ...	14	10	11
Total		£51	18	2

The society had been established for many years under the Industrial and Provident Societies Act, 1876, and was in the nature of a co-operative society supplying goods to the members. The capital was in shares of £1, and it was provided by the rules that each member must hold at least five shares. By rule 16 provision was made that members might withdraw their capital at certain rates, and on certain terms, on giving notice to the manager. Early in the year 1898 the society was in financial difficulties and it was found by the learned county court judge that by the 14th of July, 1898, the society was to the knowledge of the managing committee insolvent. In February, 1898, before the first of the refundings above referred to, the amount of capital held by Morgan in the society was £54 19s. This amount appears to have been £4 19s. in excess of the maximum allowed by the rules to be held by a member, but this does not appear to be material. From time to time during the year 1898 Morgan was being supplied with goods, and it appears that owing to the strike and labour difficulties which were existing at the time he, in common with many other members of the society, was unable to pay cash for the goods supplied to him, it being provided by rule 12 that as far as possible the goods of the society were to be sold for ready money and that in no case should credit be given to members for more than two weeks. In consequence of this state of things the committee of management on the 21st of February debited the amount standing to Morgan's credit as shareholder with a sum of £4 19s, he at the same time paying £2 10s. cash, making a total of £7 9s. on account of £7 18s. 7d. due from him to the society for goods. Similarly upon the 30th of June, he being indebted to the society in the sum of £20 2s. 11d., a further amount of £20 was debited to his share account and credited against his debt for goods.

The circumstances of the transactions of the 20th of July and the 25th of November were exactly the same, and by the last debit of £14 10s. 11d. the amount standing to Morgan's credit was reduced to the sum of £4 19s. 1d.

The formal resolution for the winding up of the society was passed on the 27th of February, 1899.

It was admitted on the argument before us that no steps had been taken by Morgan to withdraw his capital under rule 16 and that therefore the transactions could not be supported under that rule.

It was stated that there were a considerable number of outside creditors, and the question raised is whether under the above circumstances the liquidator is entitled to set aside the transactions, the result of which would be that Morgan will be a debtor and contributory to the society in the amount of £51 18s. 2d. for goods supplied. If the transactions are to be regarded as withdrawals of capital by the shareholders then the case of *In re Sunderland Universal Building Society* decides that such withdrawals can only be legally supported when the society is or believes itself to be solvent, and under the decision in that case the two last transactions of the 20th of July and the 25th of November could not be supported.

A further point was raised with reference to the last transaction, the 25th of November, 1898, that it was void under the 164th section of the Companies Act, 1867, as having taken place within three months of the resolution of winding up. It was contended on behalf of the respondent that the transactions were in effect carried out under section 23 of the Industrial and Provident Societies Act, 1893, and that it must be taken upon the facts that the society exercised its right to set off against the amount credited to the member on his shares the debt due from him. The point seems to us one of considerable difficulty. If the words "any sum credited to the member thereon" in sub-section 2 of section 23 are to be construed as meaning a sum credited and payable, the principle of the *Sunderland case* would seem to apply to this extent, that after a society is known to be insolvent there would probably be no sum to which the member would be in fact entitled; but there seems to us to be great difficulties in this construction. If effect were given to this contention it would affect the two last of the four transactions which are impeached. Section 34 contemplates that the register shall show the amount paid, or agreed to be considered as paid, on any shares, and as long as the society is carrying on business it is difficult to find any substantial ground upon which it can be held that it is precluded from exercising the right of set off mentioned in sub-section 2 of section 23. The words "set off" in that section do not appear to us to be used in the strict legal sense, but more in the business or accountant's sense, as indicating that the society may deduct or write off from the sum credited the amount of the member's debt. It seems to us that as long as a society is carrying on business it may *bonâ fide* avail itself of the provisions of this sub-section, otherwise it might be necessary to have a valuation of the society's assets or an inquiry into its position before any set off under the section could be made or entered in the books.

Upon the whole, we are of opinion that the county court judge, having found as a fact that the committee acted *bonâ fide* without any fraudulent intention or without the intention of preferring any particular shareholder, his judgment must be affirmed.

With regard to the further point taken as to the last payment, that it was void under section 154 of the Bankruptcy Act, we do not think that in any view the transaction would be within that section, Morgan not being a creditor within the meaning of the section. For the reasons we have given we think our judgment must be for the respondent.

Appeal dismissed.

Solicitors for the appellant, *Bell, Brodrick, & Gray*, for *C. & W. Kenshole*, Aberdare.

Solicitors for the respondent, *Riddell & Co.*, for *Walter Morgan, Bruce, & Nicholas*, Pontypridd.

House of Lords.

From C. A. (Ireland). — May 13.

INLAND REVENUE COMMISSIONERS *v.* PRIESTLEY AND ANOTHER. (*a.*)

Inland revenue—Estate duty—Settled property—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (*a*), *and* 5, *sub-section* 2.

A wife on her marriage settled certain funds, whereby a life interest was given to her husband followed by a life interest to herself, with an absolute reversion to herself. She predeceased her husband, and estate duty was paid on the principal value of her settled property.

Held, that by section 5, *sub-section* 2, *of the Finance Act*, 1894, *upon the husband's death estate duty was not again payable on the settled funds.*

Semble, *that no estate duty was payable in respect of the husband's life interest.*

Judgment of Rigby, L.J., *in* Attorney-General *v.* Dodington, 45 *W. R.* 657, [1897] 2 *Q. B.* 373, *approved.*

Decision of the Court of Appeal in Ireland, [1900] 2 *Ir. R.* 400, *affirmed.*

This was an appeal from an order of the Court of Appeal in Ireland.

The case involved the construction of section 5, sub-section 2, of the Finance Act, 1894, which is as follows: "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not . . . be payable in respect thereof until the death of a person who was at the time of his death, or had been at any time during the continuance of the settlement, competent to dispose of such property."

Caroline Amelia Priestley (afterwards Studdert) by her marriage settlement dated the 7th of October, 1861, assigned to trustees certain personal property in trust after the marriage to pay the income thereof to George Studdert (her intended husband) and his assigns during his life, and after his death to pay the said income to the said Caroline Amelia Priestley and her assigns during her life, and after the death of the survivor of the said George Studdert and Caroline Amelia Priestley to hold the said trust property and the income thereof in trust, in the event, which happened, of there not being a child of the marriage who attained the age of twenty-one years or married, for such person or persons as the said Caroline Amelia Priestley notwithstanding her coverture might by deed or will appoint.

Mrs. Studdert died before her husband on the 19th of March, 1897, having by her will exercised the power of appointment given to her by her marriage settlement.

George Studdert died on the 14th of April, 1897.

The appellants for the purpose of ascertaining the principal value of the reversionary interest appointed by the will of Mrs. Studdert estimated the principal value of the life interest of George Studdert at the time of the death of Mrs. Studdert in the trust property at the sum of £413 17s., and deducting this from £3,564 3s. 4d. the estimated value of the trust property, they found the sum of £3,150 6s. 4d. to be the principal value of the said reversionary interest at the death of Mrs. Studdert, and claimed estate duty on the death of Mrs. Studdert thereon, and the duty was paid to the appellants by the executor of Mrs. Studdert. The appellants also claimed estate duty on the death of the said George Studdert in respect of the principal value—namely, £3,564 3s. 4d.

The Court of Appeal considered that estate duty was not payable.

Sir R. B. Finlay, A.G., and *Wright, S.G. for Ireland* (*Vaughan Hawkins* and *C. E. MacDermot* (of the Irish bar) with them), for the appellants.

Ingpen, K.C., and *Meredith* (of the Irish bar), for the respondents.

Attorney-General v. *Beech*, 47 W. R. 257, [1899] A. C. 53; *Attorney-General* v. *Dodington*, 45 W. R. 657, [1897] 2 Q. B. 373; and *Earl Cowley* v. *Inland Revenue Commissioners*, 47 W. R. 525, [1899] A. C. 198, were referred to.

(*a.*) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

Earl of HALSBURY, L.C.—In this case I entirely agree with the judgment which was given by Rigby, L.J., in the case of *Attorney-General* v. *Dodington*, and I agree with the learned judges in Ireland who have taken the same view. It only remains to say that I shall move that this appeal be dismissed. I have the less hesitation in speaking of it thus compendiously, because I think it would be impossible to answer and difficult to improve upon the judgment given by the Lord Chief Baron in Ireland. It appears to me that he has exactly expounded the construction of the question and the logical effect of the language, and the only thing that one feels a difficulty about is that there is a certain amount of want of logic, considering the reasoning both in that and in the *Dodington case*, in the money having been paid for duty upon the death of Mr. Studdert. But here, as there, there is no cross-appeal. The result is that we must leave the matter as it stands. I have no hesitation in expressing my own opinion that Rigby, L.J., was right in that particular, and, had the question so arisen, I should have unhesitatingly agreed to a judgment which would have gone to the full extent.

The reason to my mind is very plain. The whole question turns upon section 5, sub-section 2. As Rigby, L.J., has said, the manifest difficulty that was in the mind of the framers of the statute was that it would be unreasonable and improper in respect of settled property that the same whole estate should pay over and over again. Here it is only one life estate that is interposed, but it might be a dozen, and no doubt the framers of the statute thought that it would be extremely improper and unjust that in consequence of the splitting up what was one property included in one settlement, and which was to continue until either an actual change of entire ownership, or, what for the purpose of the Act was the same thing, the vesting in one person who had in himself or herself the power of changing the ownership completely, had occurred, there should be as many new duties enforced as there were persons comprehended in the settlement. The meaning and object of the statute appears to me to be both sensible and intelligible, although in this particular case it is only one life interest that is interposed before the change, not of the estate, but of the possession of the estate. That seems to me to be at the root of a great deal of the confusion that has arisen. The statute regards the passing of the ownership—not necessarily the possession, but the passing of the ownership—as that upon which, when occasioned by death, the duty is to be levied; and accordingly when the death occurs of a person who is entirely able to dispose of the whole estate—the whole estate, be it observed—then either the thing does pass, or shall be deemed to pass. Accordingly, on Mrs. Studdert's death, she being the complete owner at that time and entirely able to do what she pleased with it, the result is that upon her death undoubtedly duty was payable.

What the death of the husband, who had only a life estate, has to do with it, I confess I am wholly unable to understand according to the true construction of the statute. It appears to me that the statute does not regard the question of who was in possession of the estate at the moment for any purpose, however deferred the enjoyment of the possession of the estate may be. What is to happen is that the duty is to be paid upon the whole of the property on the occasion on which alone in the case of settled property it is to arise—namely, on the death of a person whom the statute treats as the person who is entirely free from the settlement, and able to do what he or she will with it; that is to be the guiding line, so that if the property does not actually pass, if he or she is capable of passing it, the statute draws the line accordingly.

I entirely agree with the reasoning of Palles, L.C.B. It seems to me to be impossible to answer it, and, as I have said, very difficult to improve upon it. Therefore, I entirely concur with the judgment which he (conspicuously he) and Holmes, L.J., have given upon the subject, based upon what is, to my mind, the very plain construction of the statute itself. I only look at the words of the statute. The scheme of the Act of course may be looked at where there are doubtful words; but I think these words are not doubtful. The result is that I move your lordships that the appeal be dismissed with costs.

Lord MACNAGHTEN.—I agree. To my mind this is a very plain case. I think the question before the House is best answered in the fewest possible words, and as far as may be in the language of the Act itself.

On the marriage of Mr. and Mrs. Studdert a deed was executed for the purpose of regulating the enjoyment and disposition of certain funds which formed part of the lady's fortune. The deed was a "settlement"—the funds became "settled property" within the definition of those expressions in the Act. The settled property was limited to the husband for life, with remainder to the wife for life, and subject thereto, in the events which happened, the property was at the absolute disposal of the wife.

The wife died in the lifetime of her husband. On her death, as it seems to me, there was no "passing" of property within the meaning of section 1 taken by itself. No property changed hands. And therefore, in my opinion, if it had not been for section 2 no duty would have been payable on Mrs. Studdert's death. But under section 2 (*a*), taken in conjunction with section 1, estate duty became leviable in respect of the settled property as being property of which at the time of her death Mrs. Studdert was competent to dispose. And so the commissioners claimed estate duty in respect of the settled property on Mrs. Studdert's death, as they were entitled and bound to do. It was then in the option of the persons accountable for the duty either to defer payment until the interest in expectancy at the time of Mrs. Studdert's death fell into possession, or to pay at once under discount. The latter alternative was the one adopted. The principal value of the settled property was estimated (as the Act directs) at the price which, in the opinion of the commissioners, the property would have fetched if sold in the open market at the time of the death of Mrs. Studdert. The commissioners seem to have arrived at their estimate in the ordinary way in which buyers of such property in the market make their calculations, by taking the market value of the securities forming the settled property as at the time of Mrs. Studdert's death, and then making an abatement or allowance in respect of Mr. Studdert's life interest, reckoning the probability of life according to the accepted tables of mortality. But the persons accountable for the duty have nothing to do with the mode in which the commissioners form their opinion, so long as they comply with the directions of the Act. Whatever process the commissioners may go through in their own minds—however they may split up the property for the purpose of coming at their estimate—the duty is leviable in respect of the settled property, not in respect of any particular part or parts of the settled property, or in respect of anything short of the full amount of the property. I entirely agree with the views expressed by Rigby, L.J., in *Attorney-General* v. *Dodington*, which have the approval of the Lord Chief Baron and Holmes, L.J., and I am compelled to dissent from the construction placed upon the Act

by FitzGibbon and Walker, L.JJ. — a construction which seems to me calculated to reproduce the difficulties which I had thought were cleared away by the decision of this House in *Attorney-General* v. *Beech* and *Inland Revenue Commissioners* v. *Cowley*.

Shortly after his wife's death Mr. Studdert died, and the commissioners now claim estate duty once more in respect of the principal value of the settled property. Are they entitled to payment of duty over again? In my opinion, most clearly and certainly not. Since the date of the settlement, estate duty has been paid in respect of the settled property, and therefore under the express provisions of section 5, sub-section 2, estate duty is not payable again on Mr. Studdert's death. He was not at the time of his death, nor had he been at any time during the continuance of the settlement, competent to dispose of settled property. So the one and only event which could have entitled the commissioners to estate duty on Mr. Studdert's death has not occurred.

The only difficulty about the case, in my opinion, has arisen from the circumstance that for some reason, which at present I do not understand, and for which I have at present not been able to discover any authority in the Act, the respondent offered to pay, and the commissioners seem to be prepared to accept, a sum as and by way of estate duty on the amount which the commissioners, in their own minds, allowed as a deduction from the full value of the settled property at Mrs. Studdert's death in respect of her husband's life interest. I think the appeal should be dismissed with costs.

Lords MORRIS and SHAND concurred.

Lord DAVEY.—I think that this property, and not a part or slice of it, must be deemed to have passed on the death of the wife, under the words of section 2, sub-section 1, where a person is "at the time of his death" competent to dispose of the property. I suppose this means has a power of disposition, and has executed it. If the power is not executed, I do not see very well in what sense the property which would have devolved on the persons entitled under the settlement—in this case the next-of-kin—would be deemed to pass on the death of the person who had the power, but had not in fact executed the power.

We have here two deaths—first, the death of the wife, when the property is, for the purpose of the Act, to be deemed to have passed; secondly, the death of the surviving husband, when the property did actually pass. I have some doubt whether property which is to be deemed to have passed at one date can be said to have passed, according to the scheme of the Act, to the same persons and under the same settlement at a later date; but that point has not been taken in the argument, and I do not desire to express any opinion of my own upon it.

For the purpose of this case I am content to rest my opinion upon the grounds fully and clearly stated in the judgment of the Lord Chief Baron in Ireland, and I agree with that learned judge in thinking that the judgment of Rigby, L.J., in the case of *Attorney-General* v. *Dodington* was correct. I agree that this appeal should be dismissed.

Lords BRAMPTON, ROBERTSON, and LINDLEY concurred.

Vaughan Hawkins. — The Attorney-General has desired me to say that, although there is no cross-appeal, the commissioners will, after what your lordships have said, return the duty on the £413.

Lord MACNAGHTEN.—I think the House will be of opinion that the Attorney-General has taken a very proper course.

Appeal dismissed.

Solicitors, *Solicitor of Inland Revenue, Ireland*, for appellants; *Whitfield & Harrison*, for *Rooke & Rooke*, Dublin, for respondents.

Court of Appeal.

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) — July 9; Aug. 1.

In re HAYES.
TURNBULL *v.* HAYES. (*a.*)

Will—Special power of appointment—Power created subsequent to will purporting to execute it—Wills Act, 1837 (1 *Vict. c.* 26), *ss.* 24, 27.

A special power of appointment is not well executed by general words of disposition in a will executed prior to the date of the instrument creating the power.

Decision of Byrne, J. (ante, *p.* 21, [1900] 2 *Ch.* 332), *affirmed.*

This was an appeal from a decision of Byrne, J., reported *ante*, p. 21, [1900] 2 Ch. 332.

Henry Hayes, the younger, by his will dated the 29th of December, 1884, after appointing trustees and executors and giving pecuniary legacies to his wife and to his executors, proceeded as follows: "And subject to the payment of the said legacies I give all the residue of the property over which at the time of my death I shall have a disposing power unto my trustees upon trust in their discretion to sell and convert the same into money" and to invest the proceeds as therein mentioned. "And I empower my trustees to continue the existing investments of my estate, whether they shall be of the description hereinbefore authorized or not, as they in their absolute discretion shall think fit. And upon further trust, and I direct my trustees to pay the yearly income or produce arising from my trust estate unto my said dear wife for her life if she shall so long continue my widow for her own use absolutely. But in case my said wife shall marry again then I direct my trustees to pay to her out of the income of my trust estate in addition to the provision made for her by marriage settlement an annuity of £50 payable half-yearly instead of the whole of such income." And the testator directed his trustees to stand possessed of his trust estate subject to the trusts aforesaid upon trust for his children as thereinmentioned, with an ultimate gift over in default of children living at his decease or of children afterwards attaining twenty-one or marrying under that age.

The testator executed a codicil dated the 20th of March, 1893, whereby he made a change in the persons to be trustees and executors, and in all other respects confirmed his said will.

Henry Hayes, the elder, the father of Henry Hayes, the younger, made his will dated the 10th of June, 1893, and thereby empowered each child of his by his or her will or any codicil thereto to appoint in favour of his or her wife or husband the whole or any part of the yearly income of his or her share in his, the testator's, residuary estate for the life of such wife or husband or for any interest determinable on or before the death of such wife or husband. And by the same will Henry Hayes, the elder, directed that a sum of £4,000 thereby directed to be raised should be held

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

upon the same or the like trusts, and with and subject to the same or the like powers and provisions as were thereinbefore declared with respect to the share of his son Henry Hayes, the younger, in the residue as if the same were there repeated.

Henry Hayes, the elder, died on the 19th of April, 1895, and Henry Hayes, the younger, died on the 8th of September, 1899.

Henry Hayes, the younger, left a widow and three children. He had no power of appointment exercisable in favour of his widow other than the power contained in the will of his father, and the question for determination was whether or not the power in question was well exercised by his will, which, together with the codicil, had been executed before the date of his father's will.

Byrne, J., held that the power was not well exercised. The widow appealed.

Upjohn, K.C., and *A. Adams*, for the widow.

H. Terrell, K.C., and *D. D. Robertson*, for the trustee.

Cur. adv. vult.

Aug. 1.—COLLINS, L.J., who delivered the judgment of the court, said: The question in this case is whether the will of Henry Hayes, the younger, operated as a good exercise of a special power of appointment conferred on him by the will of his father, Henry Hayes, the elder, whereby he was empowered to appoint a life interest in certain funds to his wife. Henry Hayes, the younger, made his will on the 29th of December, 1884. In March, 1893, he made a codicil confirming it, and he died in September, 1899. His father, Henry Hayes, the elder, made his will on the 10th of June, 1893, and he died in April, 1895. Thus at the date of the son's will, and of the codicil confirming it, the power created by his father's will had not come into existence. The material clauses in the two wills are fully set out in the judgment of Byrne, J., and we need not refer to them at length here. We think it is quite clear from the authorities cited by Byrne, J., that the case is not within section 27 nor section 24 of the Wills Act, and, indeed, Mr. Upjohn, for the appellant, did not contest this. The case, therefore, must be decided altogether apart from the special provisions of the Wills Act. There is, therefore, no legal presumption of intention. Nor is it, we think, necessary to decide whether it is possible as a matter of law to exercise by anticipation a special power which has not been created till after the alleged exercise. For even if it be possible to do so, as to which see per Lord Romilly, M.R., in *Walker* v. *Armstrong*, 4 W. R. 280, 21 Beav. 284, and *Cowper* v. *Mantell*, 4 W. R. 500, 22 Beav. 223, it could only be deemed to be exercised in this case if an intention to exercise it could be fairly collected from the words of the will of Henry Hayes, the younger, taken as a whole: see *In re Milner*, 47 W. R. 369, [1899] 1 Ch. 563. And in looking for such an intention in the case of a special power where the statute does not aid it, we necessarily, as it seems to us, start with a presumption against it when the will which is said to exercise the power has been made before the power came into existence. Further, in the case of a special power giving to the donee the right of determining in which of two or more directions a certain fund shall fall even though the power could not be said to be strictly fiduciary, there is, we think, at the lowest, a presumption that the donee could not have intended to exercise such a power at a time when he could not know the conditions or limitations imposed by the donor. It would require, therefore, as it seems to us, very clear indications in the language of the will to found an inference of intention to exercise a special power under such circumstances. In the will in question there was this clause: "And subject to the payment of the said legacies I give all the residue of the property over which at the time of my death I shall have a disposing power unto my trustees upon trust in their discretion to sell and convert the same into money." That is the only clause from which, if at all, an intention to execute the power was to be inferred. There was nothing else in the will which favoured the inference. On the contrary, there were difficulties to be got over in the language of the other parts of the will if they were to be held consistent with the alleged intention as pointed out in the judgment of Byrne, J.; and though, as is usual in these cases, many authorities were cited to show that these difficulties have been severally surmounted when construed in other contexts in other wills, the result cannot be put higher than as showing that they would not suffice to defeat an otherwise well-founded inference. Coming back, then, to the words which are said to refer to the power and to show an intention to exercise it, we think they cannot be fairly construed as disclosing an intention to exercise a non-existent special power. Taking the whole will together, we think the balance distinctly inclines against such an inference, and, at all events, there is no such clear preponderance in favour of the intention as to warrant us in differing from the opinion of Byrne, J. The appeal therefore fails.

Appeal dismissed.

Solicitors, *Bell, Brodrick, & Gray*, for *Buchannan & Sons*, Whitby.

From Q. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Romer, L.JJ.) June 21.

DRIEFONTEIN CONSOLIDATED MINES (LIMITED) v. JANSON. (a.)

Insurance—Bullion—Seizure by government of assured's country—Subsequent declaration of war—Insurance of property of enemy.

Gold bullion, the property of a company registered and carrying on business in the Transvaal, was insured at Lloyd's during transit from the Transvaal to the United Kingdom by a policy which covered the usual risks of capture and detention. The gold, while in transit, was seized on the 2nd of October by the order of the Transvaal Government. At that date negotiations were proceeding between this country and the Transvaal which might result in war. On the 9th of October the Transvaal Government addressed an ultimatum to the British Government and declared war on the 11th of October. In an action on the policy, it having been agreed that the case was to be dealt with as if the war was over,

Held, by A. L. Smith, M.R., *and* Romer, L.J., Vaughan Williams, L.J., *dissenting, that it was not contrary to public policy to allow the contract of insurance to be enforced, and that the underwriters were liable.*

Judgment of Mathew, J. (48 *W. R.* 619, [1900] 2 *Q. B.* 339), *affirmed.*

Appeal, by the defendant from the judgment of Mathew, J., reported 48 W. R. 619, [1900] 2 Q. B. 339.

The facts are sufficiently stated in the judgment of A. L. Smith, M.R.

Joseph Walton, K.C., Lord Robert Cecil, K.C., and *J. A. Hamilton, K.C.*, for the defendant.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

J. Lawson Walton, K.C., Carver, K.C., and *Scrutton, K.C.,* for the plaintiffs.

Cur. adv. vult.

June 21.—A. L. SMITH, M.R., read the following judgment: There is no case to be found in the books which covers the present; and we have had judgments of different eminent judges given upon totally different facts from those of the present case cited to induce us, if possible, to hold that in this case it is against the interest of this country—that is, against what is called public policy—that the defendant should be held liable in this action to pay, under the policy of insurance he underwrote for the plaintiffs, the loss the plaintiffs have undoubtedly sustained. Notably amongst these judgments we have been referred to the judgments of Lord Alvanley in *Furtado* v. *Rogers*, 3 B. & P. 191, and of Lord Ellenborough in *Gamba* v. *Le Mesurier*, 4 East, 407, of the same learned judge in the same year in *Kellner* v. *Le Mesurier*, 4 East, 396, and of the same judge in *Brandon* v. *Curling*, 4 East, 410, as showing principles which should be applied when considering a question of public policy as applicable to a policy of insurance effected in this country on the goods of enemies. And in my opinion it is very important in this case, remembering what has been argued, to clearly ascertain and keep in mind what are its special facts in order that this court may itself determine, applying what principles are to be found in the judgments, whether it is against the interest of this country that the defendant upon the true facts of this case should be held liable to indemnify the plaintiffs for the loss of their gold which was underwritten by the defendant, and which was lost under the following circumstances: The plaintiffs are a limited company, which, for the convenience of carrying on its business was incorporated and registered in the Transvaal according to the laws of the South African Republic. Its shareholders are almost entirely resident outside that Republic and in Europe, and are not subjects of the Republic. The company has a London office and a London committee of management, and it carries on its business of extracting gold from its mines in South Africa and of sending such gold to this country and Europe for sale, and there dividing the profits among its shareholders. There is, in my judgment, no pretence for saying that the committee of management of this company or its shareholders, or the company itself as a legal entity, were *de facto* enemies of this country when the loss occurred. War had not then broken out; and, what is more, in my opinion they never were *de facto* enemies of this country. This company was in the habit before the 2nd of October, 1899, of getting the gold which it won and imported from South Africa covered by policies of insurance underwritten at Lloyd's, "at and from the mines in South Africa until its arrival in this country or Europe"; and, so far as concerns the policy now sued on, it is dated the 1st of August, 1899, and is to follow and succeed an insurance for £100,000 dated the 15th of May, 1899. When the policy was effected no question of war between this country and the Government of the South African Republic was in the contemplation of the parties; and the risks covered are declared in the usual form of a Lloyd's policy so far as regards capture—viz., "against enemies, pirates, rovers, arrests of all kings, princes, and people of what nation, condition, or quality soever." Whilst the gold covered by this policy was in transit to this country it was, upon the 2nd of October, 1899, seized and taken possession of by the Government of the South African Republic against the will of the plaintiffs when at a railway station in that country. There is no evidence of what has become of this gold excepting that it has been seized by the Transvaal Government and that it has never been returned to the plaintiffs; and to them from the 2nd of October, 1899, onwards it has ever been a total loss. It was strenuously urged in the court below, before Mathew, J., by Mr. Joseph Walton for the defendant, that war had broken out before this seizure; but Mathew, J., found, as was the fact, and it is now conceded on the part of the defendant, that war had not broken out upon the 2nd of October, for it did not break out until some time after—though it is true that the Blue Books, which, by agreement, constitute the sole evidence in this case, show that upon the 2nd of October, 1899, war was imminent. The well-known ultimatum by Mr. Reitz, the State Secretary, demanding an answer from this country on or before Wednesday, the 11th of October, 1899, at 5 p.m., was not sent until the 10th of October, 1899, and Mr. Chamberlain has certified, which certificate is to be taken as evidence, that war did not break out until 5 p.m. on the 12th of October. It is true that the plaintiff company is registered as a company in South Africa; but it is equally true that the beneficial ownership in the gold insured did not belong to persons subjects of the South African Government and resident therein; and what is more important still to my mind is that neither the persons to whom the insured gold really belonged nor the company as a legal entity were in truth and in fact enemies of this country when the loss occurred; and, indeed, in my opinion, in truth and in fact, neither these persons nor the company have ever at any time been *de facto* enemies of this country. The gold having been thus lost by being seized and captured by the South African Government, the plaintiffs now asked the defendant to make good this loss according to the terms of the policy underwritten by him; and what is his answer? It is said that it is against public policy—*i.e.*, against the interest of this country, that he should do so; and thereupon this action is brought. Can any wilder suggestion be well made than that the repayment of this loss of their gold to the plaintiffs is in truth and in fact against the interests of this country? It certainly appears to me that this defence for not paying the loss incurred because of its being against public policy is, as a matter of fact, absurd, and I am not surprised that my brother Mathew has held that the defence was unfounded. The risks covered by the policy are against capture, in the words above stated—viz., against arrest of kings, princes, &c. It is true that, as Lord Ellenborough pointed out in *Kellner* v. *Le Mesurier*, these general words must be read with this exception and qualification annexed to them—viz., that they are limited to an insurance of goods other than goods belonging to enemies of this country, for otherwise they would cover enemies' property, the destruction of which it was the object of this country when at war to effect; and thus the destruction of this property by this country when at war would be rendered ineffectual, if a subject of this country could indemnify an enemy against the consequences of war with this country. In my judgment, enemy, as regards the application of this public policy, means a real *de facto* enemy, and not a mere possible technical enemy, as the company in this case. That the above indemnity of a real enemy *de facto* of this country would be against the interests of this country when at war, and therefore against public policy, I do not doubt. But where upon the facts of this case can it be found that the policy of insurance sued on covered a loss sustained by a real enemy of this country? As a matter of truth the suggested loss to a real enemy of this country is all fiction. Notwithstanding the learned and ingenious arguments of

Mr. Joseph Walton for the defendant, I am wholly unable to apply the suggested public policy to the facts of this case. It was urged that the gold taken by the Transvaal Government was taken for the purposes of war. Be it so, though there is no proof of this; and it was argued that, the gold being taken for war purposes, it was the same as if the gold had thus become a gun or other implement of war, which it was the object of this country to destroy. This, in my opinion, is another fiction and wild suggestion. If by this is meant that the gold became likened to a gun belonging to an enemy, in which I certainly do not agree, then I would point out that the defendant did not insure a gun, and how can public policy be involved? In my opinion the arguments addressed to us when applied to the facts of this case have no substance whatever in them. I should point out that the parties have agreed not to raise the defence, which would have been a good defence if the facts supported it, which they do not—viz., that the payment of the policy-moneys by the defendant to the plaintiffs would be trading with an alien enemy, and therefore unlawful. This is not insisted on, for by agreement between the parties the case is to be treated as if the war was over and no dilatory plea was to be pleaded. It was next argued that it could be extracted from the judgments cited that any contract which directly or indirectly assisted a foreign state for the purposes of war against this country, no matter how long before war actually broke out or not, was contrary to public policy. My first answer is that I do not find this laid down in any of the judgments cited. Secondly, it would, in my opinion, be contrary to the interests of this country to hold that such contracts, entered into during negotiations preceding a war or which might never result in war, were contracts against the interests of this country to enforce. And, lastly, but by no means least, the contract in this case was not entered into for any such purpose—*i.e.*, for assisting a foreign state in making war against this country. There was one other public policy stated, which I think exists—viz., that it is against the interests of this country that a subject of this country when at war should relieve an enemy of this country against the calamities of war. Apart from the plaintiffs not being *de facto* enemies, which I have pointed out above, can any stretch of imagination lead anyone to suppose that, if the defendant pays to the plaintiffs the moneys secured by this policy, one single penny of those moneys would ever go towards relieving an enemy of this country against the calamities of the South African war? I certainly cannot do so. Here is another fiction. I agree with Mathew, J., and am of opinion that this appeal must be dismissed, and with costs. In my judgment the public policies which do exist have no application whatever to the real facts of this case, and it would be against all reason to hold that they had.

VAUGHAN WILLIAMS, L.J., read the following judgment.—This is an action brought against underwriters to recover in respect of a loss of gold on its transit from Johannesburg to the United Kingdom. The loss occurred in this way. The South African Republic, not being at war with us (but war being imminent), "commandeered" some gold, the property of the plaintiffs, a Transvaal corporation, that is, of a subject of the South African Republic, and did so with a view to the imminent war which might or might not break out with Great Britain. The general terms of the policy are sufficient to cover this loss; but it is said that the loss arose by a seizure against which a British subject could not consistently with his public duty insure in direct terms, and that, wherever the generality of the terms of assurance might in their actual application produce, if effect were given to them in their extended sense, a contravention of public interest, the insurance must be construed in such a manner as to exclude the particular event or peril which could not for the reason above mentioned be made the subject of a legal insurance in direct terms by a British underwriter. This is the law as laid down by Lord Ellenborough in the case of *Kellner* v. *Le Mesurier*, 4 East, 396; *Gamba* v. *Le Mesurier*, 4 East, 407; *Brandon* v. *Curling*, 4 East, 410; and also by Lord Alvanley in the case of *Furtado* v. *Rogers*, 3 B. & P. 191; and it follows, in my view, that in the present case one must take the particular loss and ask oneself whether the insurance in express terms against this loss would be inconsistent with the public duty of a British underwriter. If it would be, the contract would be illegal, and the policy must be construed as if it contained a proviso excluding from the policy such a loss. Lord Ellenborough, in *Brandon* v. *Curling*, 4 East (at p. 417), gives two instances of the proviso which must be read upon principles of public policy into the instrument of insurance to prevent its application to a particular risk, the insurance against which would be repugnant to the interests of the state. One instance is a proviso that the insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer. The other instance is a proviso that it shall not extend to cover any loss happening in the course of any contraband adventure in which the goods would become liable to seizure as forfeited by the laws of the country; and he says: "More instances might be put of similar implied exceptions which may arise out of the general terms of this contract." Lord Ellenborough does not say, and in my judgment does not intend to say, that the existence of a state of war between the respective countries of the assured and assurer is the only instance in which the relations of the two countries may be such that it would be injurious to the country of the assurer to allow a subject of that country to indemnify a subject of the other country against a particular loss. No doubt the application of the general rule that it is illegal for a British subject to enter into a contract of insurance inconsistent with his public duty takes place in most cases where the risk is a risk of capture in the course of war between the two countries by the warships of the country of the underwriter; but the principle that a British subject cannot make a contract of insurance contrary to his public duty is not limited to such cases; and Erle, C.J., in delivering the judgment of the Exchequer Chamber in *Aubert* v. *Gray*, 11 W. R. 27, 3 B. & S. 163, 169, seems to take the view that an insurance against a loss arising from an embargo placed by the government of the country of the assured on ships of subjects of that country with a view to expected hostilities with the country of the assurer would be contrary to public policy, and therefore an insurance which a British subject could not take upon himself. But, however this may be, the principle is clear that a British subject cannot make a valid insurance if such insurance is repugnant to the interests of his country; and the question which we have to answer in this case is whether it is against public policy that a British subject should contract to indemnify a subject of the South African Republic against this particular loss—that is to say, the loss arising from the fact that the South African Republic, not being at war with us, have commandeered some gold, the property of a Transvaal corporation, that is, of a subject of the South African Republic, and have done so with a view to the imminent war which may

or may not break out with Great Britain. I cannot make any distinction between this Transvaal corporation, whoever the corporators may be, and any other subject of the South African Republic. Now, what was the character and purpose of the seizure of this gold? It was commandeered. It was not seized under the authority of the revenue law of the land; it was seized as a matter of military necessity. It was seized to provide the Government of the South African Republic with gold for the purpose of the threatened war with Great Britain in case it should break out. The gold might be applied in buying munitions of war, in paying soldiers, or in paying judges or civil servants, or in buying provisions; one cannot say. All one can say is that the evidence makes it clear that it was seized with a view to the threatened war with Great Britain. I do not think that the particular application, or intended application, of gold thus seized and for such a purpose is of any great importance. The material fact is that there was this extraordinary seizure of gold, a seizure which the Transvaal Government could only justify to themselves on the ground of the necessities of the impending war—that is, a seizure with a view to the threatened war with Great Britain. Is it illegal for a British subject to contract to insure Transvaal subjects against such a seizure? To hold that it is illegal is, it is true, to extend the principle established by Lord Ellenborough and Lord Alvanley to a case to which it has not up to this time been extended. But I take it that, if it is made out that it would be injurious generally to the state to allow such a contract by a British subject to be valid, the principle must be applied, although there may be no previous instance of its application to this particular case. I do not think that the question whether it is against the interests of the state to allow the assured to enforce against the underwriters the contract to idemnify the assured against this seizure depends on whether the seizure was an act of hostility in the sense of being an act of war. In my judgment it clearly was not an act of war, and could not be so treated by our government, and I entirely agree that the commandeering seizure by the Transvaal Government of this gold belonging to a Transvaal subject took place in the time of peace before the war had begun. I think that on the breaking out of the war the Transvaal corporation to whom the gold belonged became an "alien enemy"; and in my judgment the question whether it is against the interest of the state to allow this contract to be enforced against the underwriters depends not on whether the seizure was an act of war, but on whether it is against the interest of the state that a British subject should contract to indemnify an alien against a levy made on him by his government for the purpose of a war against this country. This question obviously cannot be determined by considering how matters stood immediately after the gold was seized. The right to raise this question as to whether the contract is void as being repugnant to the interests of the country of the underwriters is, of course, not affected by any agreement between the parties to treat, for the purpose of this action, the war as over. Such an agreement merely goes to the pleading of a temporary bar to the rule that an "alien enemy" cannot sue during the continuance of war. I am not sure that the court ought to give effect even to such an agreement, because the rule against an "alien enemy" coming into court is itself based on public policy; and I doubt if the parties to an action can waive such a rule if the fact of the plaintiff being an "alien enemy" appears upon the record. But I wish to point out that the suspension of the cause of action during the war does not prevent a contract entered into before the commencement of hostilities to indemnify an "alien enemy" from losses incurred during the war from being injurious to the interests of the country of the underwriter. This is pointed out by Lord Alvanley in *Furtado* v. *Rogers*, 3 B. & P., at p. 199. The question whether it is against the interest of the state that a British subject should contract to indemnify an alien against a levy made on him by his government for the purpose of an imminent war against this country does not, to my mind, in any way depend on the finality of the intention of the Transvaal Government to enter upon a state of war with this country. In my judgment the question whether the contract of indemnity is repugnant to the interests of the country depends upon the character of the act of seizure which brings about the loss. In this case the seizure by the Transvaal Government of the gold of its own subject, although an act of the government, was not, as I have already pointed out, an act done in accordance with the ordinary law of the country. It was not done in the due course of law; it was manifestly an extraordinary act done to meet an extraordinary occasion, when clearly war against England was immediately anticipated. It was not an act of war, nor an act of hostility in the sense of an act of war, but it was an act specifically done for the purpose of the prosecution of expected war against England. The question is whether this manifest character and purpose of the seizure made it repugnant to the interest of Great Britain that British subjects should contract to indemnify Transvaal subjects against a loss arising from such a seizure. I do not think that the legality of an undertaking to indemnify the subject of another country against the levy by his own government on his goods for the purpose of an expected war against the country of the underwriter can depend upon the accident of the expected war in fact occurring. Such an undertaking to be impugned as contrary to public policy must be an undertaking which, if expressed in terms in the policy, would be illegal; it must be illegal from the first or not at all. Take the case of an express contract to indemnify the assured in case of the capture of his ship by the warships of the country of the underwriter in the course of war between the respective countries. Such a contract is void *ab initio*, and the application of the assurance to such an event would *ab initio* be excepted from a policy couched in general terms wide enough to cover such a capture. The accident of no war occurring would merely prevent any claim arising, but would not affect the legality of the contract or its construction. The occurrence of war may suspend the remedy of the assured, but cannot alter his contractual rights. The only question to my mind is, Can a British subject legally contract to indemnify the subject of a foreign state against a loss by the forcible seizure by his government of his property for the purpose of an imminent war between Great Britain and that state? That depends on the question whether the performance of such a contract would be injurious to Great Britain. It is said to be injurious because it increases the resources of the foreign country for the expected war against Great Britain, both by relieving the foreign state from recouping their subject the value of the goods which it has seized for the purpose of war against us, and for which it has given a receipt, and by the relief such an indemnity will give the foreign subject against the burden of the war in the event of the expected war actually taking place. Is it not contrary to public policy that a British subject should in effect indemnify a foreign government against expenses incurred by them for the

purpose of expected war against us, and give the foreign subject an indemnity which will greatly relieve him from the burden of the expected war in the event of its taking place? I think that such an indemnity, if carried into effect, would undoubtedly be injurious to Great Britain. The assured is complaining of a loss inflicted on him by the government of the state of which he is a citizen; and the benefit of the indemnity, by subrogation or otherwise, would in effect go to a government for whose acts there are no slight grounds for saying he is responsible, for it was decided in *Conway* v. *Gray*, 10 East, 536, that an assured was so identified with the government of his country that he could not recover under a clause in a policy in terms covering all arrests and detentions of princes if the arrest or detention was the act of the government of the assured's own country. *Conway* v. *Gray* and the other cases based upon the fiction that every subject consents to and adopts as his own every act of the government of his state were overruled by the Court of Exchequer Chamber in *Aubert* v. *Gray*, 3 B. & S. 163, 169, which was the case of an embargo put by the Spanish Government on a Spanish ship for the purpose of war with Morocco; but Erle, C.J., in delivering the considered judgment of the court, says, at p. 182: "This judgment recognizes a marked distinction between an embargo in a a time when there is peace between the countries of the insurer and the assured, laid on for a purpose wholly unconnected with hostility, either existing or expected, and an embargo connected with such hostility; therefore this judgment does not interfere with any of the decisions on points connected with war." This passage in the judgment of Erle, C.J., leaves it open to doubt whether he means that in the case of an embargo laid on for a purpose connected with hostility, either existing or expected, the theory of the adoption by the subject of the act of his government is still law, or whether he means that the theory of identity of the subject and government is wholly gone, and that the assured is unable to recover in cases where the arrest or detention is laid on for a purpose hostile to the country of the underwriter, because to allow the assured to recover in the British courts would be contrary to public policy. I am inclined to think he means the latter; but, whichever he means, he was dealing with the case of a seizure of the property of the assured by the government of his own country; and it seems to me that there is great difficulty in saying that the passage does not cover the present case, for it is impossible to say that the commandeering of this gold was wholly unconnected with hostility, either existing or expected. On the whole, I think it contrary to public policy that an underwriter should insure against such a risk, and that it is contrary to public policy that this action should be maintained.

ROMER, L.J., read the following judgment: In my opinion this appeal should be dismissed. I think that the rights of the parties to this action must be determined by considering how matters stood immediately after the gold was lost by the seizure of it by the Transvaal Government. In saying this, I of course recognize that subsequent events may be regarded if and so far as they tend to show what was the then position of affairs. At that time there was peace between the South African Republic and this kingdom. The act of seizure cannot, in my opinion, be treated as an act of hostility against this country, and certainly it was not so treated by our government. It cannot, in my opinion, be regarded as the commencement of the war which subsequently broke out. At that time, and for an appreciable time after, the plaintiff company was not an alien enemy, though for the purpose of my judgment I shall assume that the company is to be treated simply as an ordinary subject of the South African Republic. The war did not commence until about a week after the seizure, and meantime negotiations between the two governments continued. It is true that after war began, and so long as it continued, as between the two antagonistic countries, the plaintiff company, which might then be regarded as an alien enemy, would not have been entitled to enforce its right against the insurers under the contract of insurance, assuming the right to exist. During the war that right would have been suspended. On the termination of the war that right would revive. And it is common ground that we are to deal with this action on the footing that the war is ended; and, seeing that the Transvaal is now annexed, there is nothing to prevent the court's acting on this view. The question then is, Were the defendants, under the circumstances existing at the date of the seizure of the gold, freed from liability on their contract of insurance, although its terms were large enough to cover the plaintiff's loss? I think not. No authority has been cited which really supports the view urged on behalf of the defendants. I think that view ought not to be adopted by the court. The decided cases, no doubt, show that a contract of insurance, though its terms may be large enough, will be held not to cover a case which if it had formed the subject of a separate insurance would not be enforceable in our courts. If then this seizure of the gold had been insured against by a separate contract, would there be anything in such a contract to render it not enforceable in our courts? I think not. Such a contract would not fall within any of the classes of contract held by existing authorities to be not enforceable. It would not be a contract with an enemy of this country, not one to indemnify a person against a loss arising from an act of our government and intentionally inflicted upon him. It would not be a contract obviously antagonistic to the interests of this country, like one dealing with arms or munitions of war intended to be used against this country, nor one to indemnify a subject of a foreign government against an act committed by that government which was an act of hostility against this country, or which could be regarded as the commencement of war, or which would be like an embargo connected with hostility against this country perfected by the subsequent outbreak of war, such as is in my opinion referred to by the passage as to an embargo in the judgment of Erle, C.J., in *Aubert* v. *Gray* mentioned by my brother Vaughan Williams. It would, no doubt, be a contract to indemnify the subject of a foreign power, at the time of peace with us, against a pecuniary loss inflicted on him by his government with a view of strengthening the resources of that government at a time when relations between it and our government were strained. But if nothing more could be said against the contract, I think there would not be sufficient grounds in our courts refusing to enforce it. The strained relations might not lead to war, and in that case it is difficult to suppose that the contract would be treated as invalid because of the above-mentioned object of the foreign government at the time of seizure, or because the seizure may have been unjustifiable as between that government and its subject; and even if war ultimately ensued, that fact could not have a relation back so as to change the rights of the parties which were fixed as at the date of the loss suffered. It is, however, said on behalf of the defendants that the courts ought to refuse to enforce such a contract if at the time of the act of the foreign government that government had an intention of shortly afterwards making war upon this country.

For it is said that it would be contrary to the policy of this country in such a case to allow the contract to be enforced; and that, therefore, our courts ought, where such a case is said to arise, to try the question as to what was the intention of the foreign government at the time of its act. I do not think that this contention is well founded. I do not consider that it is in accordance with the interest or policy of our country or government or right in a case where an act of a foreign government not in itself hostile to this country has to be considered, and where our government has determined, notwithstanding the act, to treat the foreign government as still at peace with us and to continue negotiations with that government, that that government should be treated or regarded by our courts as having at the time of that act formed an intention irrevocably hostile to this country. I can imagine few things likely to embarrass our government more at a time when it is our policy to treat the foreign government as not being hostile than for our courts to be obliged (as they might be) to have to decide as a question of fact what was the "intention" at the time, or a short time previously, of the foreign government. The question of "intention" of a foreign government is one very difficult to inquire into or to determine. Especially would this be the case if no war ensued and the two countries became quite friendly. And yet if "intention" had to govern the rights of the parties to the contract our courts might be obliged to ascertain the intention at the time of the loss even if no war ensued. A subsequent change of intention on the part of the foreign government could not change the rights of the parties. And it is impossible to say that any "intention" is irrevocable and could not be changed. It appears to me that in such a case as we are considering these courts ought not to be asked to embark upon a consideration of the question as to the intention of a foreign government at a time when admittedly it is or was at peace with this country and is or was being treated by our government as not hostile. I think that the intention of a foreign government at any given time ought to be treated by these courts for such a purpose as that I am now considering as conclusively determined by the way in which our government chooses or has chosen to deal with that foreign government, and that where our government has not treated the foreign government as being hostile at a particular time our courts ought not to try and ascertain what was then in the minds of the king, president, or responsible ministers or authorities of the foreign government. In the result I think that it would not be contrary to the policy and interests of our government and country or proper for this court to hold that the contract of insurance in this case as applied to the loss in question was invalid or ought not to be enforced. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *William A. Crump & Son.*

Solicitors for the defendant, *Waltons, Johnson, Bubb, & Whatton.*

From P. D. & Ad. Div. (Lord Alverstone, L.C.J., A. L. Smith, M.R., and Romer, L.J.) — May 20.

"THE DEVONIAN." (a.)

Ship—Collision—Vessel at anchor with tug attached —"Attached for the purpose of towing or manœuvring"—Failure of tug to exhibit towing lights—Liability of tow—Mersey Rules, 1900, *art.* 4 (a)—*Merchant Shipping Act,* 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-section* 4.

The plaintiffs' vessel, while lying at anchor in the River Mersey with a tug made fast alongside to keep her to her anchor till she could be towed into dock, was negligently run into by the defendants' vessel. The tug was carrying the ordinary lights for a steamship under way.

Held, that, under rule 4 *of the Mersey Rules, the tug ought to have carried towing lights; that the infringement of the rule was one which might possibly have contributed to the collision; and that for this infringement the plaintiffs' vessel was to blame, both apart from statute and under section* 419, *sub-section* 4, *of the Merchant Shipping Act,* 1894.

Appeal from the judgment of Sir Francis Jeune on the trial of an action of damage by collision.

The action was brought by the owners of the steamship *Veritas*, by the owners of her cargo, and by her master and crew, suing for their lost effects, to recover the damage sustained by them by reason of a collision which occurred about 10.45 p.m. on the 12th of October, 1900, in the River Mersey, off Salisbury Tower, between *The Veritas* and the defendants' steamship *Devonian.*

The Veritas, a Norwegian steamship of 485 tons gross register, with a crew of thirteen hands, was bound from Krageroe to Liverpool with a cargo of ice.

During the early morning of the 12th of October, when she was about thirty miles N.W. from the Bar lightship, her engines broke down and she was subsequently towed to an anchorage on the east side of the Mersey.

Her master made arrangements for towing her into dock when the tide made; and shortly before the collision she was lying at anchor in charge of a duly licensed Mersey pilot, waiting for water to get into dock.

The weather was clear and moonlight, there was a moderate breeze from the westward, and the tide was about half flood running about three knots.

The Veritas had a white light forward and a white light at the stern, properly placed according to the rules regulating the lights to be carried by vessels at anchor in the Mersey, and these lights were burning brightly.

The screw steam tug *Prairie Cock* had been engaged to stand by *The Veritas* and be ready to hold her up against the tide, and she was attached on the starboard side of *The Veritas* fore and aft.

The Prairie Cock was carrying a masthead light and side lights, the ordinary lights for a steamship under way.

In these circumstances *The Veritas* was run into by *The Devonian*, a steamship of 10,500 tons gross register, which was on a voyage from Boston to Liverpool with a crew of ninety-eight hands and a general cargo, passengers and cattle.

The Devonian struck the port bow of *The Veritas* near the stem, doing her so much damage that she began to sink.

The Prairie Cock and another tug which had come up took hold of *The Veritas* and attempted to tow her ashore, but she ultimately sank and was lost.

The plaintiffs alleged that the collision was brought about by the bad look-out kept by those on board *The Devonian.* The defendants charged *The Veritas* with allowing the tug *Prairie Cock* to exhibit misleading lights. The plaintiffs contended that even if wrong lights were exhibited by the tug the plaintiffs would not be liable for this.

By rule 4 of the Rules for Navigating the River

(a.) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

Mersey, "A steam vessel when towing another vessel or vessels, or when attached for the purpose of towing or manœuvring such vessel or vessels, shall carry the compulsory lights prescribed by article 3 of the General Regulations—viz., two bright white lights and side lights.

At the trial the learned President, who was assisted by two of the Elder Brethren of the Trinity House, found that *The Devonian* was to blame for keeping a bad look-out, and that the tug was guilty of a breach of rule 4 of the Mersey Rules in not exhibiting towing lights, and he held that, the tug being under the control of *The Veritas*, the owners of *The Veritas*, were, by virtue of section 419, sub-section 4, of the Merchant Shipping Act, 1894, to blame for that breach. In the result therefore he held that both vessels were to blame.

The plaintiffs appealed.

Laing, K.C., and *Stubbs* (*Robson, K.C.*, with them), for the plaintiffs.

Joseph Walton, K.C., Aspinall, K.C., and *Glynn*, for the defendants.

Lord ALVERSTONE, L.C.J.—This is an interesting and important case, and it is desirable to understand clearly the facts on which our decision has to be given. If it were the case of a tug merely hanging on to a vessel at anchor for the purpose of preventing herself from drifting away, and not at the time engaged, or not at the time in a condition to render help, then other considerations would arise. In all cases of collision statements found in a ship's log are accepted as contemporaneous statements of the nature of any manœuvre which the ship was engaged in carrying out, and this court has held that such a statement was fair evidence against the ship. In this case the log of *The Veritas* contained the following entry with regard to the tug: She was engaged to make fast alongside to manœuvre and keep us to our anchor until we could enter the dock." That statement was put to the captain when he was in the witness-box and he said that it was correct. The learned President found that the tug was fast fore and aft, and that she was in a position to put a strain on the rope at any time; and he came to the conclusion that she was there to assist, and to manœuvre, if necessary, the vessel to which she was fast. I concur in that view, and I am of opinion that the tug clearly came within the words of rule 4 of the Mersey Rules as being attached to *The Veritas* "for the purpose of towing or manœuvring" her, and that she was in such a position and engaged in such work as made it imperative on her to have two white lights at her masthead. Since *The Fanny M. Carvill*, 24 W. R. 62, 13 App. Cas. 455, n., was approved by the House of Lords in *The Duke of Buccleugh*, 40 W. R. 241, [1891] A. C. 310, it has been settled that the true construction of section 17 of the Merchant Shipping Act, 1873 (now section 419, sub-section 4, of the Merchant Shipping Act, 1894), is that the infringement must be one having some possible connection with the collision, and I agree with the President in thinking not only that there was a possibility, but more than a possibility, that the absence of a second white light might have contributed to the collision.

Then the question arises whether *The Veritas* is responsible for the absence of the second white light, and, further, whether she is responsible so as to come within section 419, sub-section 4, of the Merchant Shipping Act, 1894. Apart from the statute there seems to be no real difficulty as to the law. Ever since the case of *The Cleadon*, 14 Moo. P. C. 97, 9 W. R. H. L. Dig. 15, it has been held that, where one ship is in tow of another, the tow and the tug may for some purposes be considered as one ship, the motive power being in the tug and the governing power in the ship that is being towed. In the case of *The Niobe*, [1891] A. C. 401, 40 W. R. Dig. 101, Lord Selborne said: "Where a ship in tow has control over and is answerable for the navigation of the tug, the two vessels—each physically attached to the other for a common operation, that of the voyage of the ship in tow, for which the tug supplies the motive power—have been said by high authority to be for many purposes properly regarded as one vessel." No doubt there have been cases, such as *The Stormcock*, 5 Asp. M. L. C. 470, 34 W. R. Dig. 56, in which that rule has not been applied, but in my opinion, where two vessels are so attached and under such government or control that they move practically as one vessel, then the tow is responsible for any infringement of any rule of navigation on the part of the tug. And I think that in this case the tug and tow were so attached and were under such control as to be regarded as one vessel. The point remains whether the case comes with section 419 (4) of the Merchant Shipping Act, which enacts that "Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." It was argued on behalf of the appellants that "the ship" in that section meant that ship on board which in a physical sense the infringement occurred. I think that is too narrow a construction of the section. In my opinion the ship by which the regulation was infringed was the ship on which was the authority to see that proper lights were exhibited on the tug. I therefore think the appeal should be dismissed.

A. L. SMITH, M.R., and ROMER, L.J., concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Thomas Cooper & Co.*

Solicitors for the defendants, *Rowcliffes, Rawle, & Co.*, for *Hill, Dickinson, & Co.*, Liverpool.

High Court of Justice.

K. B. Div.
(Bruce and Phillimore, JJ.) June 4.

STODDART v. THE ARGUS PRINTING CO. (LIMITED). (a.)

Gaming — Betting — Advertisement of house kept for purpose of receiving money in connection with betting —Betting House Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 7 —*Betting House Act*, 1874 (37 *Vict. c.* 15), *s.* 3.

By an agreement entered into by the plaintiff and the defendants the defendants agreed to print and publish a certain paper on the plaintiff's behalf every week on certain terms and conditions, one of which was that they were only to be called on to fulfil the contract if the said newspaper contained matter which was neither libellous nor illegal. The plaintiff called upon the defendants to print and publish for circulation in England with the said newspaper and as part of it an advertisement relating to a "coupon competition"—that is to say, of a promise by the plaintiff to pay a sum of money to such persons as should correctly guess the result of a certain

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

horse-race then shortly about to be run, and should write their guesses upon certain forms, called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to the plaintiff's office in Holland, together with the sum of one penny in respect of each guess made. The defendants refused to print the advertisement, contending that the publication was illegal and constituted an offence against the Betting Acts, 1853 (*section* 7) *and* 1874 (*section* 3). *The plaintiff thereupon brought an action to recover damages from the defendants for breach of contract.*

Held, that the publication of the said advertisement did not constitute an offence under section 7 *of the Betting House Act,* 1853, *or section* 3 *of the Betting House Act,* 1874, *as the advertisement did not relate to a house to which persons physically resorted for the purpose of betting.*

This was an argument of points of law arising on the pleadings.

By his statement of claim the plaintiff, Joseph Stoddart, said that:

"1. The plaintiff is and has since the beginning of the year 1890 been carrying on business as the proprietor of a newspaper called *Sporting Luck.*

"2. By an agreement dated the 20th of March, 1890, the defendants agreed with the plaintiff to print and publish *Sporting Luck* on his behalf every week on terms and conditions in the said agreement more particularly specified.

"3. The defendants have recently, while the said agreement was still in force, without any justification and in violation of their said agreement, refused to print and publish *Sporting Luck* for the plaintiff, whereby the plaintiff has suffered considerable damage."

By their amended defence the defendants said that:

"1. The defendants always have been and still are ready and willing to fulfil their said contract so far as they legally may and to print the said newspaper. It was a condition of the said agreement that the defendants were only to be called upon to fulfil it if the said newspaper contained matter which was neither libellous nor illegal.

"2. The defendants only refused to print the said newspaper because the plaintiff called upon them, under the contract which is above referred to, to print and publish for circulation in England with the said newspaper and as a part of it an advertisement headed 'International Supplement' relating to a horse-racing competition, the publication of which, according to the defendants' contention, constitutes an offence against the Betting House Acts of 1853 (16 & 17 Vict. c. 119, s. 7) and 1874 (37 Vict. c. 15, s. 3).

"Particulars: (1) On the 30th of October, 1900, one Ada Jane Stoddart was tried and convicted at the Central Criminal Court for that she, being the occupier of an office at 10, Red Lion-court, in the City of London, had unlawfully opened, kept, or used that office for the purpose of money being there received by her as the consideration of undertaking to pay thereafter money on events relating to horse-racing in contravention of section 1 of the Betting House Act of 1853.

"(2) The learned judge, at the trial of the said Ada Jane Stoddart, reserved the point and stated a case for the consideration of the Court of Crown Cases Reserved as to whether the then defendant had in law been guilty of any offence against the said section of the said Act, and on the 17th of November, 1900, the conviction of the said Ada Jane Stoddart was unanimously affirmed by the Court for the Consideration of Crown Cases Reserved. The facts that were proved against the said Ada Jane Stoddart and upon which her conviction was founded were that she was the occupier of an office at 10, Red Lion-court, in the City of London, and the registered proprietor of a newspaper published weekly at that office. Each number of the paper contained a notice of what was called a 'coupon competition'—that is to say, of a promise by the then defendant to pay a certain specified sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms called 'coupons,' which were issued with each number of the newspaper, and should return the coupons so filled up to the then defendant's office, together with the sum of one penny in respect of each guess made. A large number of persons every week sent in to the said office coupons filled up as aforesaid, accompanied by remittances of money.

"(3) As between the date of the said decision of the Court of Crown Cases Reserved affirming the said conviction and the date of the issue of the writ in this action, the plaintiff instructed the defendants under the agreement referred to in paragraph 1 in this defence to publish the advertisement called 'An International Supplement,' containing a number of coupons as part of the newspaper called *Sporting Luck*, in which was advertised to the English public a system of competition identical in all respects with that in regard to which the said Ada Jane Stoddart had been convicted, except that the competitors were no longer to send their moneys or deposits to No. 10, Red Lion-court, in the City of London, or to any place of receipt or deposit within the jurisdiction of the English courts, but were to send all moneys to, and it was expressly announced that in the future all moneys would only be received at an office which had been opened by the plaintiff for the purpose of receiving them, at Middleburg, in the kingdom of Holland.

"(4) The defendants refused to print the said advertisement, contending that as the said office in Middleburg, in Holland, had been opened by the plaintiff for a purpose which would infringe section 1 of the Betting House Act of 1853, and section 3 of the Betting House Act, 1874, if it had been so opened in this country, the publication of an advertisement in relation to such an office was illegal under the specified sections of the two several Acts of Parliament which are above set forth, which refusal constitutes the breach alleged in the statement of claim and sued upon in this action."

Lord Coleridge, K.C., and *C. H. Stutfield* (*Bovill Smith* with them), for the plaintiff.—The question here is whether the advertisement was or was not an infringement of section 1 of the Betting Act, 1853. The only advertisement which is illegal is that of a house. Section 1 deals with two offences—firstly, keeping a house for betting with persons resorting thereto; secondly, keeping a house for the purpose of receiving there any money or valuable thing as the consideration for any assurance to pay any money on any contingency relating to any horse or other race. Section 7 refers back to section 1, and prohibits the advertising as stated in section 7 of any house as described in section 1, it enlarges the scope of section 1. Section 3 of the Betting Act, 1874, also refers back to section 1 of the Act of 1853, and merely prohibits the doing of something in a house as defined in section 1 of the Act of 1853: *Powell* v. *Kempton Park Racecourse Co.*, 47 W. R. 585, [1899] A. C. 143. The object of the Act of 1853 is to suppress betting-houses, and therefore it is the locality, not the betting, that is prohibited, and that locality must be

within the jurisdiction—that is, it must be a betting-house within this country: *Cox* v. *Andrews*, 12 Q. B. D. 126. No bet is illegal except in respect of its being made in a house in England. "Publishing" a betting-house in Holland is not publishing a betting-house within section 1 of the Act of 1853, and, therefore, it is not punishable under that Act. It would be contrary to international comity to condemn a house in Holland as a common gaming-house within an English Act of Parliament. That would be the result if sections 11 and 12 of the Act of 1853 applied to houses abroad: *Macnee* v. *Persian Investment Corporation*, 38 W. R. 596, 44 Ch. D. 306. In the present case there is no betting with persons resorting to the house. In *Reg.* v. *Brown*, 43 W. R. 222, [1895] 1 Q. B. 119, it was held that there must be a physical resorting to bring the case within section 1. Section 7 of the Act does not cover this case. The mere advertising of an illegal house is not sufficient; it must be an advertisement of an illegal house to which persons resort for the purpose of betting. A house with which business is done by means of letter, telegram, or telephone is not a house within section 1.

C. W. Mathews, for the defendants.—Section 7 is co-extensive with section 1, and makes it an offence to publish an advertisement of any betting-house and does not place any limit as to where the house is situated. In *Reg.* v. *Brown* Lord Russell of Killowen, C.J., says, referring to section 1, "The real gist of the offence created by the section is the opening and keeping of a house for the purpose of betting with persons resorting thereto, and the offence could be proved although no person even resorted there." *Reg.* v. *Stoddart*, *ante*, p. 173, [1891] 1 K. B. 177.

PHILLIMORE, J.—My learned brother has asked me to deliver the first judgment. In this case we are of opinion that there should be judgment for the plaintiff, and possibly on a somewhat narrow ground. Section 1 of the Betting Act of 1853 deals with two different offences—first, that of keeping a betting-house to which persons resort for the purpose of betting. The decision of the Court of Crown Cases Reserved in *Reg.* v. *Brown* is binding on us, and says that the resort to the house must be physical. Therefore the first part of section 1 of the Act of 1853 makes it illegal to keep a house to which persons physically resort for the purpose of betting.

That is not the class of offence which it is suggested the plaintiff Stoddart may be committing by what he is now doing. The second half of the section deals with the case of a person who keeps an office at which money is received (whether physically brought or sent by post or messenger) by the owner, occupier, or keeper of the office as or for the consideration for any . . . promise, or agreement, . . . to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse-race," or to certain other events. Under that half of the section Mrs. Stoddart was convicted, and the conviction was upheld by the Court for the Consideration of Crown Cases Reserved in *Reg.* v. *Stoddart*. The circumstances under which she was convicted are precisely the same as those under which the business is being carried on by the plaintiff, and which the defendants are asked to advertise, except that the plaintiff has his house of business outside the jurisdiction—namely, in the kingdom of Holland, and not within the United Kingdom. It has been argued that the place where the plaintiff carries on his business makes all the difference; but, speaking for myself, I do not think it is necessary to consider that point. If this business had been that which Mrs. Stoddart carried on, and for which she was convicted, I still fail to see that advertising that business would, in the language of the amended defence, have constituted an offence against the Betting Acts, 1853 and 1874. The sections with regard to advertising are section 7 of the Act of 1853 and section 3 of the Act of 1874.

Upon careful analysis of section 7 of the Act of 1853 it will be seen that it is directed against advertisements of houses kept for the first of the two purposes mentioned in section 1, and not against houses kept only for the purpose of the second offence under section 1. The point was left to a certain extent open in *Reg.* v. *Stoddart*, whether the particular form of so-called competition for encouraging which Mrs. Stoddart was convicted was betting or not. For myself I think it was betting for the reasons given in that case by my brother Wills; but it is not necessary to decide that point at all, because the offence under the first half of section 1 is not that of keeping the house open for the purpose of betting *simpliciter*, but of keeping the house open for the purpose of betting by persons resorting thereto, which under the authority of *Reg.* v. *Brown* means physically resorting. So that, whether this form of competition be or be not a bet, it is not a bet made by persons resorting to a place for the purpose of betting; and therefore section 7 of the Act of 1853, which only relates to advertisements of such house, does not make this particular publication an offence. At one time during the argument we thought that section 3 of the Act of 1874 put further difficulty in the way of the plaintiff, but when it is analyzed it appears clear that it does not do so. Sub-section 1 relates entirely to information or advice. It makes it an offence to advertise that a person will give information or advice with respect to any such bet or wager, but that is not this case. I agree with the contention of Mr. Stutfield that in sub-section 2 the words "with respect to any such event or contingency" are all subordinate to the words "information or advice." My brother Bruce has pointed out to me that in sub-section 1 the words seem to show that that must be so, awkwardly as the grammatical meaning is expressed. Therefore sub-section 2 only deals with advertisements which point out persons or places where information or advice can be obtained, which again is not this case. Sub-section 3 deals with advertisements inviting any persons to make any such bet or wager, or take a share in or in connection with any such bet or wager. One has to consider what is "such bet or wager." It is such bet or wager, as sub-section 1 shows, as is mentioned in the principal Act. The only bets or wagers which are mentioned in the principal Act are bets or wagers made by persons resorting to a house for the purpose of betting or, according to the construction put upon those words, physically resorting to a house for the purpose of betting. Therefore there is nothing in section 3 of the Act of 1874 which makes the conduct of these defendants illegal. They are not offending because they are publishing this advertisement, and therefore they have no right to break their contract, and there must be judgment for the plaintiff. In saying this, however, we pass no opinion upon the question whether the plaintiff, Joseph Stoddart, is carrying on a legal business. From what passed on a previous occasion, when the court was differently constituted, I should conjecture that it was hoped by this proceeding to obtain a decision from this court which might have some bearing on certain summonses now pending before the alderman against the plaintiff Joseph Stoddart in respect of the carrying on of his business. If that be so, nothing that we now say will assist or injure the plaintiff at the hearing of those summonses. Speaking for myself, and I

believe speaking with the consent of my brother, I in no way consider whether or not Joseph Stoddart, by having moved the business from London to Middleburg, has or has not escaped from the decision of the Court for the Consideration of Crown Crown Cases Reserved in *Reg.* v. *Stoddart*. Assuming that he is doing exactly the same thing for which Mrs. Stoddart was convicted, I still say that neither section 7 of the Act of 1853 nor section 3 of the Act of 1874 makes it illegal for the defendants to print and publish this particular advertisement.

BRUCE, J.—I am of the same opinion and for the same reasons.

Judgment for plaintiff.

Solicitors for plaintiff, *Le Brasseur & Oakley.*

Solictors for defendants, *Lewis & Lewis.*

K. B. Div.
(Ridley and Phillimore, JJ.) } May 21.

In re AN ARBITRATION BETWEEN MARGETTS AND THE OCEAN ACCIDENT AND GUARANTEE CORPORATION (LIMITED). (*a.*)

Insurance (Marine)—"Actual collision with another vessel"—Fouling anchor in bed of river attached to ship—Liability of insurance corporation under policy.

An insurance of a tug against damage arising from "actual collision with another vessel, wharf, mooring, pier, or similar structure,"

Held to cover damage caused to the tug by striking upon an anchor in the bed of the river attached by a length of chain to a vessel.

Special case stated by arbitrator on a question of law.

The question arose under a policy of insurance which provided *inter alia* that the corporation would pay to Messrs. P. Margetts, the assured, the amount of any damage which should be caused to any tugs belonging to the assured, and covered by the policy, owing to "actual collision between any such tug and any vessel wharf, mooring, pier, or similar structure."

On the 13th of August, 1900, *the Ada*, one of the tugs covered by the policy, while coming up the Thames, struck upon an anchor in the bed of the river and sunk. The anchor was attached by about 20 or 30 fathoms of chain to a schooner lying on the north side of the river, with her afterpart on the mud, but attached to the anchor at her bows.

The question was whether upon the facts stated the corporation were liable to pay to the assured the amount of the damages to the said tug.

A. E. Nelson, for the assured, contended that an anchor being a necessary part of a ship the accident to *The Ada* arose out of a collision with a ship or her moorings within the meaning of the policy, and cited *The Warwick*, 15 P. Div. 189, 6 Asp. Mar. L. C. 545, 39 W. R. Dig. 213; *European and Australian Royal Mail Co.* (*Limited*) v. *Peninsular and Oriental Steam Navigation Co.*, 14 W. R. 843, 2 Mar. Law. Cas. 351; and *The Niobe*, [1891] A. C. 401, 40 W. R. Dig. 101.

G. Spencer Bower, for the corporation.—There was here no collision "with a vessel" within the meaning of that risk as covered by the policy: *Hoskins* v. *Pickersgill*, 3 Doug. 222.

THE COURT (RIDLEY and PHILLIMORE, JJ.) answered the question in the affirmative. In the case of *The Niobe* the collision of the tug towing the vessel was held to be a collision of *The Niobe* with another vessel. That was an *a fortiori* case, and on that authority the corporation were liable to the assured.

Solicitors for Messrs. P. Margetts, *Lowless & Co.*

Solicitors for the Ocean Assurance Corporation, *William Hurd & Sons.*

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

(1903) 2 KB. 623.

K. B. Div.
(Ridley, J.) } May 18.

PERRY v. CLEMENTS. (*a.*)

Master and servant—Negligence—Personal injury—Accident caused by defendant's servant — Action against defendant—Notice of accident previously given by plaintiff to his employers—Wages paid as before—No further proceedings taken against employers under Workmen's Compensation Act, 1897, *ss.* 2, 6—*Right of plaintiff to sue defendant.*

The plaintiff, a sawyer, who worked for Messrs. Jones Brothers, met with an accident caused by the negligence of a servant in the employment of the defendant.

Having given notice of the accident to his employers, Messrs. Jones Brothers, they continued to pay the plaintiff the same wages as before, and no further steps were taken by him to obtain compensation under the Workmen's Compensation Act, 1897.

In a common law action against the defendant for damages,

Held, the action was maintainable, because a mere notice of an accident given under section 2 of the Workmen's Compensation Act, 1897, *to the employer was not a "proceeding" against the employer within the meaning of section 6, and did not, therefore, preclude the plaintiff from bringing an action against a person, other than his employer, whose negligence caused the injury.*

Further consideration.

This case was tried before Ridley, J., and a common jury, and they found a verdict for the plaintiff with £225 damages.

The plaintiff was in the employment of Messrs. Jones Brothers, of Oakwood-court, Addison-road.

The defendant was a contractor carrying on business at Hammersmith.

On the 12th of March, while the plaintiff was having his dinner at Messrs. Jones's works, a horse and cart belonging to the defendant was backed against some stone near where the plaintiff was sitting and a portion of the stone fell on him causing injuries of a serious character.

After the accident, on the 17th of May, a notice in accordance with section 2 of the Workmen's Compensation Act, 1897, was served on Messrs. Jones Brothers, notifying that Perry had been injured on the 12th of March.

No further steps under that Act were, however, taken or claim for compensation made as they voluntarily continued paying the plaintiff his wages.

The plaintiff meanwhile commenced this action against the defendant for damages, and the defendant pleaded that the action was not maintainable on the ground that the plaintiff had taken "proceedings" against his employers for compensation under the Act of 1897, and was therefore by section 6 of the Act estopped from recovering damages from the defendant in respect of the same injury.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Montague Shearman, for the defendant.—Section 6 of the Act of 1897 enacts that where the injury for which compensation is payable under the Act is caused under circumstances creating a legal liability in some person other than the employer—which is the case here—to pay damages in respect thereof, the workman has an option as to which of the two parties he will sue. He may proceed either at law against the stranger to recover damages at common law, or against his employer for compensation under the Act. He may not go against both, and if compensation be paid under the Act, the employer is to be indemnified by the stranger. The document notifying the injury was served on the plaintiff's employers Messrs. Jones Brothers. That was a notice and a claim for compensation as well: *Powell* v. *Main Colliery Co.*, 48 W. R. 534, [1900] 2 Q. B. 145, *ante*, p. 49, [1900] A. C. 366. Messrs Jones Brothers admitted the claim and have paid the plaintiff the same wages as before the accident. He cannot, therefore, recover compensation from the defendant as well, and the defendant is entitled to judgment in spite of the finding on the jury.

Witt, K.C., and *Alen Macpherson*, for the plaintiff.—The mere notice of an accident not followed by a claim for compensation is not of itself a proceeding under the Act of 1897. The plaintiff has not recovered "compensation" at all. His wages merely represent what but for the accident he would have earned and nothing more. It is absurd that a man should be deprived of his right to recover damages against a stranger merely because he gave formal notice that he had met with an accident to his employer.

RIDLEY, J.—I have come to the conclusion that in this case judgment should be entered for the plaintiff in accordance with the finding of the jury. And for these reasons. I do not think that the formal notice of injury served on the plaintiff's employers, Messrs. Jones Brothers, on the 17th of May can be treated as a claim within section 2 of the Workmen's Compensation Act, 1897. That section enacts that proceedings to recover compensation must be given within six months from the occurrence of the accident, otherwise the claim cannot be maintained. Looking at the Act it seems to me clear, and it has so been decided, that the claim for compensation is the initiatory proceeding and not the notice of injury. In this case all that was done was to serve on Messrs. Jones Brothers a simple notice informing them that Perry had been injured while in their employment. There is no intimation in that notice that Perry intended to claim compensation from them. The notice and the claim are distinct, and must be treated as such whether they appear on two separate documents or are contained in one and the same document. One had to be served as soon as practicable, the other must be served within six months of the accident. In this case all that was done was to give notice. In the absence, therefore, of a claim for compensation the mere notice under the Act of 1897 was insufficient to estop the plaintiff from recovering the damages awarded him by the jury, and judgment for him for that sum must accordingly be entered.

Solicitors, *Alexander Pope; Leighton & Savory.*

K. B. Div.
(Kennedy and Phillimore, JJ.) May 15.

MAPLE & CO. (LIMITED) v. WILSON (SURVEYOR OF TAXES). (a.)

Inland Revenue—Inhabited House Duty—Blocks of shops—Buildings used partly as shops and partly for residence of staff—House Tax Acts, 1808 (48 *Geo.* 3, *c.* 55), *Schedule B, r.* 3, *and* 1851 (14 *&* 15 *Vict. c.* 36).

The appellants appealed against an assessment made upon certain blocks of buildings used by them partly as shops and partly for the residence for their staff.

Held, dismissing the appeal, that the blocks of premises were assessable to the Inhabited House Duty as a whole, because the business part of the premises communicated with the residential part, and the fact that the communication was closed at night by iron doors made no difference.

Case stated by Commissioners of Income Tax for the Holborn Division of the County of Middlesex upon confirming an assessment to inhabited house duty for the years 1897-8 and 1898-9 of £11,069 at 6d. in the £ which had been made upon a portion of the premises in occupation of the appellants, Maple & Co. (Limited), fronting Tottenham Court-road, and extending down Beaumont-place and Grafton-street respectively.

The assessment was made under the House Tax Acts, 1808 and 1851. Schedule B, r. 3, of the former Act provides that shops and warehouses which are attached to a dwelling-house and being in communication with it shall, in regard to the charge of duty, be valued together with the dwelling-house and household and other offices.

By the Act of 1851 warehouses which are distinct and separate buildings, and which are used solely for the purpose of lodging goods and merchandise, or for carrying on some manufacture, notwithstanding that the premises might be adjoining or in communication with a dwelling-house or shop, are exempted from the operation of the earlier Act.

The premises in question were divided into several blocks, each block having its own party walls and communicating with the other blocks by means of double iron doors open during the day but closed at night for protection against fire. Most of the blocks were used solely as shops and show-rooms, but two of them were used partly for business purposes and partly for residential purposes. In these the basement, ground-floor and first floor were used as shops and show-rooms, and on the second floor there were dining and recreation rooms for the assistants, and on the third, fourth, fifth and sixth floors were kitchens and offices and bedrooms, dormitories, and sitting-rooms for forty clerks, house servants, waiters, and the like. The lower floors communicated direct with the other blocks by means of iron doors separated by lobbies. The upper or residential floors communicated with the lower floors by means of two staircases, one of which communicated with all the floors. The other staircase was situated between the blocks which were partly residential and the blocks which were used solely for business purposes, and was bounded by party walls. On the second floor landing of this staircase there was an iron door leading to the residential blocks, and also an iron door leading to the adjoining non-residential block. On the upper landing there were doors communicating with the residential premises, but none which communicated with the business premises.

Sir Edward Clarke, K.C., and *Ernest Pollock*, for

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the appellants.—The residential portions of the premises being distinct from the business portions of the establishment, the assessment to inhabited house duty should be restricted to such parts of the premises as are used for the purposes of a dwelling-house, there being no communication within the meaning of rule 3 of Schedule B of the Act of 1808 between the residential portion and the business portion of the premises. At any rate the assessment should be limited to the two blocks which are used in part for residential purposes.

Sir E. H. Carson, S.G., and *S. A. T. Rowlatt.*—It is impossible to draw a line for the purpose of imposing this tax between those parts of the premises which the appellants contend ought not to be assessed thereto and the rest of the building. Nor are the business parts of the premises separate warehouses, and therefore they are not exempted by the proviso at the end of rule 3.

KENNEDY, J.—In my judgment this appeal fails because on the evidence before us it seems clear that the business portion of the premises communicate in fact with the residential portion. The fact that for protection from fire, and for the proper conducting of the establishment, there are rules and regulations in pursuance of which the means of communication open in the daytime are closed at night is immaterial. The question of whether these premises as a whole ought to be assessed to the tax depends not on how the premises are in fact used, but whether in fact communication exists between the residential portion and the business part of them, so that they can be said to be separate buildings to the dwelling-house. In my judgment the whole of the buildings are assessable under rule 3, and no exemption can be claimed under the latter part of the rule, because it is clear the premises are not "such warehouses as are distinct and separate buildings."

PHILLIMORE, J., gave judgment to the same effect.

Solicitors, *Peake, Bird, Collins, & Co.; The Solicitor of Inland Revenue.*

C. C. R.
(Lord Alverstone, L.C.J., and Mathew, Wills, Grantham, and Bigham, JJ.) May 18.

THE KING *v.* TAYLOR. (*a.*)

Criminal law — False pretences — Friendly society— Member in arrears with subscription—Arrears paid up by prisoner—He places member's name on sick list —Applies sick pay to satisfy debt—Person to whom false pretence made.

It was the duty of the prisoner, who was an officer of a society, to return the names of members entitled to sick pay. The prisoner wrongfully entered on the list a member's name, which he gave to the secretary, and in due course received an order from the treasurer to pay the member the sum named. When the prisoner received the money he applied it in payment of a debt due from the member to himself. Upon an indictment charging the prisoner with obtaining the money from the treasurer by falsely pretending to him that the member was entitled to sick pay,

Held, dismissing the appeal, that there was evidence upon which the jury might find that the false pretence was made by the prisoner to the treasurer.

(*a.*) Reported by ERSKINE REID, Esq., Barrister-at-Law.

Case stated by the chairman of the Worcestershire Court of Quarter Sessions, upon the trial of an indictment against Herbert Taylor, the present appellant, heard at the April Quarter Sessions.

The indictment charged the appellant with obtaining two sums of £1 each from William Martin, by falsely pretending to him, Martin, that one, Arthur Bennett, was entitled to that sum for sick pay.

Taylor was an officer of the court of the United Friendship Branch of the Broomgrove District of the Ancient Order of Foresters' Friendly Society, and it was his duty, on the application of any member for sick pay, to visit that member and satisfy himself that the member was entitled to sick pay, and then to take the proper steps to obtain it for him.

Taylor had been paying the arrears of a member of the society, named Bennett, until the latter owed him £3. Considerable correspondence had taken place between Taylor and Bennett's wife about this debt, and Mrs. Bennett wrote on one occasion that her husband was suffering from a bad cold. She did not, however, nor did any one else, make any application for sick pay for him, but the appellant took the necessary steps to place Bennett's name on the list of persons entitled to sick pay, and received in due course, from the treasurer, on two occasions, £1 for twelve days of such pay. He did not, however, pay the money over to Bennett or Bennett's wife, but applied the money in part satisfaction of the sum which Bennett owed him.

The list of members entitled to sick pay was handed in to the secretary, who then made out documents in the form of cheques addressed to the treasurer of the court, authorizing him to pay to the person named the amount due to him for sick pay. Taylor, in the ordinary and proper course of business, on receipt of these cheques, took them to the treasurer, who thereupon paid to Taylor the money mentioned in them for him to pay over to the sick member. The cheques were the treasurer's authority for making the payments, and not the list.

The chairman directed the jury that it was immaterial that personally Taylor made no representation to the secretary or treasurer, but that the fact of his falsely pretending or representing that Bennett was entitled to sick pay when he was not (if the jury so found), and by this pretence or representation getting his name inserted in the list and thereby obtaining the money, would be sufficient in law to sustain the indictment. The jury brought in a verdict of "Guilty." The question for the opinion of the court was whether the false representation by Taylor to the secretary, upon which an order for payment was made out to the treasurer, was in law a false pretence by Taylor to the treasurer.

Daldy, for the appellant.—The conviction is wrong, because there is no evidence of a false pretence made to the treasurer. There is nothing to connect the false statement made by Taylor in the list he supplied to the secretary with obtaining by false pretences money from the treasurer. He cited, *Reg.* v. *Rouse*, 4 Cox. Cr. Cas. 7.

Stamford Hutton, for the prosecution, was not heard.

Lord ALVERSTONE, L.C.J.—The question is one of fact for the jury. The course of business was that Taylor gave a list of the names of persons entitled to receive sick pay to the secretary, who prepared from the list cheques which were handed by Taylor to the treasurer. The treasurer thereupon then paid the amounts mentioned in the cheques to Taylor. Taylor made an untrue representation through the secretary which enabled him to obtain two sums of money from

the treasurer. He made the representation for the express purpose of obtaining the money from the treasurer. The jury found that that representation was made to the treasurer, and we cannot say that there was no evidence on which they could so find.

The other members of the court (MATHEW, WILLS, GRANTHAM, and BIGHAM, J.J.) concurred.

Solicitors: *Wainwright & Co.*, for *J. W. Clulow*, Brierly Hill, Staffs; *Robbins, Billing, & Co.*, for *Wm. Waldron*, Brierly Hill, Staffs.

Prob. Div. & Adm. Div. Divorce. } May 6, 9.

WAUDBY v. WAUDBY AND BOWLAND. (a.)

Divorce—Practice—Wife's costs—Jury discharged without giving a verdict.

It is the usual practice of the Divorce Court to allow to an unsuccessful wife her costs up to the limit of the amount paid into court or secured, with the addition of such sum as may be added de die in diem *at the trial; but if a wife brings her case to a hearing without having previously taxed them against her husband, and is unsuccessful, the husband is not liable.*

This was a husband's petition for a dissolution of his marriage.

The questions left to the jury were:

(1) Has the petitioner been guilty of cruelty and adultery (which at the trial was not denied)? Answer, Yes.

(2) Has the respondent condoned the petitioner's cruelty and adultery? Answer, Disagreed.

(3) Has the respondent been guilty of adultery with the co-respondent? Answer, Disagreed.

JEUNE, P., declined to allow these findings to be recorded as a verdict and discharged the jury.

Barnard applied for the wife's full costs. He contended that if the case was set down again for trial the wife would be entitled to bring in all her costs up to the setting down of the case the second time and to have her bill taxed, including the costs of the late trial. If she were to elect to change her solicitors the court would be powerless to compel them to hand over her papers to other solicitors for the purposes of a new trial. Under rule 158 of the Rules and Regulations applicable to this court a wife may file her bill of costs for taxation as against her husband, and the registrar is bound to ascertain what is a sufficient sum of money to cover the costs of the wife incidental to the hearing of the cause. Whatever the practice has of late been, nevertheless the principle was clearly carried out in *Hurley* v. *Hurley and Menzies*, [1891] P. 367, 40 W. R. Dig. 76. Until a wife has been proved guilty she is to be presumed innocent, and is entitled to pledge her husband's credit. In *Robertson* v. *Robertson*, 29 W. R. 880, 6 P. D. 119, the Court of Appeal held that the wife was entitled to her full costs, although she was found guilty. The rule giving a wife security for her costs is only to prevent the necessity of taxation *de die in diem*, as was the practice in the old Ecclesiastical Courts. The case of *Hurley* v. *Hurley and Menzies* is binding upon the court, and it is not a matter of discretion at all. The principle was followed in *Delaforce* v. *Delaforce and Driscoll*, [1892] W. N. 68.

Bargrave Deane, K.C. (*Priestley* with him), cited *Walker* v. *Walker*, 4 Sw. and Tr. 264, 10 W. R. Prob. Dig. 21, and contended that inasmuch as there had been no application for security for costs at all in this case the husband could not be liable.

JEUNE, P., in delivering a considered judgment, said: In this suit the husband charged the wife with adultery. No application was made by the wife for taxation or security for costs against the husband, and it must, therefore, be assumed that she was in some way enabled to bring her case to a hearing without assistance. The case came before me, sitting with a special jury, and, as too frequently happens, the jury were unable to agree on their verdict, and were discharged. Application was then made that the husband should be ordered to pay the full costs of the wife in respect of the abortive trial. Apart from the special practice of this division as to a wife's costs in a matrimonial suit, it is indisputable that such an application was premature. As a general rule, there can be no order as to the costs of a party in an abortive trial until by further proceedings the rights of the parties are ascertained. There is, however, in this division, as in the Ecclesiastical Courts which previously had cognizance of matrimonial matters, a well-recognised rule that a husband must provide means for his wife to bring her case to a hearing if she is unable to provide such means for herself. This principle has given rise to several rules by which practical effect has been given to it. The practice is that *pendente lite* an application is made by the wife that the husband shall pay her costs incurred up to the time of the application, and further pay into court, or secure, a sum estimated to be sufficient to cover her costs up to the hearing. A further practice once existed that during the trial the wife's costs were taxed *de die in diem* and provided by the husband, which has been modified into a practice that on application a wife is allowed to bring in her actual costs of the days of the trial as if the husband had been ordered to pay or secure them. Then after the hearing is concluded the judge is to decide what costs shall be allowed to the wife, a practice embodied in the 159th rule. The usual practice undoubtedly has been, and is, to allow a wife who has been unsuccessful her costs, but only up to the limit of the amount paid into court or secured, with the addition of such sum as may be added, as above mentioned, on account of the prolongation of the trial. Although in *Robertson* v. *Robertson*, the view appears to have been taken by the Court of Appeal that such limitation ought not in practice to exist, that case cannot, after the observations upon it of Lord Hannen in *Smith* v. *Smith*, 30 W. R. 688, 7 P. D. 84, be taken as an authority governing the practice of this court to its full apparent extent; and, as far as I know, the "usual order" invariably asked for at the end of a trial in which a wife who has had her costs secured is unsuccessful carries a right to the wife to have her costs only up to the limit of the amount secured. There are two decisions which carry further the right of a wife who has had her costs secured, and with regard to whose conduct a jury fail to agree. This question, of course, could not have arisen before 1857, as before the Act of that year, the judicial system applicable in the Ecclesiastical Courts, as in those of Equity, did not recognise trial by jury. But in *Hurley* v. *Hurley and Menzies*, it was held by Collins, J., to whose assistance at that time this division was so greatly indebted, that after an abortive trial, a wife was entitled to her full costs; and this decision was afterwards followed by Sir Charles Butt, when President, in *Delaforce* v. *Delaforce and Driscoll*,

(a.) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

68. I do not pause to criticise the discretion which those learned judges exercised in giving the wife her full costs, and not her costs up to the limit of security, or to consider whether, if those cases were in point, I should be bound to exercise my own discretion in the same way. It is, however, the foundation of the peculiar practice of this division, with regard to a wife's costs, that the wife should be unable without assistance from her husband to bring her case to a hearing, evidenced as that is by her applying for payment of a security for such costs before the trial. As Lord Hannen pointed out in *Smith* v. *Smith*, it was in 1858 expressly decided by the full court, consisting of Lord Chelmsford, Whiteman, J., and Sir Cresswell Cresswell, in the case of *Keats* v. *Keats and Montezuma*, 1 Sw. and Tr. 334, at p. 358, that if a wife brings her case to a hearing without having previously taxed her costs against her husband, and fails, the husband has never then been made liable for her costs. In the present case, therefore, if at the late trial the wife had failed, she could not have obtained any costs against her husband. But if this be so, to give her costs would be to treat her as if she had succeeded, which is to my mind clearly impossible. It is true, as was so strongly urged upon me, that a wife must in law be presumed to be innocent until she is proved to be guilty, but that to my mind has nothing to do with the matter. She is an accused woman, and her rights as to costs depend on the question whether or no that accusation is well-founded, a matter in the present case not yet determined. There is no injustice done by refusing the wife's application for costs at present. She has not needed assistance to bring her case to a hearing. If the husband does not proceed to another trial, the wife will be entitled to ask for her costs as of a proceeding abandoned against her. If she is unable without assistance to proceed to another trial, there is nothing to prevent her from applying to tax her costs against her husband in respect of such future trial. If at the next trial she succeeds, she will, unless some special reason prevent it, obtain her full costs of both trials. I think, therefore, that the present application by the respondent must be refused.

Solicitors, *Iliffe, Henley, & Sweet; Long & Gardner; Ridsdale, & Son.*

Court of Appeal.

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) July 20.

FARQUHARSON BROTHERS & CO. v. KING & CO. (a.)

Principal and agent—Fraud of agent—Sale of goods—Conduct of principal enabling agent to commit the fraud—Estoppel.

The plaintiffs, who were timber merchants, imported timber which they warehoused at the docks. The timber, when sold by them, was delivered to purchasers by means of delivery orders addressed by the plaintiffs to the dock company. The plaintiffs gave their confidential clerk authority to sign delivery orders for the purpose of carrying through sales, and gave the dock company notice to honour delivery orders signed by him. The clerk, by means of delivery orders signed by him in fraud of the plaintiffs, had certain timber at the docks transferred into a fictitious name, and then sold the timber in this fictitious name to the defendants, who acted bonâ fide *in the transaction, and he converted the purchase-money to his own use. In a common law action against the defendants to recover damages for the conversion of the timber,*

Held, Stirling, L.J., *dissenting, that the plaintiffs had by their conduct in giving their clerk authority to sign delivery orders enabled him to commit the fraud, and that therefore the loss must fall upon them.*

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

Application for judgment or a new trial in an action tried before Mathew, J., and a jury.

The action was brought to recover certain timber or damages for its conversion.

The plaintiffs were timber merchants, and the defendants were packing-case manufacturers.

The plaintiffs used to import large quantities of timber, which they warehoused at the Surrey Commercial Docks.

When the timber was sold to purchasers the plaintiffs used to sign transfer or delivery orders addressed to the dock company directing them to transfer the timber into the names of, or to deliver it to, the purchasers.

The plaintiffs had an office in the City of London, and in their employment they had a confidential clerk named H. J. Capon. Capon's duties were to attend at the office and to direct the business in the absence of the partners, and he had authority to sell timber to a limited amount to old customers of the plaintiffs' firm.

On the 25th of January, 1895, the plaintiffs sent the following written authority to the directors of the Surrey Commercial Docks: "We hereby authorize you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined. The company acting also on our signature as heretofore. This authority is to remain in force until expressly revoked in writing by us." This document was signed by the plaintiffs. With it the plaintiffs sent the following letter to the manager of the docks: "Dear Sir,—We have made arrangements whereby in future Mr. Capon will sign D/orders on behalf of and in addition to the other members of the firm, and enclose our written authority for same.—Yours truly, FARQUHARSON BROTHERS & CO."

Commencing in 1896, Capon, by means of the wrongful exercise of his authority, perpetrated a series of frauds, which he carried on until 1900.

He manipulated the plaintiffs' books in such a way as to make it appear that there was less timber at the docks than was actually the case. This surplus timber was dealt with by Capon on his own account.

By means of the above authority he signed transfer orders directing the dock company to transfer this surplus timber at the docks into the name of "J. T. Brown."

Writing to the defendants, who were not old customers of the plaintiffs, in the assumed name of "J. T. Brown, timber agent," from an address in Battersea, which was in reality a stationer's shop, he stated that he had a quantity of timber known as "throw outs" for sale on commission for a firm of ladder builders.

The defendants *bonâ fide* entered into a series of contracts for the purchase of the timber from the fictitious Brown, paid him the price, and obtained delivery of the timber from the docks by means of delivery orders signed in the name of Brown.

The business between Brown and the defendants was throughout entirely conducted by correspondence.

It appeared from the evidence of witnesses called

for the defence that the prices paid by the defendants were fair and reasonable, and it was admitted that the defendants, in entering into the contracts of purchase, had acted with perfect honesty and good faith, and in the ordinary and proper course of business.

The learned judge asked the jury the following question: Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell the goods to the defendants? The jury answered this question in the negative. The judge was requested, by the defendants counsel, to put the following question to the jury: Had the plaintiffs, by their conduct, enabled Capon to hold himself out as the true owner, or as entitled to dispose of the goods? This he refused to do. Upon further consideration the learned judge entered judgment for the plaintiffs for £1,200, the agreed amount of damages.

It was agreed upon the appeal that the court should have power, if any other question should have been left to the jury, to say what was, in point of fact, the right answer which should be given to that question.

J. Lawson Walton, K.C. (*Cababé* with him), for the defendants.—The learned judge did not leave the right question to the jury. It was not suggested that the plaintiffs so acted as to hold out Capon to the defendants as their agents to sell the timber. The defendants did not know that Capon was the agent of the plaintiffs. The right question for the jury was the one which the learned judge refused to put: *Ramazotti* v. *Bowring*, 8 W. R. 114, 7 C. B. N. S. 851. The proposition upon which the defendants rely is that where one of two innocent persons must suffer from the fraud of a third person, he shall suffer who has enabled such third person to commit the fraud: *Henderson* v. *Williams*, 43 W. R. 274, [1895] 1 Q. B. 521; *Root* v. *French*, 13 Wend. N. Y. Supr. Ct. 570. If the plaintiffs did so act as to enable Capon to hold himself out as entitled to dispose of the goods, the plaintiffs are estopped as against the defendants, who are innocent purchasers, from denying Capon's authority. It is not necessary that the plaintiffs should hold out Capon as so entitled. There was no holding out in *Ramazotti* v. *Bowring*. The defendants are therefore entitled to judgment.

He also referred to *Pickering* v. *Busk*, 15 East 38; *Cooke* v. *Eshelby*, 35 W. R. 629, 12 App. Cas. 271; *Brocklesby* v. *Temperance Permanent Building Society*, 43 W. R. 606, [1895] A. C. 173.

Joseph Walton, K.C., and *W. Whately*, for the plaintiffs.—There was in this case no holding out of Capon by the plaintiffs to the defendants as having authority or as entitled to sell this timber. The only holding out by the plaintiffs was to the dock company by reason of the authority given to the company to act upon transfer and delivery orders signed by Capon. Mere negligence in the custody or management of one's own property does not of itself raise an estoppel unless there has been a holding out: *Scholfield* v. *Lord Londesborough*, 45 W. R. 124, [1896] A. C. 514. The owner of property who has given a thief the opportunity of stealing it can recover it from a *bonâ fide* purchaser for value. There must be a holding out which is the proximate cause of the loss: *Bank of Ireland* v. *Evans' Trustees*, 3 W. R. 573, 5 H. L. Cas. 389; *Swan* v. *North British Australasian Co.*, 11 W. R. 862, 2 H. & C. 175; *Mayor, &c., of Merchants of the Staple of England* v. *Bank of England*, 36 W. R. 880, 21 Q. B D. 160. In *Henderson* v. *Williams* there was a holding out, and all the judges decided the case upon that footing. The giving of the authority to Capon to sign delivery orders was not the proximate cause of the loss. The fraud of Capon intervened and was the proximate cause. Capon merely abused his authority by stealing the timber. It is like entrusting the key of a safe where valuable documents are kept to a person who subsequently steals them: *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658, 47 W. R. Dig. 29. If the statement in *Root* v. *French*, which was quoted by Lord Halsbury in *Henderson* v. *Williams*, is that mere carelessness is enough to raise an estoppel, it is too wide. [A. L. SMITH, M.R., referred to *Nash* v. *De Freville*, 48 W. R. 434, at p. 436, [1900] 2 Q. B. 72, at p. 82.] That statement—that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it—is taken from the dictum of Ashurst, J., in *Lickbarrow* v. *Mason*, 2 T. R. 63, and is two wide. Nor was there any entrusting of the timber or of the indicia of title to Capon. If the plaintiffs had signed the transfer orders to Brown they would have entrusted the timber to him, that is, to Capon. There must be an entrusting in fact, not a fraudulent taking of the timber by Capon. The Factor's Acts are the high-water mark of the doctrine of entrusting. Those Acts were passed to amend the common law. In *Lamb* v. *Attenborough*, 10 W. R. 211, 1 B. & S. 831, the facts were very similar to the present case, and yet the court held that the Factor's Acts did not protect the person with whom the plaintiff's clerk had fraudulently deposited the dock warrants. It would be strange if, notwithstanding, the court should hold that the defendants were protected at common law, *Johnson* v. *Credit Lyonnais*, 26 W. R. 195, 3 C. P. D. 32, it's a strong authority in favour of the plaintiffs. The judgment was therefore right.

J. Lawson Walton, K.C., in reply.—In the cases like *Bank of Ireland* v. *Evans' Charities* the person who committed the fraud was merely entrusted with the custody of the seal, or whatever the property might be. He was not authorized to do any act with it. In the present case Capon was authorized to do a certain class of acts, and abused his authority in that respect, whereby an innocent person suffered loss. The fraud of Capon was the proximate cause of the loss. *Pickering* v. *Busk* is in point. Entrusting possession of the goods is not necessary; control over the goods is sufficient. The real question is whether Capon had the dominion over the goods so that he could dispose of them. Clearly he had. The authority to him to sign transfer and delivery orders as if he was a partner in the firm gave him the dominion or control over the goods which directly caused the loss. *Dyer* v. *Pearson*, 3 B. & C. 38; *Vickers* v. *Hertz*, L. R. 2 Sc. & D. 113, 19 W. R. H. L. Dig. 15.

A. L. SMITH, M.R.—This is an action of detinue and conversion tried before Mathew, J., and a special jury. The learned judge left a question to the jury which was answered adversely to the defendants, and he thereupon entered judgment for the plaintiffs for £1,200, the agreed amount of damages. The defendants now move for judgment or a new trial, contending that the right question was not put to the jury, and it has been agreed between the parties that we shall have power to say, not merely what is the proper question that should have been put to the jury, but what on the facts is the right answer to be given to that question.

The plaintiffs, who are timber merchants, complain that the defendants have detained from them and converted to their own use, during a period extending over four years, divers quantities of small lots of timber, the agreed value of which has been taken at £1,200. It appears that the plaintiffs are importers

of timber, having an office in the City of London, and they stored the timber which they imported at the Surrey Commercial Docks in their own names. The timber, when sold to a purchaser, was handed over to him by means of a delivery order signed by the plaintiffs and addressed to the dock company. This was the mode of transacting business followed down to the 25th of September, 1895, when a change was made. The plaintiffs had in their employment a confidential clerk named Capon, and, as unfortunately sometimes happens, this clerk turned out to be a rogue. On that day the plaintiffs sent an authority to the directors of the dock company to accept all transfer or delivery orders signed by Capon on their behalf, and at the same time they sent a letter to the docks manager telling him that they had made arrangements whereby in future Capon would sign delivery orders on behalf of, and in addition to, the other members of the firm. Those are most important documents. Nothing could possibly be larger than the authority so given to Capon as to getting the timber out of the docks. It was a plenary authority without stint or limit given to Capon to sign delivery orders addressed to the dock company directing them to hand over the timber to any one whom Capon designated. Under that authority Capon could have signed delivery orders to transfer the timber into the name of any one he pleased. He had *carte blanche* in that respect. I should have thought that any person of ordinary prudence would have paused before handing over the control of his goods to a clerk in that way. Armed with this power, Capon committed frauds both upon the plaintiffs and the defendants. He cheated them both. He signed delivery orders for these small lots of timber and then sold them to the defendants. It is admitted that the defendants purchased the timber *bonâ fide*, honestly believing that Capon, who was acting in the name of Brown, had authority to sell it, and that the sale was in the ordinary course of business. The defendants' honesty is admitted. These are the facts. At the trial Mathew, J., put one question to the jury and declined to put any other. The question which was put to the jury was this: Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell the goods to the defendants? That question could only be answered in one way—that is to say the way in which it was answered: Was that the right question to ask the jury? I do not think so. The right question to ask the jury upon the facts here is this: Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the goods so as to enable him to dispose of them? That question ought to have been put to the jury. The next matter to consider is: What is the right answer to give to that question? In my opinion the answer ought to be in the affirmative, and judgment should be entered for the defendants. The law upon the point as to which of two innocent persons must suffer from the fraud of a third person has given rise to a good deal of discussion. I myself laid down a proposition in *Nash* v. *De Freville* which I think is good law, subject to a limitation. In that case I said: "It is a well-known principle of law that whenever one of two innocent persons must suffer by the acts of a third person, he who has enabled such third person to occasion the loss must sustain it." That is merely repeating what was laid down by Ashurst, J., in *Lickbarrow* v. *Mason*. The act, however, which enables the third person to occasion the loss must be one immediately connected with the fraud which is the cause of the loss. In the present case the plaintiffs gave an authority to the dock company to honour all transfer or delivery orders signed by Capon. Shortly after that was given Capon began to sign transfer or delivery orders to the dock company to transfer certain timber to the order of Brown, who was a fictitious person. Having thus got the timber into the name of Brown, he then, in the name of Brown, directed the company to transfer the timber to the order of the defendants, who thereupon took delivery of it and paid the fictitious Brown for it. Upon these facts, can it be denied that the plaintiffs by their conduct enabled Capon to hold himself out as the owner of the goods so as to enable him to dispose of them? Without the authority of the 25th of January, 1895, Capon could not have signed the delivery orders and could not have acted as he did. The authority of the 25th of January directly enabled Capon to commit the fraud. As to the contention that the fraud of Capon, and not the authority of the 25th of January, was the proximate cause of the loss, I would point out that the rule as to which of two innocent persons should suffer for a loss occasioned by the act of a third person can only come into operation when there is a fraud committed by the third person; and if the contention put forward is correct, we may as well run our pen through the rule. In *Vickers* v. *Hertz* the Lord Chancellor (Lord Hatherley) said: "When, however, one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it." Then in *Henderson* v. *Williams* Lord Halsbury said: "I think that it is not undesirable to refer to an American authority—which I observe was quoted in the case of *Kingsford* v. *Merry*, 5 W. R. 151, 1 H. & N. 503—*Root* v. *French* in which, in the Supreme Court of New York, Savage, C.J., makes observations which seem to me to be well worthy of consideration. Speaking of a *bonâ fide* purchaser who has purchased the property from a fraudulent vendor and given value for it, he says: "He is protected in doing so on the principle just stated, that when one of two innocent persons must suffer from the fraud of a third, he shall suffer who, by his indiscretion, has enabled such third person to commit the fraud." The result is that, upon the facts of this case, the question which, as I have stated above, should have been put to the jury must be answered in the affirmative, and the verdict and judgment must now be entered for the defendants.

VAUGHAN WILLIAMS, L.J.—I am of the same opinion. The case seems to me to be a difficult one, and I think it is important to endeavour to draw with some precision the line between the authorities on the one side and on the other. Perhaps the best way of effecting that object will be to state first what in my judgment are the facts of the case, and then to state the legal position resulting from those facts.

The plaintiffs kept a large stock of timber at the Surrey Commercial Docks, and they gave authority to the dock company to honour all transfer and delivery orders relating to their timber signed by their confidential clerk, Capon, as if they were signed by a member of the firm. Capon signed various transfers of lots of timber into the name of Brown. He did this for the purpose of carrying out sales which he had effected with the defendants, and he gave the defendants delivery orders in the name of Brown. The defendants in good faith duly paid Capon in the name of Brown for the timber in question, and they received the timber from the dock company by means of the delivery orders. In my opinion the effect of these facts is this: that the plaintiffs entrusted Capon with the power of transferring the timber standing in the name of the firm to any order that he chose, but they only authorized him to make such transfers for the purpose of sales to

customers of the firm, and Capon, contrary to his authority, exercised the power of making transfers for the purpose of carrying through sales effected by him in fraud of his employers in the name of Brown. That is to say, the plaintiffs for their own convenience entrusted Capon with the power of placing timber in the names of persons other than their customers, or, in other words, they gave him the power which enabled him to commit the fraud which he did commit. They gave him that power for the purpose of carrying through sales, though not for the purpose of carrying through those sales which in fact he did carry through. The plaintiffs did something more than merely place the timber in the custody of Capon—they enabled him to transfer the timber from their name into other names for the purpose of carrying through sales. They not only gave him the key of a box, but they authorized him to deal with the goods in the box.

The general principle which underlies this class of cases is that which was laid down by Ashurst, J., in *Lickbarrow* v. *Mason*—namely, that "wherever one or two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Notwithstanding observations of Lord Halsbury in *Henderson* v. *Williams*, where he refers to the wide proposition laid down by Savage, C.J., in *Root* v. *French*, it must be admitted, having regard to all the authorities, that that proposition was stated in too wide terms. The cases show that there must be some limitation placed upon it. Sometimes it is said that the conduct which is the basis of the estoppel must be in the same transaction, and must be the proximate cause of the fraud, or the proximate cause of the loss. In other cases it is said that it must be the effective or proximate cause of the loss. But, at any rate, there are plenty of cases to shew that it is necessary to qualify in some way the general terms of the dictum of Ashurst, J. The conclusion at which I have arrived is that one ought never to say that a person has, within the meaning of the rule, enabled the third person to occasion the loss or commit the fraud, unless the act which he did is an act which he intended to be acted upon by somebody. For instance, suppose that in *Brocklesby's case* the father had simply entrusted his son with the deeds to take care of, and the son had thereupon used them for a fraudulent purpose, that would not have been within the rule, for on that supposition the father would not have done an act which he intended to be acted upon. But, in point of fact, in that case the father handed the deeds to his son not simply that he might take care of them, but that he might raise money on them; and that brought the case within the rule. In the present case the power which the plaintiffs gave Capon was a power to make transfers and issue delivery orders for the express purpose of carrying out sales. They meant, of course, that the sales should be made on their account, but the object of the power was that the sales should be carried out. The mode of working was that the dock company should receive instructions from time to time from the confidential clerk to transfer timber from the name of the firm into the name of somebody else. In these circumstances it seems to me that this case is in the same position as *Henderson* v. *Williams*. In my opinion we ought not to treat this case as if the sale to the defendants were something independent of the power conferred by the plaintiffs on their clerk, but to treat it as if that sale were a dealing with the goods in pursuance of that power, though not in pursuance of the clerk's authority as agent for the plaintiffs. With regard to the question how this case ought to have been left to the jury, I think that the proper question to put to the jury is that stated by Lord Tenterden in *Dyer* v. *Pearson*—viz., whether A. had by his conduct enabled B. to hold himself out to the world as having the property as well as possession of the goods.

STIRLING, L.J.—I am unable to arrive at the same conclusion as the other members of the court. In my opinion the judgment of Mathews, J., is right. This is not a case under the Factors Acts, but under the common law. The rule at common law is well stated by Blackburn, J., in *Cole* v. *North-Western Bank*, L. R. 10 C. P. 354, at p. 362, 23 W. R. Dig. 186: "At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bonâ fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves." In the present case there was no sale in market overt; it was not a case of a person in possession having a title defeasible on account of fraud. Capon, who made the sale to the defendants, made it without authority. The only question is whether the case comes within the exception referred to by Blackburn, J., as to the owner of the goods having so acted as to clothe the seller with apparent authority to sell the goods. Upon this point many authorities have been referred to. The two most important are *Johnson* v. *Crédit Lyonnais* and *Henderson* v. *Williams*. Both are decisions of this court, and are therefore binding upon us. Taking first the case of *Johnson* v. *Crédit Lyonnais*, which is the earliest in point of date, the facts of that case are shortly stated in the headnote. H., a merchant dealing in tobacco and a broker in that trade, had fifty hogsheads of that article lying in bond in his name in the K. dock. The warrants for them had been issued to him. The plaintiff bought the tobacco from H. and paid for it, but he left the dock warrants in the possession of H., and took no steps to have any change made in the books of the dock company as to the ownership of the tobacco. H., being the ostensible owner of the tobacco, fraudulently obtained advances on the pledge of a portion of the tobacco from the defendants respectively, and handed to them the dock warrants. Both the defendants acted in good faith, and took fresh dock warrants from the dock company. It was held that the conduct of the plaintiff in leaving the indicia of title in H.'s hands, and thus enabling him to obtain advances on the security of the goods, was not such as to disentitle the plaintiff to recover their value from the defendants. Cockburn, C.J., in delivering judgment, referred to the authorities, including the case of *Dyer* v. *Pearson*, and said (3 C. P. D., at p. 40):—"Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee of goods bought or the documents of title in

the hands of the vendor till it suited the convenience of the former to take possession of them, would on a fraudulent sale or pledge by the party so possessed divest the owner of his property or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the authorised sale of goods by a factor." I pause here to say that a forcible observation was made by Mr. Joseph Walton, when he called attention to the case of *Lamb* v. *Attenborough*, a case almost indistinguishable in its facts from the present case. In that case the clerk, who was the plaintiff's servant, and who had authority to sign delivery orders in his master's name, fraudulently pledged the goods and signed delivery orders; and it was held that the Factors Acts did not apply so as to protect the person with whom the goods had been pledged. How extraordinary it would be if the pledgee could justify under the common law of England apart from the Factors Act, which was passed for the express purpose of remedying the common law. Returning to the case of *Johnson* v. *Crédit Lyonnais*, Cockburn, C.J., further on said: "It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied."

I proceed now to contrast that with the case of *Henderson* v. *Williams*. There the owner of goods at a warehouse was induced by the fraud of F. to place the goods at the disposal of F. by a transfer order addressed to the warehouseman. F. then sold the goods to an innocent purchaser, who, before concluding the contract, sent to the warehouseman to ascertain if the goods were at F.'s order. The warehouseman replied that the goods were at F.'s order, and that he would hold them for the purchaser on receipt of F.'s transfer order. There were two points taken on behalf of the purchaser in that case, but the one material to the present case is that the owner of the goods had conferred on F. full power to dispose of them, and had held him out as having such power, and that therefore F. was capable of giving a good title to the goods. In that case Lord Halsbury, after quoting the passage from the judgment of Savage, C.J., in the American case which has been referred to, said: "It appears to me, therefore, that when once the correspondence is looked at upon which these goods were committed to Fletcher, to his order and disposition, and Fletcher was invested with a full power of disposition, it is impossible to argue that this was not a holding out by the true owner of the goods of Fletcher as capable of giving a good title." The plaintiffs in the present case did not hold out Capon as capable of giving a good title to the timber. They gave authority to the dock company to accept Capon's delivery orders, but they did not authorize the dock company to communicate that to anyone. They did not authorize Capon to hold himself out as having authority to deal with the goods at all. The case does not, in my opinion, come within the judgment in *Henderson* v. *Williams*. The plaintiffs knew nothing of the transfer of the goods into the name of Brown, nor of the sale of the goods. I think that the case would be the same if Capon had transferred the goods into his own name, got delivery of them, and sold them.

I must also deal with the question of negligence. That question was raised in *Johnson* v. *Crédit Lyonnais*, and Cockburn, C.J., at p. 40, says: "That the plaintiff, in omitting to have the goods transferred to his own name, and to have the dock warrants delivered over to him, was wanting in common prudence, in other words, was guilty of negligence, I cannot bring myself to doubt." Then, on p. 42, he says: "But whether this negligence of the plaintiff will, under the circumstances, give to the defendants any ground of complaint which can be enforced in point of law is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is, in my opinion, correctly stated by Blackburn, J., in *Swan* v. *North British Australasian Co.*, where, after referring to what was said by Parke, B., in *Freeman* v. *Cooke*, 2 Exch. 654, namely, that 'negligence, to have the effect of estopping the party, must be the neglect of some duty cast upon the person guilty of it,' he goes on to say: 'This, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not, in consequence, estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt.' The same principle could obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants—at least, no duty which the law can recognise—either as individuals or as members of the general public." That judgment was concurred in by the other members of the court. On the points to which I have referred, Bramwell, L.J., added nothing; and Brett, L.J., said: "If the plaintiff was guilty of no negligence and did not give either authority or ostensible authority to Hoffman to pledge the tobacco, the defendants cannot, I think, be protected by any principle of law independent of the statutes"; and he came to the conclusion that there was no such negligence as would prevent the plaintiff from succeeding. It seems to me that in the present case the plaintiffs owed no duty to the defendants or to the general public. I come to this conclusion with great diffidence, seeing that my brethren have come to a different conclusion. I am far from saying that the law is even now in a satisfactory state. That it was not in former times in a satisfactory state may be taken as admitted, because the Factors Acts were passed to alter the law as laid down by Blackburn, J., in *Cole* v. *North-Western Bank*. I may add that if I had to say whether it was more equitable that the loss should fall on the plaintiffs or on the defendants, I should be inclined to say that it would be more equitable that it should fall on the defendants.

Appeal allowed.

Solicitors for the plaintiffs, *Ward, Perks, & McKay.*

Solicitors for the defendants, *Anning & Co.*

High Court of Justice.

Chan. Div. } July 25.
Byrne, J. }

In re POWER.
In re STONE.
ACWORTH *v.* STONE. (*a.*)

Inland Revenue—Estate duty—Will—Exercise of general power of appointment—Appointed fund—General residue—Property "passing to executor as such"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-section* 1.

Apart from any special direction by the testator a fund appointed by the testator under a general power of appointment, is not property that passes to the testator's executor as such, and consequently the fund appointed and not the general residue must bear the estate duty payable in respect of such fund.

In re Treasure, 48 *W. R.* 696, [1900] 2 *Ch.* 648, *and* In re Maddock, [1901] *W. N.* 118, *followed.*

In re Moore, ante, *p.* 373, [1901] 1 *Ch.* 691, *not followed.*

This was a summons taken out by the executors and trustees of Ellen Louisa Power, who died on the 31st of January, 1900, to determine, *inter alia*, whether the estate duty payable on the death of the said testatrix, in respect of certain property appointed by her will dated the 16th of May, 1896, under a general power of appointment given to her by the will of James Stone, who died on the 4th of January, 1865, ought to be paid out of the property so appointed or out of the residuary estate of the said testatrix.

The will contained no direction as to the payment of duty or testamentary expenses.

Horsley, for the trustees.

Church, for the appointees.—There are unquestionably here conflicting decisions. *In re Treasure*, 48 W. R. 696, [1900] 2 Ch. 648, and *In re Maddock*, [1901] W. N. 118, conflict with *In re Moore*, *ante*, p. 373, [1901] 1 Ch. 691, a decision of Buckley, J.; but the latter should be followed. In *In re Treasure* there was a direction for payment of the testamentary expenses. The fund passes to an executor as such within the meaning of section 9 of the Finance Act: *In re Hoskins's Trusts*, 25 W. R. 779, 6 Ch. D. 281; Hanson on Death Duties, 4th ed., pp. 194-5. One proof of this is that such a fund is recoverable by a married woman executrix *virtute officii*.

R. J. Parker, for the parties interested in the residue.—The decisions of Kekewich, J., in *In re Treasure* and *In re Maddock* should be followed. The general rule as to equitable and legal assets is laid down in *Pardo* v. *Bingham*, L. R. 6 Eq. 485, 17 W. R. Ch. Dig. 49. [He referred also to Williams on Executors, pt. 4, bk. 7, chap. i.] Property which comes to an executor as such is property which the executor would have a right to recover if the will had only appointed him executor and contained nothing else. *Attorney-General* v. *Brunning*, 8 W. R. 362. 8 H. L. Cas. 243. In *In re Davies' Trusts*, 20 W. R. 165, L. R. 13 Eq. 163, Wickens, V.C., says that it has not been decided that the appointment of an executor in a will and nothing more would make an appointed fund assets. In *In re Thurston*, 34 W. R. 528, 32 Ch. D. 508, Chitty, J., stated that the appointment of an executor is not sufficient to make the property the subject of the power, assets for all purposes. Under the old law the Ordinary could not have applied such funds *in pios uses*. The only funds which he could so apply were funds which the executor could recover in virtue of the probate: Hanson on Death Duties, p. 272: *Platt* v. *Routh*, 3 Beav. 257, 6 M. & W. 756. The reason why courts of equity made equitable assets liable for debts was the legal presumption that if a man wishes volunteers to take, he also wishes his creditors to take.

Church in reply.—Most of the cases relied on are anterior in date to *In re Hoskins's Trusts*. The Act itself draws no distinction between legal and equitable assets.

BYRNE, J.—The question raised by this summons is whether or not, where a general power of appointment by will over a fund has been exercised, the appointed fund passes to the executor "as such" within the meaning of that expression as used in section 9 (1) of the Finance Act, 1894. If it does so pass, estate duty is payable out of residue; if not, it has to be borne by the appointed fund. In the case of *In re Treasure*, Kekewich, J., held that the appointed fund does not, under such circumstances, pass to the executor "as such"; but there was another ground of decision—viz., that the duty fell within the description of testamentary expenses which were directed to be paid out of residue, and, consequently, that although the fund did not pass to the executor "as such," the duty fell to be paid out of residue. In the case of *In re Moore*, Buckley, J., declined to follow the opinion expressed by Kekewich, J., and held, in a case where there was no direction as to payment of testamentary expenses, that the appointed fund did pass to the executors "as such," and that the estate duty was on that ground payable out of residue. The point again came before Kekewich, J., in the case of *In re Maddock*, there being no direction as to payment of testamentary expenses, when, as I am informed, without fresh argument he adhered to his opinion as expressed in *In re Treasure*, notwithstanding the decision in *In re Moore*. In this state of the authorities I am bound to express my own opinion upon the question. The rule is that property subject to general powers of appointment becomes assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers, and Lord Hardwicke in *Townshend* v. *Windham*, 2 Ves. sen., 1-10, points out that "if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment, not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will." Prior to the passing of the Act 23 Vict. cap. 15, property over which the deceased had a general power of appointment only was not subject to probate duty. This was decided in *Drake* v. *Attorney-General*, 10 Cl. and Fin., 257, affirming the decision of Lord Langdale in *Platt* v. *Routh*. In *Drake* v. *Attorney-General*, the Lord Chancellor, in giving the unanimous opinion of the House and of the judges, says: "The property here taken by Mrs. Platt for her life was taken not subject to any power of appointment for any persons specially named, and is therefore subject to legacy duty in the hands of her appointees. But, on the other hand, the property appointed was not property which, within the meaning of the Act as applied to the schedule imposing the probate duty, was so completely her property as to render it liable to that duty, so that the judgment of the court below appears to be right in both instances." Lord Langdale's decision in *Platt* v. *Routh* was in accordance with the certificate of the Court of Exchequer. Lord Abinger, in giving the judgment of that court, says, at pp. 790-791, 6 Mee. & Wel.: "In that

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

case," referring to a case of *Attorney-General* v. *Hope*, 1 C. M. L. R. 530, "which was very fully considered, the House of Lords held that probate duty was not payable in respect of such parts of the testator's assets as were situate in America at the time of his death, and the broad ground on which that decision rested was that probate duty is granted in respect of such part only of the assets as the executor can recover by virtue of the probate; being, in fact, that property which but for the will the Ordinary would in early times have been entitled to apply *in pios usus*. Now, although Judith Ann Platt had what we consider an absolute power of appointment over the property in question, yet it is clear that the Ordinary never could under any circumstances have had any right whatever to interfere with it, and it is also certain that, whether probate be granted or not, the executor, *qua executor*, can have no title to any part of the property." Lord Langdale, in the course of his judgment (see 3 Beav. 281), says: "The next question is whether the residuary estate of John Ramsden appointed by the will of Mrs. Platt is chargeable with probate duty upon the probate of the will of Mrs. Platt, and I am of opinion that it is not. It was not the property of Mrs. Platt, and could not be recovered by her executors by virtue of the probate. It would be singular that the rule of this Court, which requires a probate merely as evidence to show that the instrument of appointment is a will, should have the effect of subjecting the property to duty as if it had been the property of the testator, which the court does not consider it to be." I pass by another passage. "But the 38th section of the Act appears to me to show that the Act only relates to the estate and effects of the deceased for or in respect of which the probate is granted, and as this was not the property of the deceased, I am of opinion that no duty is payable in respect of it." It is, I think, quite clear that the appointed property was considered not to pass to the executor *virtute officii* or "as such." Kindersley, V.C., in *Cook* v. *Gregson*, 4 W. R. 581, 3 Drew., 547, at p. 550, in considering the difference between what are legal and what are equitable assets says that "every item of property come to the hands of the executor which he has recovered, or had a right to recover, *virtute officii*, that is, which he would have had a right to recover if the testator had merely appointed him executor, without saying anything about his property or the application thereof" is legal assets. Lord Chelmsford, in the *Attorney-General* v. *Brunning*, 8 H. L. Cas., at p. 265, expressly approved of this passage. In the last-mentioned case the question was whether or not money paid to an executor under a contract for sale of land entered into by the testator was legal or equitable assets, and Lord Cranworth observes (see p. 258), "With all deference to the Court of Exchequer, I think that court fell into an error in treating this money as being equitable assets. It is a sum which the executor would take as executor, and which therefore would be legal assets in his hands. His right would not depend on anything contained in the will of Mr. Hope. Mr. Hope's administrator would have been entitled in case he had died intestate, and what an administrator is entitled to recover as administrator *virtute officii* can never be equitable assets." Lord Cranworth also points out that foreign assets were not liable to probate duty not being recoverable by virtue of the English probate, and when they come to the hands of the executor they so come because he has established a title in a foreign jurisdiction. In *In re Davies' Trusts*, Wickens, V.C., states it as settled law that a testator who has a general power of appointment directing payment of his debts without more and appointing an executor makes the appointed fund liable, in aid of his own assets, for payment of his debts; and he expresses his opinion that the same rule would apply though no executor were appointed. I think that it is also established that the appointment of an executor without more would not make the fund assets (see *In re Davies*, and *In re Thurston*). In this state of the law the Act 23 Vict. c. 15 was passed; and the effect of sections 4 and 5 is to make the appointed funds liable to probate duty, but not, as it appears to me, to cause that to pass to the executor "as such" which had not previously so passed. Passing to the case of *In re Hoskins's Trust*, I do not myself think that James, L.J., meant to express the opinion that the executor was entitled to receive the fund "as such," but that he must prove the will and constitute himself executor before he could ask to have the fund handed over. The production of probate would be necessary as proof of title on the part of the executor in his capacity as a person nominated to administer the fund and as showing an appointment. Turning to the Finance Act, and bearing in mind that estate duty was intended to be analogous to probate duty, I cannot gather any suggestion of intention to alter the incidence of duty in respect of funds appointed under a general power. Before that Act I consider that the fund in question would have been equitable assets and not legal. I do not think that by the Act it was intended or that the effect of the section under discussion is to convert equitable into legal assets, or to cause property to pass to the executor *virtute officii* which had not previously so passed, nor, as I have said, do I believe that James, L.J., in the case of *In re Hoskins*, meant to decide or to express an opinion which would have a similar result. I need not dwell upon the difficulty I have naturally felt in deciding in opposition to the opinion of Buckley, J., but I consider that I ought to decide in accordance with the view expressed by Kekewich, J., in the case referred to.

Solicitors, *Norris, Allens, & Chapman.*

Chan. Div.
Cozens-Hardy, J. } May 15; June 21.

POWER v. BANKS. (a.)

Corporation sole—Endowment—Rector—Wrongful investment—Statute 13 *Eliz.* c. 10.

In pursuance of the private Act 31 *Geo.* 2, *c.* 2, *a sum of money was vested in the rector of a parish as corporation sole. In* 1881 *a rector of the parish invested part of the money in the purchase of land, which was conveyed to him, "his heirs and assigns," with a declaration in bar of dower. The deed was not enrolled in Chancery and there was only one attesting witness, and no licence in mortmain was obtained. Part of the property thus conveyed was sold by the rector, and the rest, on resigning the living, he conveyed as beneficial owner by deed to H. (his successor) in fee simple in consideration of five shillings as purchase-money. Shortly afterwards H. sold the property by auction, and defendant B. was the purchaser.*

Held, that though personal property cannot usually be vested in a corporation sole, the Statute 31 *Geo.* 2, *c.* 2, *made this case an exception, and therefore that the rector as corporation sole could receive and give a good discharge for the money vested in him.*

(a.) Reported by J. H. DAVIES, Esq., Barrister-at-Law.

Held, that, on the sale by H. to B., as the purchase-money was received by H., it came into the proper hands, and that the defendant B. was not answerable.

In this action the incumbent of St. Mary's, Stratford, Bow, claimed from a purchaser of ground-rents a sum of money invested by a previous incumbent in the ground-rents, on the ground that this money was part of the endowment of the living.

By an Act of Parliament entitled "An Act for providing a maintenance for the minister of the parish church of St. Mary, Stratford, Bow, in the county of Middlesex," 3 Geo. 2, c. 3, the sum of £3,500, part of the moneys appropriated by an earlier Act for the maintenance of ministers of certain new churches, was allotted as the share which the rector of St. Mary, Stratford, Bow, should have, and this sum was to be laid out in purchasing lands, ground-rents, or other hereditaments in fee simple to be conveyed to and settled upon, and to the use of, the rector of the said church for the time being for and towards the maintenance of such rector.

By the private Act, 31 Geo. 2, c. 2, it was enacted, *inter alia*, that the sum of £3,274 7s. 4d., South Sea Annuities, in which the sum of £3,500 had been invested, and which was then standing in the books of the South Sea Company in the name of Henry Fane, late treasurer to the commissioners, acting under the prior Acts, should be transferred unto the rector and his assigns to the intent that the dividends might be received by the rector and his successors towards his and their maintenance, but not to be transferred, sold, or disposed of unless for such purpose and with such licence and consent as therein mentioned, and which stock should on the death or removal of the said rector vest in, and was thereby vested, in the succeeding rector and not in the rector so removed, nor in the executors or administrators of the deceased rector, and should be carried to the account of such succeeding rector accordingly in the said company's books for the purposes of the said Act. And it was further declared that when a proper and convenient purchaser should be found it should be lawful for the rector, for the time being, with the consent of the bishop of the diocese, to be signified in writing under his hand and seal and attested by two witnesses, to sell, and that the money produced by such sale should be received by such person or persons as the said bishop should by writing under his hand and seal attested as aforesaid appoint, and such money should be laid out and applied in the payment of the purchase-money for such lands, tenements, or hereditaments, such purchase being first approved by the said bishop in writing under his hand and seal attested as aforesaid, and that the same lands, tenements, or hereditaments should be settled and assured to the use of such rector and his successors for and towards his and their maintenance for ever. Under the statute 16 & 17 Vict. c. 23, owners of South Sea Annuities who did not assent to the conversion of their annuities were directed to be paid off at par.

Mr. Driffield, who was rector of St. Mary, Stratford, Bow, at that time, did not assent to the conversion, and in April, 1854, the sum of £3,524 6s. 7d. was paid to him.

He invested this money in Consols, and apparently treated it as his own. Subsequently he sold out the Consols, and applied the proceeds towards the payment of the contract price for the building of a new church called St. Stephen's, Old Ford.

By a deed dated the 6th of April, 1857, to which the Bishop of London was a party, and by another deed dated the 7th of July, 1857, the new church until consecration, and afterwards the pew rents, were charged with payment to Mr. Driffield of £4,000, with interest at 4½ per cent.

Mr. Driffield afterwards borrowed £1,500 on the security (*inter alia*) of this mortgage.

In 1880 Mr. Driffield resigned the living, and he was succeeded by Mr. Insley.

In April, 1881, Miss Hyndman's trustees paid Mr. Driffield £3,500 for the purpose of discharging the debt on St. Stephen's, Bow, in consideration of the transfer to Miss Hyndman's trustees of the patronage of three churches—St. Stephen's Church, Bow; St. Mark's Church, Bow; and St. Paul's Church, North Bow. Mr. Driffield accepted the £3,500 in full satisfaction of his charge and executed a release. Out of the £3,500, the sum of £1,000 balance due to his mortgagees was paid to them, and he received £2,500.

On the 20th of April, 1881, he paid Mr. Insley £3,524 6s. 7d., and took from Mr. Insley a receipt "on account of the endowment of the rectory of Bow." He also paid Mr. Insley back interest on this sum.

In October, 1881, Mr. Insley purchased some freehold land at Lewisham for £2,362 10s. This was part of the money he had received from Mr. Driffield. The land was conveyed by deed dated the 25th of October, 1881, to Mr. Insley "his heirs and assigns," with a declaration in bar of dower. This deed was not enrolled in Chancery and there was only one attesting witness. The consent of the bishop was not given to the purchase, nor was any licence in mortmain obtained. In April and August, 1889, Mr. Insley sold portions of the Lewisham property to Mr. Byrne and Mr. Bush, receiving in each case the full purchase-money. It did not clearly appear what was done with this purchase-money, but it was apparently represented by a sum of Great Western Railway Stock standing in the names of the Ecclesiastical Commissioners.

In March, 1892, Mr. Insley resigned the living, and he was succeeded in June by Mr. Hare. By deed dated the 17th of February, 1893, Mr. Insley "in consideration of 5s. as purchase-money" as beneficial owner conveyed all the unsold Lewisham property to Mr. Hare in fee simple with a declaration in bar of dower. This deed was not enrolled and there was only one attesting witness.

On the 6th of October, 1893, the unsold property was put up for sale by auction by Mr. Hare, and defendant was the purchaser of one lot. The conveyance was dated the 14th of November, 1893. It was made between Mr. Hare of the first part, Mr. Insley of the second part, and the defendant of the third part. After reciting the contract for sale, it recited that Mr. Insley had not dealt with the property for value since the execution of the deed of the 17th of February, 1893, and at the request of the defendant had agreed to join in manner thereinafter appearing. Mr. Hare as beneficial owner conveyed and Mr. Insley as beneficial owner confirmed the property to the defendant in fee simple. Mr. Hare received the defendant's purchase-money. On his resignation of the living, in May, 1899, it was not forthcoming.

The plaintiff was the present rector. The action was commenced on the 19th of October, 1900. It was founded upon the Act 31 Geo. 2, c. 2. A declaration was sought that the conveyance of the 14th of November, 1893, was void, and that the hereditaments were part of the possessions appertaining or belonging to the rector, or in the alternative a declaration that the defendant took the conveyance with notice that they were held subject to a trust for the benefit of the rector for the time being, and that the defendant is a trustee for the rector for the time

being, and the plaintiff asked for consequential relief.

Dibdin, K.C., and *Errington*, for plaintiff, referred to *Attorney-General* v. *Gardner*, 2 De G. & Sm. 102; *Attorney-General* v. *Munro*, 2 De. G. & Sm. 122; *Attorney-General* v. *Ward*, 6 Hare 477; *Churcher* v. *Martin*, 37 W. R. 682, 42 Ch. D. 312; *Board* v. *Board*, 22 W. R. 206, L. R. 9 Q. B. 48; *Dalton* v. *Fitzgerald*, 45 W. R. 685, [1897] 2 Ch. 86; *In re Hallett's Estate*, 28 W. R. 732, 13 Ch. D. 696.

Micklem, K.C., and *Buckmaster*, for defendant, referred to *Magdalen Hospital* v. *Knotts*, 27 W. R. 602, 4 App. Cas. 324; *In re Salmon*, 38 W. R. 150, 42 Ch. D. 351.

COZENS-HARDY, J., found on the facts that neither Insley nor Hare nor Corbin nor the defendant was aware of the statute of Geo. 2; but Insley and Hare both knew that the property was, or was purchased out of, or represented in some way, "church property." They thought, as did Corbin, that whatever the trust might be, there was full power to vary the investment and to sell the land for this purpose. The defendant himself knew nothing whatever about the matter. [His lordship then proceeded:] These facts raise legal questions of great difficulty, especially having regard to the peculiar position of a rector. He is a corporation sole. Apart from statute or special custom, personal property cannot be vested in a corporation sole. It will pass to the executors or administrators and not to the successors of the corporation sole. *Fulwood's case*, 4 Coke, 65; *Howley* v. *Knight*, 14 Q. B. 240, and cases there cited. Apart from statute, real property cannot be vested in a corporation sole either at law or in equity without a licence in mortmain. Now the statute of 31 Geo. 2, clearly vested the South Sea Stock in the rector as a corporation sole, and thus created an exception from the general rule. The Conversion Act of 1853, 16 & 17 Vict. c. 23, enabled all persons and bodies, politic or corporate, to assent to accept new stock, and provided that those who should not signify their assent should receive £100 cash for every £100 of stock, and should be at liberty to demand and receive payment from the bank. The bank assumed, and I think rightly, that Mr. Driffield, as a corporation sole, could receive and give a good discharge for the cash. Whenever, by statute or by special custom, as in the case of the Chamberlain of London, chattels or choses in action are vested in a corporation sole, it seems to follow that such corporation sole must have the right to receive and get in and give a good discharge for the property thus vested in him. Mr. Driffield handed the money to Mr. Insley, who must be taken to have received it in his character of corporation sole. His receipt was a good discharge to Mr. Driffield. Mr. Insley was accountable for this money to his successor, Mr. Hare. When in 1881 he invested part of the money in the purchase of land, he did not purport or intend to effect a purchase under the statute of George 2, of which he had never heard; nor did he purport or intend, as an individual, to create a trust of the land, for the benefit of himself and his successors, as a corporation sole. Any such trust would have been unlawful as putting an equitable estate in mortmain without a licence from the Crown. In other words, Insley could not elect to treat this land as part of the benefice or as appertaining or belonging to it. The land was therefore not subject to the restraining Acts, and I cannot hold the subsequent conveyance by Hare to the defendant to be void under the statute 13 Eliz. c. 10. What, then, was the legal position when Insley purchased the land? He still remained accountable for the cash. There was nothing to prevent him from selling the land, which was his, to provide the cash. In the case of an unauthorized purchase by a trustee, I think the trustee can make a good title to a purchaser with notice, provided only that all the beneficiaries are not at once competent and desirous to take the land in specie: see *In re Patten and Edmonton Guardians*, 31 W. R. 785, 52 L. J. Ch. 787. Here there was no beneficiary either competent or desirous to take the land in specie. The right of the trustee to sell cannot depend upon the question whether the entire amount of the trust fund or only a portion of it is cleared by the sale. He must have a right to sell in lots and generally to realize the property as a prudent owner would. He is simply doing his duty by turning the property into cash so as to replace as far as may be the trust fund. The contrary view would prevent a trustee from ever remedying a breach of trust of this nature without instituting a suit for that purpose, as was done in *Robinson* v. *Robinson*, Ir. Rep. 10 Eq. 189, 24 W. R. Dig. 298. No *cestuis que trustent* are said to have a lien upon the improper investment, but where there is no right to elect to take the land in specie I am not aware of any authority which shows that, before proceedings taken to assert the lien, the trustees cannot realize the property by means of an honest sale. It is analogous to the lien, which in the dissolution of a partnership exists on partnership assets in favour of a retiring partner, or the executors of a deceased partner. Such a lien does not prevent the continuing or surviving partner from selling the assets, *In re Langmead's Trusts*, 3 W. R. 260 and 602, 20 Beav. 20, but I doubt whether this analogy is too favourable to the plaintiff. By means of the sales effected by Insley the purchase-money got into the hands of the corporation sole—*i.e.*, into the proper hands, and I cannot see what harm was done by this. To affect the purchasers from Insley with the consequences of any subsequent misappropriation by the corporation sole would be unjust, unless the sale itself was a wrongful act. On Insley's retirement in 1892, I assume that he in some way secured the purchase-money he had received for the benefit of Hare as corporation sole. He certainly passed on to Hare, as an individual, the unsold property, which so far as appears was of ample value to make good the balance. Hare sold by public auction; no impropriety in the sale is suggested. The legal estate passed to the defendant. The purchase-money was received by Hare, the corporation sole. It reached the proper hands. Hare subsequently stole the money, but I cannot bring myself to make the defendant answerable for his misdeeds. I have assumed in favour of the plaintiff, without deciding it, that the defendant cannot, having regard to Corbin's position of solicitor for vendor and purchaser, be regarded as a purchaser for value without notice. But even on that assumption, I think, for the reasons above stated, that the action fails, and I must dismiss it with costs.

Solicitor for the plaintiff, *Leslie Stock*.

Solicitors for the defendant, *Corbin, Greener, & Cook*.

K. B. Div.
(Kennedy and Phillimore, JJ.) May 15.

SOUTHWELL (SURVEYOR OF TAXES) v. SAVILL BROTHERS (LIMITED). (a.)

Inland Revenue — Income tax — Deductions—"Call of licences"—Necessary annual trade expense—Income Tax Act, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*

Expenses incurred by brewers in applying for new and additional licences for houses owned and leased by them, including payments made to owners of public-houses for the surrender of licences in order to enable the brewers to obtain a new licence, cannot be deducted from the profits made by the brewers and assessable to income tax under Schedule D of the Income Tax Act, 1853.

Case stated by Commissioners for Income Tax for the Division of Beacontree, in the county of Essex, held at Stratford in June, 1900.

Messrs. Savill Brothers (Limited), brewers, of Stratford, the respondents, who had been duly assessed, appealed by Mr. Phillip Savill, one of their directors, against an assessment of £35 000 in respect of their profits as brewers charged upon them for the year ending the 5th of April, 1900.

The facts were set out as follows:

The respondents carry on the trade of brewers at Stratford, and they submitted accounts showing profits for the year 1897 £31,247 6s., for 1898 £33,355 10s. 4d., and for 1899 £30,752 13s. 5d.; but in arriving at these figures they had deducted for the year 1897 £780 16s. 2d., for the year 1898 £1,576 4s. 10d., and for the year 1899 £2,242 15s. 2d., these being sums expended in connection with applications made by the company to the licensing justices for the grant of new and additional licences to houses owned and leased by them, and also to houses not owned by them, but for which the company conduct the applications for the purpose of maintaining, and, if possible, increasing the trade. These expenses consisted of law costs, printing and advertising, preparing petitions, serving notices, court fees, surveyor's fees, and payments for the "call of licences." The sums expended on this latter account during the three years were respectively £250 in 1897, £1,015 15s. in 1898, and £1,525 in 1899.

These amounts represented payments made to the owners of public-houses for the right to call for a surrender of the licences attached to such houses in the event of the justices requiring them to be surrendered before the grant of a new licence for a new house. The respondents contended that as the licensing justices for the Beacontree Division of Essex, in which the bulk of their trade was carried on, required an applicant for a new licence to offer surrenders of existing licences as a preliminary for the grant of a new licence, the amounts paid for the call of these surrenders were a necessary trade expense incurred in the ordinary course of the business of a brewer. When the applications were unsuccessful these expenses were charged to the "licensees' expenses" of the year. When the application was successful, the expenses were added to the cost of the new house. For the Crown, it was contended that the expenses referred to were not exclusively laid out for the purposes of the trade of brewers, but were altogether outside it, being an outlay of capital made with a view to the extension of their business by increasing the number of houses which would be supplied with their goods, and therefore such expenses were not allowable as deductions under the rules of Schedule D.

The Commissioners determined that, having regard to the requirements of the licensing justices, the amounts should be allowed as a necessary annual trade expense incurred by the respondents, and reduced the assessment to £31,852, being the average profits of 1897-1898-1899. They stated this case, however, for the opinion of the court, as the surveyor of taxes was dissatisfied with their decision.

Sir R. B. Finlay, A.G., and *S. A. T. Rowlatt*, for the Crown.

Sir Edward Clarke, K.C. and *Horace Avory, K.C.*, for the respondents.

The COURT gave judgment for the Crown, allowing the appeal.

KENNEDY, J.—The question in this case is whether the respondents, who carry on the trade of brewers at Stratford, in estimating the profits made by them in their business for the purposes of taxation under Schedule D of the Income Tax Act, 1853, are entitled to deduct sums expended by them in connection with the applications made by them for the grant of new and additional licences to houses owned and leased by them, and also to houses not owned by them, but for which the respondents conduct the applications for the purpose of maintaining and, if possible, increasing their trade. The conclusion I have come to is that the Commissioners were wrong, and that these expenses which the brewers seek to have deducted ought not to be treated as a loss to be put against profits. They are expenses which may very well be treated as an investment made out of profits. It was contended by the respondents that as the licensing justices of the Beacontree Division required an applicant for a new licence to offer surrenders of existing licences as a preliminary to the grant of a new licence, the amount paid for the call of these surrenders was a necessary trade expense, although they admitted that when the application was successful the expenses so incurred could not be deducted from profits. On the other hand, it was contended for the Crown that the expenses referred to were an outlay of capital made by brewers with a view to the extension of their business by increasing the number of houses which would be supplied with their goods, and that such expenses were not allowable as deductions under the rule of Schedule D. When, therefore, the Commissioners allowed as a necessary annual trade expense these sums so expended and reduced the assessment accordingly, I think they were wrong. It is admitted that if the proceedings to obtain a licence were successful the expenses could not be deducted, and, therefore, I fail to see on what principle these expenses should be deducted when the proceedings were unsuccessful.

For these reasons my judgment must be for the Crown, as I do not think the respondents are entitled to deduct the expenses in arriving at their annual profits.

PHILLIMORE, J.—I am of the same opinion. The case is obscure. The question is whether the sums of money expended by brewers in obtaining new licences are to be deducted from profits. It is not clear from the case whether the sums are expended in successful pursuits or in unsuccessful pursuits, or partly in successful and partly in unsuccessful pursuits. The matter has been cleared up by the admission of Sir Edward Clarke that if and so far as they are in respect of successful applications he does not support them. He says, however, that none are in respect of successful applications. If they cannot be supported in respect of successful applications, why are they

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

to be supported when they are in respect of unsuccessful applications? They are sums applied in extending the business, and why should those sums be deducted from the profits of brewers assessable to income tax under Schedule D? They may not really be an expenditure of capital. The profits for the year would be exactly the same whether this money was expended at the close of the year or not. It might become a profit if not used for the next year, but the applying for the renewal of these licences appears to me to be a legitimate annual trade expense. I agree that this appeal should be allowed.

Solicitor for the Surveyor of Taxes, *The Solicitor of Inland Revenue.*

Solicitor for the respondents, *Sandilands & Co.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) May 14.

FULLERS (LIMITED) (*Appellants*) *v.* SQUIRE (*Respondent*). (*a.*)

Factory—Workshop—Shop used for process of "adapting for sale"—Factory and Workshop Act, 1878 (41 *Vict. c.* 16), *s.* 93.

A shop was used during the daytime for the selling by retail of bonbons and sweetmeats, and after the ordinary shop hours for the purpose of packing such goods in boxes ornamented and tied with ribbons, so as to make them attractive to purchasers.

Held, on these facts, that such packing was an "adapting for sale" of an article within section 93 *of the Factory and Workshop Act,* 1878, *and that the premises were a "workshop" within the meaning of that section.*

Case stated by G. L. Denman, Esq., metropolitan police magistrate, sitting at Marlborough-street police court.

A complaint and information was preferred by the respondent Rose Elizabeth Squire, an inspector of factories and workshops, against the appellants Fullers (Limited), under sections 13 and 93 of the Factory and Workshop Act, 1878, for that they on the 19th of December, 1900, being then the occupiers of certain premises, the same being a workshop within the meaning of the Factory and Workshop Acts, 1878 to 1895, at 206, Regent-street, within the metropolitan police district, did there and then unlawfully employ a certain woman, to wit one Ada Simmonds, after the legal period of employment, contrary to the said statute.

The magistrate convicted the appellants.

By section 93 of the Factory and Workshop Act, 1878, the expression "workshop" means, *inter alia*, "any premises, room or place not being a factory within the meaning of this Act, in which premises, room or place, or within the close or curtilage or precincts of which premises, any manual labour is exercised by way of trade or for purposes of gain in or incidental to the following purposes or any of them—that is to say (*a*) in or incidental to the making of any article, or of part of any article, or (*b*) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (*c*) in or incidental to the adapting for sale of any article, and to which or over which premises, room or place the employer of the persons working therein has the right of access or control."

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

The appellants were a firm of wholesale and retail manufacturers of bonbons, sweetmeats, and confectionery, carrying on a wholesale business at a factory at Hammersmith, and had, amongst other retail places of business, a retail shop at 206, Regent-street.

At 206, Regent-street, the appellants carried on their business on the ground, first, and top floors. On the top floor artificial flowers were sewn on to the wicker hampers hereinafter mentioned. This floor was separate and distinct from the ground and first floors, and was separately managed and regulated by the appellants, according to the provisions of the Factory and Workshop Acts, 1878 to 1895. The ground and first floors were used for the sale of bonbons, sweatmeats, wicker hampers, packed and decorated as hereinafter set out, cardboard boxes, and confectionery, and also as tea-rooms, and in the manner hereinafter described.

One Ada Simmonds was, on the 19th and 20th of December, 1900, in the employment of the appellants, and was employed by them at their premises at Hammersmith from 8 a.m. until noon, and afterwards on the ground and first floors at 206, Regent-street (with certain intervals), from 1 p.m. on the 19th of December to 3 a.m. on the 20th of December.

For the purposes of such last-mentioned employment Simmonds was furnished by the appellants with an assortment of bonbons and sweetmeats of various shapes, sizes, and colours, also with cardboard boxes, ornamented wicker hampers, ribbons of a variety of sizes and colours, and fancy lace paper necessary for her work hereinafter described.

From 1 p.m. on the 19th of December until 3 a.m. on the 20th of December Ada Simmonds was chiefly engaged in packing and arranging in layers in the cardboard boxes and ornamental hampers an assortment of bonbons and sweetmeats of different colours, shapes, and sizes in fancy patterns, placing sheets of lace paper between each layer of sweetmeats or bonbons, tying up the hampers and boxes when so filled with the fancy ribbons, and in arranging them with bows on the outside of the boxes and hampers with a view to rendering them more attractive to purchasers than they would be if not so tastefully sorted, arranged, packed, and bound up; and the magistrate found as a fact that the same were so rendered more attractive by the work so expended upon them, and that such work required the exercise of skill and taste on the part of Ada Simmonds.

The hampers when so filled, arranged, and dealt with were intended to be, and were, sold to customers as a whole, and at a certain fixed price for the whole, but such price was the same as that charged to customers for such ornamented hampers when empty, *plus* the price of the sweets, no special or separate charge being added in respect of the packing.

On behalf of the appellants, it was contended that the employment of Ada Simmonds by the appellants was not manual labour exercised by way of trade or for purposes of gain in or incidental to any of the purposes set out in section 93 of the Factory and Workshop Act, 1878.

The magistrate held that that portion of the premises at No. 206, Regent-street in which Ada Simmonds was so engaged was a workshop within the meaning of section 93 of the Factory and Workshop Act, 1878, and that she was employed contrary to the provisions of the Factory and Workshop Acts. The question for the opinion of the court was whether the magistrate was right in convicting the appellants of the offence charged in the information.

Joseph Walton, K.C. (*Given* with him), for the

appellants.—The provisions in section 93 were intended to deal with processes in the manufacture of articles, not with the mere preparation of articles for delivery on sale. The process of packing the bonbons and sweetmeats into boxes is not an "adapting for sale" within the section; it is merely getting the sweets ready for delivery when bought by the customer. If this process were "an adapting for sale," then all shops, such as grocers' or druggists' shops, in which articles are packed to make them ready for customers would be workshops within the meaning of the Act. There was no evidence on which the magistrate could find that the place where this woman was employed was a workshop within the meaning of section 93.

H. Sutton for the respondent was not called on.

LORD ALVERSTONE, L.C.J.—This case is very near the line. The facts appear to be that the place at which the work was being carried on was, at any rate for a great part of the day, an ordinary shop, that is to say, sweetmeats and other articles were sold by retail; but the evidence was that up to 3 o'clock in the morning of the 20th of December the premises were being used for this particular operation to be carried on. It must have been continued to a very considerable extent, that is to say, for several hours after the ordinary shop hours had ceased. I do not wish to express any opinion upon the point raised by Mr. Walton, that if in an ordinary shop during shop hours packing takes place, that will of necessity bring the case within section 93 of the Act of 1878. We have to consider whether there was any evidence on which the magistrate could have come to the conclusion he did. I have no doubt that what was done does come within the words of the section. There were boxes of sweetmeats and they were being adapted for sale by the operation the packer was carrying on, namely, putting the bonbons and sweetmeats in layers, and placing paper in between the layers, and ornamenting and adorning the boxes afterwards. If this had been done in a room in a separate factory, or a building in which sweets were bought wholesale, I should have no doubt about it. I was impressed at first by the ingenious argument of Mr. Walton, but I think the magistrate was entitled to hold, on the evidence before him, that what was being done on these premises was not being done as an incident of the shop business, but was an adapting of the articles for sale. I think it is impossible to say there is no evidence on which he could come to the conclusion he has formed, and I think the appeal must be dismissed.

LAWRANCE, J.—I agree.

Appeal dismissed with costs.

Solicitors for the appellants, *Beaumont & Son.*

Solicitors for the respondents, *Solicitor to Treasury.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Phillimore, JJ.) May 13.

LEE *v.* BENT.
BARLOW *v.* NOBLETT. (*a.*)

Adulteration—Food and drugs—Certificate of analysis, sufficiency of—Arsenic in beer—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.

In two prosecutions under the Sale of Food and Drugs Act, 1875, *for selling beer not of the nature, substance, and quality demanded, certificates of analysts were tendered as evidence which, in the one case, stated that the samples submitted to them contained "arsenic," and, in the other, "a serious quantity of arsenic."*

Held, that neither of the certificates were sufficient.

These two cases involved similiar points of law under the Sale of Food and Drugs Act, 1875, and were heard together.

Lee v. *Bent* was a case stated by justices of Eccles, in Lancashire.

An information was preferred by James Bent, the respondent, against Frank Lee, the appellant, under section 6 of the Sale of Food and Drugs Act, 1875, charging him with selling to the prejudice of the appellant (the purchaser) beer which was adulterated with arsenic and was not of the nature, substance and quality demanded by the purchaser. The respondent purchased from the appellant a quantity of beer, and having duly complied with all the requirements of the Sale of Food and Drug Acts, caused part thereof to be analysed by public analyst. The public analysts only delivered their certificate as follows: "To Mr. Superintendent Bent—We, the undersigned, analysts for the County of Lancaster, do hereby certify that we have received on the 11th day of December, 1900, from police-constable Chipchase, a sample of beer for analysis (which was marked No. 855), and have analysed the same, and declare the result of our analysis to be as follows: 'We are of opinion that the said sample contains arsenic.' *Observations*: No change has taken place in the constitution of the sample that would interfere with the analysis" (signed by the analysts).

At the hearing of the information the above certificate was tendered as evidence on behalf of the respondent; but it was contended on behalf of the appellant that the certificate was bad on the following ground: (*a*) that the certificate of the analyst was not in the form presented by section 18 of the Sale of Food and Drugs Act, 1875, and as set forth in the schedule thereto; (*b*) that the certificate did not state the constituent parts of the sample analysed, and did not state the quantity of arsenic alleged to be therein; (*c*) that the certificate did not state the weight of the sample analysed. One of the public analysts who signed the certificate gave oral evidence on behalf of the respondent. It was proved to the satisfaction of the justices that the sample contained arsenic to such an extent as to be injurious to health, and that absolutely pure beer does not contain arsenic.

The justices admitted the certificate in evidence, and being of opinion that the offence had been committed, convicted the appellant.

Barlow v. *Noblett* was a case stated by justices of Bury, in Lancashire.

The facts of this case were similar in all respects to those in the preceding case, with the exception that the declaration in the analyst's certificate was, "We are of opinion that the said sample contains a serious quantity of arsenic."

The certificate was admitted in evidence and the appellant was convicted.

Section 18 of the Sale of Food and Drugs Act, 1875, provides that "The analysis shall be in the form set forth in the schedule hereto, or to the like effect." The form referred to is as follows:—

"To ,

I, the undersigned, public analyst for the , do hereby certify that I received on the day of , 18 , from , a sample of for analysis (which then weighed), and have analysed the same, and declare the result of my

(*a.*) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

analysis to be as follows: 'I am of opinion that the same is a sample of genuine'; or, 'I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under.'"

Montague Lush (*Fletcher Moulton, K.C.*, with him) for the appellants in each case. There is not sufficient precision in the certificates. They ought to have stated the proportion of arsenic in the sample analysed: *Fortune* v. *Hanson*, 44 W. R. 431, [1896] 1 Q. B. 202, and *Newby* v. *Sims*, [1894] 1 Q. B. 478. The justices were therefore wrong in admitting them as evidence.

Joseph Walton, K.C. (*Pickford, K.C., E. Sutton*, and *F. Mellor* with him), for the respondents in each case.—A certificate need not set out the constituent parts of the sample analysed. Where the case is not one of adulteration it need only state the result of the analysis: *Bakewell* v. *Davis*, [1894] 1 Q. B. 296, and *Bridge* v. *Howard*, 45 W. R. 78, [1897] 1 Q. B. 80. The result of the analysis was sufficiently stated in both of the certificates under consideration. The certificate of the analyst is not intended to be conclusive evidence of an offence having been committed. Section 21 only provides that it shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst be called as a witness. A certificate is not bad because it is insufficient to warrant a conviction. In *Fortune* v. *Hanson* and *Newby* v. *Sims*, which were both cases of adulterated milk, the analysts usurped the jurisdiction of the justices by stating that the sample contained so much per cent. of "added water," without stating what were the actual proportions of milk and water. It was held that they ought to have left it to the justices to decide how much of the water was added. Here there was no such usurpation of jurisdiction. The declaration in the certificates meant that there was an appreciable quantity of arsenic in the samples.

Lord ALVERSTONE, L.C.J.—In the first of these cases the analyst has certified that the sample contained arsenic, and in the second case that it contained a serious quantity of arsenic. Now we are of opinion that these two certificates are not sufficient. It is very important that the practice should be uniform, and we do not think it possible, after the series of decisions on the subject, to say that the certificate of the analyst can be other than a document issued in proper form, and that that certificate ought to contain in it sufficient materials to enable the magistrates to form a judgment on the face of the certificate that the offence charged had been committed. We need not consider whether a certificate would be bad which went further, but we think, at least, it should contain that. There are many cases in which the only evidence is the certificate of the analyst. Nothing is said in these two certificates as to what ordinary beer—I will not say absolutely pure beer, but ordinary beer—contains, and nothing is said as to the degree or amount of arsenic found in the sample, except in the one case that arsenic was there, and in the other case that there was a serious quantity of arsenic. We think, having regard to the necessary protection of the person charged, that the certificates ought to contain further particulars to enable the magistrates to have before them materials on which they can come to a conclusion. I think that we could not decide otherwise without overruling several decisions which seem to us to be founded in good sense. We need not consider whether or not in every particular case it is absolutely necessary to say that the certificate must set out all the proportions of the ingredients contained in the sample, but we think we are justified in saying that these certificates are not sufficient, and the convictions in both cases must therefore be quashed.

LAWRANCE, J., concurred.

Appeal allowed.

Solicitors for the appellants, *Snow, Fox, and Higginson*, for *Harcourt E. Clare*, Preston.

Solicitors for the respondents, *Grundy, Kershaw, Samson, & Co.*, for *Grundy, Kershaw, Samson, & Co.*, Manchester.

Prob. Div. & Adm. Div. } June 10.
Admiralty. }

"THE WINKFIELD." (*a.*)

Ship—Admiralty—Collision—Limitation of liability—Loss of mails—Locus standi *of Postmaster-General as bailee—Negligence of stranger.*

The Postmaster-General, being under no liability to his bailors for property bailed to him as Postmaster-General, cannot on behalf of the bailors recover for the loss of the property bailed, the loss being caused by the negligence of a stranger.

Claridge *v* The South Staffordshire Tramway Co., [1892] 1 *Q. B.* 422, 40 *W. R. Dig.* 11, *followed.*

This was a motion brought by his Majesty's Postmaster-General to review and vary the registrar's report, dated the 29th of March, 1901, in an action by the owners of the steamship *Winkfield* against the owners of the steamship *Mexican*, in which they claimed to limit their liability under the terms of the Merchant Shipping Act, 1894, in respect of a collision which occurred on the 5th of April, 1900, between the steamship *Mexican* and steamship *Winkfield*.

It appeared that the collision occurred in a thick fog off Table Bay, Cape Town, and resulted in the loss of the steamship *Mexican* with a portion of the mails she carried.

In April of last year the owners of the steamship *Winkfield* commenced an action in this court in which they admitted in writing liability as to a moiety of the damages proceeded for in the action subject to their statutory right to limitation of liability.

On the 24th of July a decree limiting the liability to £32,514 17s. 10d. was obtained, and that sum was paid into court on that day, which was the amount of their £8 statutory liability.

A large number of claims had been put forward in the case, among which was one by the Postmaster-General on behalf of himself and the Postmasters-General of Cape Colony and Natal in respect of the loss of registered letters and parcels for which claims had been made upon him.

The claim formulated was (1) for the value of the lost bags and cases belonging to the Post Office, (2) for the contents of a great number of parcels shipped either from Cape Colony or Natal, and (3) for the contents of a number of registered letters from those colonies.

Sir R. Finlay, A.G., and *R. B. D. Acland*, for the Postmaster-General, said that a number of claims had been made upon the Post Office by the senders and owners of lost letters and parcels, and as being a convenient course and to save expense these claims had been put forward by the Postmaster-General as bailee. It had been argued against the Post Office that inasmuch as the Crown was not bound by the statutes limiting the liability, the Post Office

(*a.*) Reported by GWYNNE HALL, Esq., Barrister-at-Law.

ought not to recover against any property of the owners of the steamship *Winkfield*, and that the claims ought to be marshalled so as to exclude the Crown from receiving against the fund in court. The cases, *Claridge* v. *The South Staffordshire Tramway Co.* [1892] 1 Q. B. 422, 40 W. R. Dig. 11; *The Minna*, L. R. 2 A. & E. 97, 17 W. R. Adm. Dig. 20; and *Meux* v. *The Great Eastern Railway Co.*, 43 W. R. 680, [1895] 2 Q. B. 387, were cited, it being contended that the decision in the case of *Claridge* v. *The South Staffordshire Tramway Co.* was wrong. Inasmuch, however, as the case was decided in the Divisional Court it was no doubt binding upon this court, and if it was to be reviewed it must be in the Court of Appeal.

Scrutton, K.C., for the owners of *The Mexican*,

Bateson, for the owners of the cargo, and

Head, for the owners of *The Winkfield*, were not called upon.

JEUNE, P., in delivering judgment, said that the point raised was a most important one, and if the Postmaster-General had not the power he claimed to have, he certainly ought to have it. The case, however, of *Claridge* v. *The South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, was exceedingly clear on the point. It should, however, be remembered that this court, although it often followed by analogy common law authorities, was not a court of common law at all, and therefore it would be important to consider what the civil law had to say on the matter. The motion would be dismissed, with costs, and the whole matter, including the question of costs, must be considered in the Court of Appeal.

Solicitors, *Sir Robert Hunter; Thomas Cooper & Co.; Jas. Ballantyne; Botterell & Roche.*

House of Lords.

From C. A. (England). } Dec. 10.

LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. (a.)

Inland revenue—Income tax—Deduction of tax from interest or annuities—"Payable out of profits or gains brought into charge to such tax"—Customs and Inland Revenue Act, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 3.

The London County Council raised money on loan by the creation and issue of Metropolitan Consolidated Stock, which with the dividends and sinking fund were charged on the lands, rents, and property of the council, and in addition the stockholders had the security of the rates. In the year 1897-8 *the council claimed exemption from income tax on rents received by them and on interest on advances by them to other public bodies, as having been paid out "of profits or gains already brought into charge."*

Held, that section 24, *sub-section* 3, *of the Customs and Inland Revenue Act,* 1888, *entitled them to do so, for the income tax assessed under the various schedules is one tax, and not a collection of taxes essentially distinct.*

Decision of Court of Appeal (48 *W. R.* 294, [1900] 1 *Q. B.* 192) *reversed.*

This was an appeal from an order of the Court of Appeal (A. L. Smith, Collins, and Vaughan Williams, L JJ.) affirming that of the Divisional Court (Day, J., and Lawrance, J.), 48 W. R. 294, [1900] 1 Q. B. 192.

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

The facts are given in the report below, the question being to what extent the county council were entitled to retain the sums deducted by them in respect of income tax when they paid dividends to the holders of the Metropolitan Consolidated Stock. The sections of the Acts appear in the judgment.

Sir Edward Clarke, Q.C., and *Jelf, Q.C.* (*Ryde* with them), for the appellants.

The Attorney-General (*Sir R. B. Finlay, Q.C.*) and *Danckwerts, Q.C.* (*Rowlatt* with them), for the respondent.

Lord MACNAGHTEN.—Acting under statutory authority, the Metropolitan Board of Works, and the London County Council as their successors, have from time to time raised money on loan by the creation and issue of stock known as Metropolitan Consolidated Stock. This stock and the dividends upon it, and the sums required to form a sinking fund are charged "indifferently" on the whole of the lands, rents, and property belonging to the council, and, in addition to the benefit of this charge, the stockholders have the security of the rates.

For the financial year 1897-8, the year to which your lordships' attention was specially directed, the dividend on Metropolitan Stock amounted in round figures to £1,140,000. On the other hand, in that year the Council received about £100,000 in rents, and about £500,000 for interest on authorized advances to other public bodies. The balance required to make up the dividend was raised by rates. In their return to the Commissioners of Inland Revenue the council charged themselves with income tax on the proceeds of rates applied towards the payment of the dividend, but they claimed exemption in respect of the rest of the money so applied as having been paid out of profits or gains already brought into charge. The commissioners disallowed the claim. They insisted that the council was bound to pay over the amount of income tax deducted from interest on Metropolitan Stock so far as the deduction was made out of moneys not brought into charge under Schedule D. It was no answer to say that the moneys had been brought into charge under some other schedule. That was the principal question in the controversy before your lordships. There was another point raised on behalf of the Crown which I confess I do not quite understand. It was seriously argued that, inasmuch as the holders of Metropolitan Stock have a charge on all the property of the council—capital and income alike—for their interest as well as for their principal, and might in case of default resort to any and every item comprised in their security, therefore it would be right and proper before default, and merely for the purpose of computing income tax, to treat the dividend on Metropolitan Stock as paid rateably out of the capital of the property belonging to the council and the different branches of their income That is an ingenious, but not, I think, a very business-like suggestion. It is enough to say that it is the plain duty of the council, not being beneficial owners of the funds which they administer, to keep down annual charges out of annual income as far as it will extend, and not, perhaps, the less so because the instructions of the Treasury, under whose financial control they are placed, require them to keep accounts distinguishing capital from income. The return to which I have already referred shows that the council has dealt with the matter properly. I cannot see that there is anything calling for further inquiry. I pass from that point. It is not, I think, open to argument. I cannot say as much for the principal matter in dispute. That involves the construction of a modern Act of Parliament.

The question depends upon the meaning and effect of sub-section 3 of section 24 of the Customs and Inland Revenue Act, 1888, which enacts that "upon payment of any interest of money or annuities charged with income tax under Schedule D, and not payable or not wholly payable out of profits or gains brought into charge to such tax," the rate of income tax in force at the time shall be deducted and an account rendered to the Commissioners of Inland Revenue "of the amount so deducted or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge as the case may be." And then the amount deducted is declared to be a debt due to the Crown and recoverable accordingly.

It will be observed that there is a change of language, and that the word "paid" takes the place of the word "payable" which occurs in the earlier part of the sentence. The result, therefore, is that so far as interest of money or annuities chargeable under Schedule D are in fact paid out of profits or gains "brought into charge," whether in law payable thereout or not, the person who makes the payment and deducts the rate of income tax is not accountable to the Crown for the duty deducted.

The difficulty which has given rise to the present claim on the part of the Crown is created by the use of the words "profits or gains brought into charge to such tax" in the earlier part of the sub-section, and the words "profits or gains brought into charge" in the latter part. What is the meaning of "such tax"? And what is the meaning of "brought into charge"? The Divisional Court and the Court of Appeal have both held that the expression "such tax," referring back to the foregoing words, means "income tax under Schedule D," and that the expression "profits or gains brought into charge" in the latter part of the sub-section means "profits or gains brought into charge under that schedule," and not "profits or gains brought into charge by virtue of the Income Tax Acts."

Now, if one had to construe the enactment with nothing but the words of the sub-section to go upon, ignoring the state of the law at the time when the enactment was passed, and supposing, as one might possibly suppose from the language used, that there was a special or peculiar sort of income tax which could be properly described as "income tax under Schedule D," still I think it would be difficult to give any satisfactory reason why the expression "such tax" should mean "income tax under Schedule D" rather than "income tax" simply, or why the expression "brought into charge" should be limited to what is brought into charge under one particular schedule. But the sub-section in question, as the Act itself declares, is introduced by way of amendment. And how can you understand the true meaning and effect of an amendment unless you bear in mind the state of the law which it is proposed to amend? It is necessary, therefore, to take a wider survey; and then, I think, the meaning of the enactment becomes plain enough. I cannot help thinking that the advisers of the Crown have somewhat misapprehended the scope and leading principles of our income tax legislation, and have not paid sufficient attention to the state of the law at the time when the Act of 1888 was passed. The consequence is that now, when the Act of 1888 has been in force for a number of years, it is discovered that a provision described in the Act as an amendment has worked a radical change in the law.

Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D and those assessed under Schedule A, or any of the other schedules of charge. One man has fixed property; another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Schedule A contains the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted as a general rule. But there again, if the subject of charge be lands let at rack-rent, the annual value is "understood to be the rent by the year at which the same are let." In every case the tax is a tax on income, whatever may be the standard by which the income is measured. It is a tax on "profits or gains" in the case of duties chargeable under Schedule A, and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge. And it is to be observed that the expression "profits or gains," which occurs so often in the Income Tax Acts, is constantly applied without distinction to the subjects of charge under all the schedules. I need not trouble your lordships by giving instances of this use of the expression, because I shall presently have occasion to call your lordships' attention to a section in the Act of 1842 in which it so happens that the expression "profits or gains arising from lands, tenements, hereditaments, or heritages" is used to denote the annual value of lands capable of actual occupation brought into charge under Schedule A. I will only refer in passing to one rather striking example. The "general declaration" required by the Act of 1842, s. 190, Sched. G, 15, is described as "general declaration by each person returning a statement of profits under Schedules (A), (B), (D), or (E)."

Unfortunately the learned judges of the courts below took a very different view in regard to this point. That, I think, was the initial mistake. In the Divisional Court the argument on behalf of the Crown as reported was this: "The tax under Schedule A is a tax on property and is totally distinct from income tax under Schedule D." It appears from the shorthand notes that that argument was adopted by the court without any qualification. Indeed, the presiding judge seems to have held that "Schedule A" was "not part of the Income Tax Act." The passage is omitted in the regular reports, though it is really the key to the judgment. In the Court of Appeal the argument apparently was not put quite so high. But there is this observation in the leading judgment: The tax under Schedule D is a tax upon 'gains and profits,' an entirely different tax from the tax under Schedule A." The other members of the court agreed. With all deference, I do not think that that is a sound view of the Income Tax Act.

It is interesting and, I think, instructive to trace the development of income tax legislation. A very clear account of it is to be found in Mr. Stephen Dowell's excellent work. I turn at once to the original Act—the Act of 1799 (39 Geo. 3. c. 13), as amended by 39 Geo. 3. c. 22. For the purposes of the tax the income for the current year of persons to be assessed was ranged under four divisions: "I. Income arising from lands, tenements, and hereditaments. II. Income arising from personal property and from trades, professions, offices, pensions, stipends, employments and vocations. III. Income arising out of Great Britain.

V. Income not falling under any of the foregoing rules." In the form of return required from the taxpayer, which is given in a schedule, these four heads of income were represented by nineteen "cases," of which the first fourteen fell under Division I. The taxpayer had to return his total income under each and all of these cases. From this total income the taxpayer was allowed to make a great many deductions under various heads, also specified in the schedule. There were deductions for rents of all sorts. There was a deduction for "annual interest for debts," whether "personal" or charged on property enumerated in the several "cases"—a deduction for "allowances to children or other relations," and a deduction for "annuities." The total amount of deductions was to be subtracted from the total amount of income, and the difference was the "income chargeable." That general return, as Mr. Dowell observes, was regarded as the most objectionable feature in the income tax. By the Act of 1803, in lieu of a general return, particular returns of income from particular sources were required. That was the origin of the five schedules of charge with which we are now so familiar. It was not that there was any difference in kind between the income arising from the different sources. The alteration was made in order to avoid disclosure of the taxpayer's circumstances. This new method was found to work so well that it has been continued in every Income Tax Act ever since. The Act of 1853, after imposing the duties of income tax by section 1, distributes those duties in section 2 among the different Schedules A, B, C, D, and E, on the ground, as there stated, of convenience of classification and facility of collection.

Another departure was made in 1803 from the system adopted in the Act of 1799. The principle was established of taxing income at its source, and afterwards distributing the burden among those upon whose shoulders it ought to fall. Speaking generally, the deductions authorized by the Act of 1799 were prohibited altogether, and the taxpayer liable to an annual payment, whether payable out of any subject of charge or not, was authorized to deduct and retain the tax upon the payment which he was bound to make. And so the law stood when the Act of 1888 was passed.

I need not trouble your lordships with a reference to all the provisions of the Income Tax Acts which authorize a person who has paid income tax on what is not really available income, because it includes money which he has to pay over to someone else, to deduct and retain the tax upon that payment. But it is, I think, worth while to refer very briefly to sections 102, 103, and 104 of the Act of 1842. In the Act of 1842 the charge upon annuities, yearly interest of money, and other annual payments is not expressly included in Schedule D, where it was afterwards placed by the Act of 1853. It forms the subject of a distinct section. The charging section is section 102. It extends to all annual payments. The charge is to be according to, and under and subject to, the provisions by which the duty in the third case of Schedule D may be charged. Then there is a provision that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act" (your lordships will note those words; they extend to income chargeable under each of the five schedules), no assessment is to be made upon the person entitled to the annual payment. The whole of the profits and gains are to be charged, and the person charged in respect thereof is entitled to deduct a proportional part of the duty when he comes to make the annual payment to which he is liable. In every other case the annual payment is charged with duty in the hands of the recipient. Then section 103 imposes penalties on persons refusing to allow the deductions authorized by the Act. It is only material, as showing that these provisions with regard to annual payments extend to annual payments out of profits or gains chargeable under all the different schedules. Then comes section 104, a curious section, and one rather clumsily framed. It provides that when it is proved to the satisfaction of the commissioners "that any annual payment shall be annually paid out of the profits and gains *bonâ fide* accounted for and charged by virtue of this Act at the rate and according to the rules specified in Schedule D," a certificate may be granted entitling the person so assessed, upon making the annual payment, to deduct a proportionate part of the duty; and then it goes on to say that "no such certificate shall be required when such payments are to be made out of the profits or gains arising from lands, tenements, hereditaments, or heritages as before mentioned, or of any office or employment of profit, or out of any annuity, stipend, or any dividend or share in such public annuities as are herein mentioned, but such deductions may be made without having obtained such certificate." So it came to this in the result, that a certificate was only required when the payment was to be made out of profits or gains chargeable under Schedule D.

A change was made by the Act of 1853 in ease of the taxpayer. Section 40 of that Act had the effect of dispensing with the certificate of the commissioners altogether. It authorized "every person" liable to the payment of rent or yearly interest of money, or any other annual payment, on making such payment to "deduct and retain thereout" the rate of duty then payable. It is obvious that that enactment was not a sufficient protection for the Crown. It contained no provision for cases where the annual payment was made out of gains or profits not brought into charge by virtue of the Act. And the person making the annual payment was not bound to make a deduction for income tax; if he did, he was apparently not bound to account to the Crown except in the case of payment out of rates under section 102 of the Act of 1842. It was to stop this gap, as it seems to me, that the enactment now under consideration was passed. It was not intended, I think, to effect a revolution in income tax law.

Now, what has the Act of 1888 really done? It is no longer optional for a person who has to make an annual payment to deduct income tax. He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty. That is a substantial improvement, and a reasonable security for payment of duty in many cases where formerly it was liable to be evaded. But to read the enactment as imposing a double duty would be contrary to the whole scope of income tax legislation, and whimsical in the highest degree, when you consider that the double burden would necessarily fall upon the fundholder, in whose case the collection of duty is certain, while a person chargeable under Schedule D would be expressly exempted from double duty.

It seems to me that the mistake comes from misreading sub-section 3 and making a pause in the sentence at a wrong place, and so treating the words "income tax under Schedule D" as a compound expression instead of connecting the words "under Schedule D" with "charged," to which they properly belong. When the enactment speaks of "interest of money or annuities charged with income tax under Schedule D," it does not refer to such interest or annuities as being charged with a special kind of income tax. There is really no such thing as income

tax under Schedule D in that sense. The expression only means "assessed to income tax in accordance with the provisions of Schedule D."

It seems to me, therefore, that the contention put forward on behalf of the Crown cannot be maintained; and I am of opinion that the information must be dismissed with costs both here and below, and I move your lordships accordingly.

Lord DAVEY.—I had prepared the judgment which which I am about to read before I had the advantage of seeing that which has been delivered by my noble and learned friend Lord Macnaghten. There is necessarily some repetition in what I have written; but I apologise to your lordships for troubling you with the same matter twice over. I think it better, as we are differing from the court below, to read my own judgment.

I am against the contention of the Crown on both the points which have been argued. The enactment on the construction of which the case turns is the 3rd sub-section of section 24 of the Customs and Inland Revenue Act, 1888; but in order to understand this section it will be proper to refer to a few sections of the earlier Income Tax Acts. By the 10th rule of section 60 of the Act of 1842, which is applicable to Schedule A, it is provided (reading it shortly) that where any lands are subject or liable to the payment of (*inter alia*) any annual payment thereupon reserved or charged the owner may retain the proportionate part of the tax out of such annual payment. The person entitled to receipt of the annual payment is bound to allow the deduction, and the owner is discharged of so much money as if the same had actually been paid to the person entitled to the annual payment. An annual payment of course includes interest reserved by the year on a mortgage, notwithstanding the suggestion of Mr. Danckwerts to the contrary. It has been continuously so construed by landowners, mortgagees, and the Crown, and if anything were wanted to make clear that which was clear enough before, it will be found in the 11th rule, which makes special provision for the case of a mortgagee in possession who receives the rents and pays himself his own interest, allowing the amount of the tax on his interest to the mortgagor. Section 102 of the same Act brings the yearly interest of money, whether payable as a charge upon any property or as a reservation thereout or as a personal debt or obligation, within the third case of Schedule D; but it is provided that where the same shall be "payable out of profits or gains brought into charge by virtue of this Act" (your lordships will observe the language) no assessment is to be made upon the person entitled to such interest, but the whole of such profits or gains is to be charged with the duty upon the person liable to make the payment, and he is entitled to deduct the proportionate amount of the tax from the yearly interest, and is thereby discharged of so much money as such deduction shall amount unto. I construe the words "profits or gains brought into charge by virtue of this Act" as including all annual income charged with the tax under any of the schedules, and not as confined to profits charged under Schedule D. This is, I think, the natural meaning of the words, but it is made clear by the terms of section 104, enabling the commissioners to grant a certificate of the tax having been paid, and making such certificate a condition precedent to the deduction where the annual payment is made out of profits and gains "charged by virtue of this Act at the rate and according to the rules specified in Schedule D." Then follows a proviso in these terms:

"Provided always that no such certificate shall be required where such payments are to be made out of the profits or gains arising from lands, tenements, hereditaments, or heritages as before mentioned, or of any office or employment of profit, or out of any annuity, pension, stipend, or any dividend or share in such public annuities as are herein mentioned, but such deductions may be made without having obtained any certificate."

Your lordships will observe, in passing, the bearing which the language of these sections has upon one of the arguments addressed to us, of which more hereafter. It is not open to doubt, and was not disputed, that sections 60 and 102 alike mean that the person paying the yearly interest may deduct and retain the amount of the tax for his own benefit, and the scheme of the Act is so far clear and is in favour of the taxpayer. It was, no doubt, considered that the real income of an owner of incumbered property, or of property charged (say) with an annuity under a will, is the annual income of the property, less the interest on the incumbrance or the annuity, and the mortgagee or annuitant and the owner of the property are, in a sense, entitled between them to the income, and therefore the Crown receiving the tax on the whole income, in the first instance, from the owner, has no further claim against the mortgagee or annuitant on whose account the owner is deemed to have paid as well as on his own; or, in other words, the Crown under this Act cannot demand the tax twice over on the same income.

The only other section I need refer to is section 40 of the Income Tax Act, 1853 (16 & 17 Vict. c 34), by which persons liable to the payment of any yearly interest or other annual payment, either as a charge on any property or as a personal debt or obligation, are empowered to deduct the income tax thereout.

I now turn to the section to be construed, which is *in pari materia* with and complementary to the earlier enactments. The words are:

"Upon payment of any interest of moneys or annuities charged with income tax under Schedule D, and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be, and such amount shall be a debt due from such person to Her Majesty and recoverable as such accordingly."

I confess I should have thought the meaning of these words sufficiently plain when read with the earlier enactments. Their general effect is to make it compulsory on the person paying taxable interest of money (not payable out of income already taxed) to deduct the tax and account for it to the Crown (as in such a case he would be bound to do) instead of leaving the deduction to his option, as was done by section 40 of the Act of 1853. But the singular thing is that the learned Attorney-General and his junior, while they tell us that this is a mere collecting section for improvement of the machinery of collecting the tax, and not a charging section, nevertheless give a construction to the words which seriously and materially increases the burden on the subject, and enables the Crown in the present case, and other similar cases, to claim payment of the tax twice over. They say that the words "brought into charge to such tax" mean "to income tax under Schedule D," and the section therefore applies to all interest charged upon or payable out of income not within that schedule. In other words, the effect (they say) of the section is to deprive the subject of the

benefit of rule 10 of section 60 and section 102 of the Act of 1842. The incumbered owner of land or of property or income within Schedule C and E must deduct the tax from his incumbrancer's interest, but pay it over to the Crown, instead of retaining it for his own benefit as previously he was entitled to do. One wonders why it has taken ten years or more to develop this view of section 24 of the Act of 1888, which, if correct, must be immensely beneficial to the Crown.

In my opinion, this construction of the section is entirely wrong. Grammatically I think it wrong. I think that the words "charged with income tax under Schedule D" mean "charged under Schedule D with income tax," and the words, "such tax" mean the tax which is called in the Act "income tax." It is said that the tax imposed on property within Schedule A is not strictly an income tax, because it is levied on the annual value of property and not on the profits received by the owner. This, no doubt, is so, and if one were writing a treatise on taxation it would be proper to refer to this distinction. But the question is, what do the words "income tax" mean in the language of the Legislature and in this Act? I believe the expression is not used in either of the principal Acts of 1842 and 1853, but by the Short Titles Act, 1892, these statutes have received the title of the Income Tax Acts of 1842 and 1853. The first instance of the words being used by the Legislature of which I am aware is in the title of another Act of 1853, relating to deduction in respect of life insurance. But in an Act of 1856, for relieving Scotch landlords in respect of public burdens not borne by landlords in England, "income tax" is the expression used for describing the tax levied under Schedule A. And not to weary your lordships, the words may be found in all the subsequent Acts (which have been passed almost yearly) as describing the tax which is levied under all the five schedules without distinction. In this Act of 1888, section 24 is one of a group of sections collected under the heading of "Income Tax." By section 23 it is enacted that there shall be charged, collected, and paid the following duties of income tax under all the five schedules. I come to the conclusion that the expression "income tax," in the language of the Legislature, is a generic description of the tax which is levied under all the schedules alike, and is so used in section 24.

Again, it is said (if I understood Mr. Danckwerts rightly) that the expression "profits and gains" has a technical, or almost technical, meaning, as descriptive only of the taxable subjects comprised in Schedule D. No doubt from the nature of the case the word "gains" is more frequently, though not exclusively, used in Schedule D. But unluckily for the argument, the word "profits" is the word selected by the Legislature for describing generally the subjects of taxation under the Income Tax Acts. The title to, as well the Act of 1842 as that of 1853 is "An Act for granting to Her Majesty duties on profits arising from property, professions, trades, and offices." I have already drawn attention to the language of section 102, and to the use of the words "profits or gains arising from lands, tenements, hereditaments, and heritages" in section 104 of the Act of 1842. The truth is that the income tax is intended to be a tax upon a person's income or annual profits, and although (for conceivable, and no doubt good reasons) it is imposed in respect of the annual value of land, that arrangement is but the means or machinery devised by the Legislature for getting at the profits. Comparing sections 102 and 104 of the Act of 1842 with this section, I think the words "profits or gains brought into charge to such tax" are intended to be, and are the exact equivalent of the words "profits or gains brought into charge by virtue of this Act" in section 102. I am therefore of opinion that the words "profits or gains" are apt words, and the words chosen by the Legislature for describing not only the taxable subjects under Schedule D, but also those comprised in Schedules A and B and the other schedules; and I hold that the London County Council are entitled to retain for their own benefit so much of the deduction made by them from the interest paid by them to their mortgagees in respect of income tax as is equal to the income tax paid by them on their real estate under Schedule A, or, which comes to the same thing, to account to the Crown only for the deducted income tax on so much of the interest as is not paid out of their income which has already been taxed.

On the second point I find it difficult to express myself with becoming respect. The contention is that as the interest on their Consolidated Stock is charged on the whole of the lands, rents, and property belonging to the council and on their rates, such interest ought for the benefit of the Crown to be apportioned rateably over all the subjects of the charge, and only a rateable proportion deemed to be paid out of their income from rents or from interest receivable by them from their own debtors. The proposition has the merit of novelty. Admittedly there is no authority for it. The attention of your lordships was not called to any statutory enactment directing any such procedure, or to any principle of law which prescribes it. On the contrary, the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. It is not required by the Income Tax Acts in order to raise the right of deduction and retention that the interest or annual payment shall be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of the taxable income, though there may be other subjects of charge. But the mortgagor cannot, of course, retain against the Crown more income tax than he has paid. One of the learned judges in the Court of Appeal seems to have thought the case might be different if the county council had made some appropriation of their funds, though it is difficult to see how any account-keeping by the debtor could alter the rights of the Crown. If such appropriation be wanted, I find it in the regulations approved by the Treasury under the statutory powers for the division of the account of the Consolidated Loans Fund into an income account and a capital account.

I am of opinion that the judgment appealed from should be reversed, and that the information should be dismissed with costs, and the respondent should also pay the costs of the appellants in the Court of Appeal and in this House.

Lords BRAMPTON and ROBERTSON concurred.

Lord LINDLEY.—The main question raised by this appeal turns on the true construction of section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8). This enactment has no special reference to the London County Council, but is a general enactment applicable to that body, inasmuch as they have to pay interest to the holders of their Consolidated Stock.

The language of the enactment is such that, if it had to be construed by itself, I should feel some difficulty in putting upon it any other interpretation than that which has been put upon it by the court of first instance and by the Court of Appeal, and which is contended for by the Crown. In other words, I

should read "such tax" in section 24, sub-section 3, as applying to income tax under Schedule D, and not as applying to income tax generally. But the enactment in question cannot be read by itself. Its object is simply to cure a defect in prior enactments, not to remodel them. Section 24, sub-section 3, must be read with them, and, so far as its language permits, it must be so construed as to accomplish its special object and produce with them results which are in conformity with the principles on which they are framed, and with the scheme of taxation contained in their provisions. The construction to which I have alluded appears to me to be quite inconsistent with those principles and with such scheme. It introduces anomalies which are startling and irrational, and which there is no reason to suppose that the Legislature ever contemplated. The judgments of Lord Macnaghten and Lord Davey, which I have had the advantage of reading, have made this so clear, that it is quite unnecessary for me to say more upon this point. The language of section 24, sub-section 3, is by no means so plain and free from ambiguity as to justify a construction which leads to such results; and if authority is wanted to shew that the Income Tax Acts must be treated as a whole, such authority will be found in the decision of this House in *Colquhoun* v. *Brooks*, 38 W. R. 289, 14 App. Cas. 493. The courts below have not, in my opinion, given sufficient weight to those sections in the earlier Acts to which our attention was called by the appellants, and which have been so fully commented upon by the noble lords who have preceded me.

I also agree with what they have said on the subordinate question of apportionment.

For the reasons given by them, I have come to the conclusion that the judgments appealed from cannot be supported, and that the appeal should therefore be allowed.

Appeal allowed.

Solicitor for appellants, *W. A. Blaxland.*

Solicitor of Inland Revenue, for respondent.

Court of Appeal.

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) — July 5, 12.

In re BAKER.
Ex parte LUPTON. (*a.*)

Bankruptcy—Lease—Assignment—Mortgage by sub-demise — Bankrupt assignee — Disclaimer — Vesting order—Exclusion—Application by lessor—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-section* 6.

Where the trustee in bankruptcy of an assignee of a lease has disclaimed the lease which the bankrupt had mortgaged by a sub-demise, the original lessor is, under section 55 *of the Bankruptcy Act,* 1883, *entitled, notwithstanding the solvency of the original lessee, to apply to the court for an order vesting the property in the mortgagee subject to the same liabilities as the bankrupt was subject to under the original lease at the date when the bankruptcy petition was filed, and if the mortgagee declines to accept such an order he will be excluded from all interest in and security upon the property.*

This was an appeal from a decision of Mr. Registrar Giffard.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

It appeared that on the 23rd of November, 1889, Mrs. Schlösser leased a house in Gerrard-street, Leicester-square, to Vincenzo Columbati for twenty-one years from the 25th of March, 1889, at a yearly rent of £100, and subject to the lessee's covenants.

On the 10th of February, 1890, Columbati died intestate. His widow was his administratrix, and on the 16th of October, 1890, she, in consideration of £200, assigned the house for the residue then unexpired of the term, and also the goodwill of his business, to Fernando Cima.

In January, 1892, Cima assigned the house for the then residue of the term and the goodwill to Richard Baker.

On the 22nd of February, 1899, Baker mortgaged the house by sub-demise for the residue unexpired of the term, less the last day thereof, to Isabella Lewis, widow.

Baker afterwards made a second mortgage of the house to Messrs. Nicholson

On the 4th of January, 1900, Mrs. Lewis died.

In February, 1901, Baker was adjudicated a bankrupt.

On the 13th of May, 1901, the trustee in the bankruptcy executed a disclaimer of the lease.

On the 18th of June, 1901, the registrar, on the application of Mrs. Schlösser, the original lessor, made an order that, unless Messrs. Nicholson should within fourteen days elect to accept and apply for an order vesting in them the leasehold house and making them subject to the same liabilities as the bankrupt was subject to under the lease in respect of the premises at the date of the bankruptcy petition, they should be excluded from all interest in and security upon the premises; and, further, that, if Messrs. Nicholson should not elect to accept such order as aforesaid within the fourteen days, then, unless the executors of Mrs. Lewis should within seven days from the expiration of the fourteen days elect to accept and apply for an order vesting in them the leasehold premises and making them subject to the same liabilities as the bankrupt was subject to under the lease in respect of the premises at the date of the bankruptcy petition, they should be excluded from all interest in and security upon the said premises.

The order was made without notice to Columbati's administratrix or to Cima.

The administratrix could not be found.

The executors of Mrs. Lewis appealed.

Cooper Willis, K.C., and *Muir Mackenzie*, for the appellants, contended that as there was still someone liable on the covenants—namely, the original lessee or his representatives, the lessor was not entitled to the order. Such an order had never been made where there was a barrier of two solvent persons between the lessor and the bankrupt.

They relied upon some observations of Cave, J., in *In re Cock, Ex parte Shilson*, 36 W. R. 187, 20 Q. B. D. 343.

Wace, for the lessor.

Cur. adv. vult.

July 12.—RIGBY, L.J., expressed his agreement with the decision of the learned registrar.

COLLINS, L.J., after stating the facts and reading the order of the registrar, said that the effect of the order was to put the mortgagees to the option of accepting the property subject to the liabilities of the bankrupt under the lease, or of having their interests in the property determined. The executors of the first mortgagee appealed, and they said that by reason of the fact that the original lessee and an assignee of the lease intervened between the lessor and

the bankrupt and continued liable to the lessor, and that the lessee (as it was suggested, though there was no evidence about it) was solvent, section 55 did not apply, and, though the mortgagee might be compelled at the instance of the intervening persons to accept the option which had been imposed on him, he could not be compelled to do so at the instance of the lessor. In his lordship's opinion the question had been already decided by two cases to which he would refer to presently. His lordship then read the clauses of section 55. That section had been the subject of discussion and decision. In *In re Cock* it was held by the late Cave, J., and the present Master of the Rolls that the lessor was, within the meaning of sub-section 6, a person interested in the property, and was entitled to put the machinery of that sub-section in motion, and to apply for an order under it. Another step a long way forward was also taken in *In re Cock*, for it was held that, though the lessor might not be in a position himself to ask for a vesting order, still he might put the machinery in motion for the purpose of ascertaining whether a sub-lessee would accept the property subject to the bankrupt's liabilities in respect of it, or give up his interest in it. That step in advance was taken in *In re Cock*, and the view of the Divisional Court there was confirmed by the Court of Appeal in *In re Finley*, 37 W. R. 6, 21 Q. B. D. 475. It was contended that, though this was the position of the lessor, the decision did not apply when the original lessee remained liable to him upon the covenants in the lease, notwithstanding that he had assigned it. But, it having been decided that the lessor could put the machinery in motion, it seemed to his lordship that there was nothing in this point. The lessor still retained an interest in the property notwithstanding the assignment, and the decision was that a person who retained an interest might put the machinery in motion, even though he could not obtain a vesting order himself. This was made clear by the decision of the Court of Appeal in *In re Morgan*, 37 W. R. 344, 22 Q. B. D. 592, the facts of which were nearly identical with those of the present case, with this difference, that there the application for the order was made by the original lessee. Exactly the same objection might have been raised there as had been raised here, for the lessee there had an assignee from whom he was entitled to a continuing indemnity against liability to the lessor, just as here the lessor had the liability of the original lessee. The lessee was (as the lessor was here) in the same position as before the bankruptcy. He had a solvent person who was bound to indemnify him. And, notwithstanding this, the court on the lessee's application made an order similar to that made in the present case. Bowen, L.J., made the following observations: "Various persons are entitled under the section to apply for an order vesting the property in themselves or in someone else. The application may be made by any person either claiming any interest in the property or under any liability in respect of it which is not discharged by the Act. It is obvious that in the case of a lease there may be many persons who claim to be interested in the property, and many others who, even if they have no interest in it, have come under some liability in respect of it. All these persons have a right to compete for a vesting order if they desire it. *Primâ facie* the court would not make an order vesting the property in one out of the class who have a right to apply, and who may possibly be injured by an order vesting the property in someone else, without giving the other members of the class an opportunity of being heard. But it is obvious that, in the case of a lease for a long term, if you were to insist on a rigid rule that every member of the class must be served, the expense would be enormous, and in the result it would be barren of any fruit, for the great majority of the class would not care a straw about the matter. Sub-section 6 of section 55 says that the court may make the order 'on hearing such persons as it thinks fit.' The registrar is entitled to deal with the matter broadly, and in a businesslike way, and if he sees that the interests of any person are likely to be really affected by the order he may say that that person must be served with notice. If, on the other hand, he thinks that the interest of any person is merely technical, he may deal with the matter in a broader way, and proceed without requiring such a person to be served. The applicant has to submit himself to the discretion of the registrar. If he omits to serve some person who in the interests of justice ought to have an opportunity of being heard on the application, he exposes himself to the risk of having to bear the costs resulting from his improvidence. Up to the time when the matter comes before the registrar the applicant is left free, but then the registrar must exercise his discretion as to the persons who ought to be served." And the Lord Justice proposed an order in the following terms, which the court adopted: "A vesting order in the terms of the notice of motion. The applicant to have his costs in the court below. No costs to be given of the appeal. The order is not to be drawn up for a month. Notice is to be given forthwith by the applicant's solicitors to the lessor and to Evans (the assignee of the lease), or, if he is dead, to his legal personal representative, if there be any. An affidavit of service of the notice, or of the facts which excuse it, is to be lodged with the registrar within fourteen days. Liberty will be reserved to the lessor and to Evans, or his personal representative, to apply to this court to rescind or vary the order at any time before this day month." So that, in that case, the order was made, although the assignee of the lease had not been served with notice. The result of these two cases governed the present case. This application having been made by one of a class who were entitled to apply, there remained only the question whether the proper persons had been served with notice. No one ought to be finally excluded until it had been ascertained whether he had more than a merely technical interest in the matter. In the present case the original lessee had a shadowy interest, but his rights were in no way affected by the registrar's order, which merely put the two mortgagees to their election. If the lessor should desire to obtain an order vesting the property in himself, he would have to institute other proceedings for the purpose. Some observations made by Cave, J., in *In re Cock*, 20 Q. B. D., at p. 348, had been relied upon, but in his lordship's opinion they did not apply to the matter now in hand. The learned judge was not then dealing with the question who was entitled to put the machinery in motion, but with the question of obtaining a vesting order. When once you had the right person making the application, there remained only the question of serving the right person with notice. In his lordship's opinion the learned registrar's decision was right, and the appeal must be dismissed with costs.

ROMER, L.J., agreed. It was clear from the words of section 55, and from the authorities, that the lessor was a person claiming an interest in the property within the meaning of the section, and was, therefore, entitled to make the application. He was not the less so because the original lessee remained liable upon the covenants in the lease. On this application clearly

the first person entitled to a vesting order was the mortgagee by sub-demise, and the court had rightly given him the option. The court was not bound to go on and make a further order vesting the property in the event of the mortgagees declining to take it. The practice was to make such an order as had been made in the present case. It was a matter of discretion whether the registrar should require any other person to be served. No doubt the court might have insisted on having the lessee before it, but it was not bound to do so. The mortgagee was in no way prejudiced by the order, nor was the lessee who was not present when it was made. The mortgagee was not concerned with the rights and liabilities of the lessee, and if it should turn out that the lessee was a solvent person, his lordship did not see why he should not apply for an order vesting the property in him. So much for the technical objections. On the substance of the case there was still less to be said for the mortgagee. He claimed only through the assignee of the lease, and had only such rights as the assignee had. It would be absurd to suppose that the mortgagee could hold the property without paying the rent and performing the covenants. Nor could his lordship see that the mortgagee had any right to claim any further delay, or to wait until the landlord should re-enter or take proceedings against the lessee upon his covenants. The appeal failed both in form and substance.

Appeal dismissed. Leave to appeal to House of Lords refused.

Solicitors, *Nash, Field, & Co.; Boyce & Son.*

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) July 8.

DICKSEE *v.* HOSKINS. (*a.*)

Metropolis—Building—Public-house—Separation of part used for trade from part used as dwelling-house—Fire-resisting materials—London Building Act, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 74, *sub-section* 2.

On the hearing of an objection by a district surveyor that the erection of a proposed beerhouse without the use of fire-resisting materials would be in contravention of section 74, *sub-section* 2, *of the London Building Act,* 1894, *the magistrate found as a fact that part of the building was intended to be used for the purposes of the trade of a beerhouse, and that part was intended to be used as a dwelling-house for the licensed occupier, but he held that the case was governed by* Carritt *v.* Godson, [1899] 2 *Q. B.* 193, 47 *W. R. Dig.* 126, *and he accordingly overruled the objection.*

Held (*reversing the decision of the* King's Bench Division, ante, *p.* 523), *that on the finding of the magistrate the objection must be held to be good.*

Appeal from the decision of a Divisional Court (Lord Alverstone, L.C.J., and Lawrance, J.) on a special case stated by a metropolitan police magistrate, *ante*, p. 523.

On the hearing of an appeal under section 150 of the London Building Act, 1894, it appeared that a builder proposed to erect a building to be used as a beerhouse, and that the district surveyor objected that the proposed erection would be in contravention of section 74, sub-section 2, which enacts as follows: "In every building exceeding ten squares in area used in part for purposes of trade or manufacture and in part as a dwelling-house, the part used for purposes of trade or manufacture shall be separated from the part used as a dwelling-house by walls and floors constructed of fire-resisting materials, and all passages, staircases, and other means of approach to the part used as a dwelling-house shall be constructed throughout of fire-resisting materials." The facts of the case are fully set out *ante*, p. 523.

The magistrate found as a fact that part of the building was intended to be used for the purposes of the trade of a beerhouse, and that part was intended to be used as a dwelling-house for the licensed occupier; but he held that the case was governed by the decision in *Carritt* v. *Godson*, [1899] 2 Q.B. 193, 47 W. R. Dig. 126, and that, in accordance with that authority, the erection of the proposed building without the use of fire-resisting materials would not be in contravention of the Act, and he stated a special case for the opinion of the King's Bench Division.

The Divisional Court affirmed the decision of the magistrate.

The district surveyor appealed.

Avory, K.C., and *H. W. Rowsell*, for the appellant.

Danckwerts, K.C., and *Craies*, for the respondent.

A. L. SMITH, M.R.—In this case the magistrate has found as a fact that the proposed building is intended to be used in part for the purposes of trade and in part as a dwelling-house. I do not agree with that finding, but I am bound by it. It seems to me that the magistrate was inconsistent in arriving at that finding and in holding at the same time that the case was governed by *Carritt* v. *Godson*. In that case the judges were of opinion that the building there in question was not "used in part for the purposes of trade or manufacture, and in part as a dwelling-house." Here we have an express finding that the building is to be so used. I am of opinion that we must accept that finding, and it then follows that the appeal must be allowed.

VAUGHAN WILLIAMS and STIRLING, L.JJ., concurred.

Appeal allowed.

Solicitor for the appellant, *W. A. Blaxland.*

Solicitor for the respondent, *P. G. Gates.*

From Q. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) July 1.

ANTONIADA *v.* SMITH.
H. W. SMITH, *Claimant.* (*a.*)

Bill of sale—Registration—Absolute bill of sale—Non-renewal of registration—Bill of sale given by grantee of first bill of sale—Subsequent execution against grantor of first bill of sale—Apparent possession—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8, 11.

In 1893 *the defendant, by an absolute bill of sale, assigned the furniture in the house in which he resided, and of which he was the tenant, to a person who also resided in the same house. This bill of sale was duly registered, but the registration was not renewed. In November,* 1900, *the grantee gave a bill of sale of the furniture to the claimant to secure an advance, and this bill of sale was duly registered. Subsequently the furniture, which had remained at the same house where the*

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

(*a.*) Reported by W. F. BARRY, Esq., Barrister-at-Law.

defendant and the grantee of the first bill of sale resided, was seized in execution of a judgment recovered by the plaintiff against the defendant, and was claimed by the claimant under his bill of sale. Upon an interpleader issue,

Held, that, as there was no execution creditor of the defendant in existence at the time when the bill of sale to the claimant was given, so as to avoid the first bill of sale under section 8 of the Bills of Sale Act, 1878, the claimant's title to the furniture was valid.

Appeal from the judgment of the Divisional Court (Lord Alverstone, L.C.J., and Lawrance, J.).

On the 14th of October, 1893, the defendant by an absolute bill of sale assigned the furniture in a house, where he resided and of which he was tenant, to his mother-in-law, Mrs. Melland, who also resided with him in the house. This bill of sale was duly registered but the registration was not renewed.

On the 8th of March, 1894, Mrs. Melland gave a bill of sale over the furniture by way of mortgage, and this bill of sale was duly registered and re-registered.

On the 14th of November, 1900, this bill of sale was paid off, and Mrs. Melland gave a fresh bill of sale of the furniture to the claimant as security for an advance. This bill of sale was duly registered.

Subsequently the furniture, which had remained in the same house all the time where the defendant and Mrs. Melland were residing, was seized under a *fi. fa.* in execution of a judgment recovered by the plaintiff against the defendant, and was claimed by the claimant under his bill of sale.

An interpleader issue was tried in the Croydon County Court, when the judge gave judgment for the claimant, and the Divisional Court affirmed his judgment.

The plaintiff by leave appealed.

Cababé, for the plaintiff.—The bill of sale given to Mrs. Melland, not having been re-registered as required by section 11 of the Bills of Sale Act, 1878, her title to the goods was defective, and the bill of sale was void as against the plaintiff, the execution creditor, under section 8 of the Act. Her bill of sale being void, she could give no better title to the goods than she herself had: *Karet* v. *Kosher Meat Association*, 25 W. R. 691, 2 Q. B. D. 361. She had a defeasible title to the goods. The claimant, who derived his title through her, has no better title than she had, and therefore as against the execution creditor the claimant's title is bad, the furniture being in the apparent possession of the defendant, the execution debtor, within the meaning of section 4 of the Act. In *Cookson* v. *Swire*, 33 W. R. 181, 9 App. Cas. 653, the original bill of sale was a spent document, and had been put an end to. In the present case the bill of sale to Mrs. Melland was the basis of her title to the furniture, and was in no way a spent document. The plaintiff is therefore entitled to succeed.

Le Riche, for the claimant.—Section 8 of the Bills of Sale Act, 1878—which applies to this case because the bill of sale given to Mrs. Melland was an absolute one—does not avoid the bill of sale *ab initio* for want of registration, but only avoids it as against a trustee in bankruptcy or execution creditor of the grantor when the goods remain in his apparent possession. At the time when Mrs. Melland gave the bill of sale to the claimant there was no trustee in bankruptcy or execution creditor of the defendant, and therefore she had a good title to the goods, and could transfer a good title to the claimant: *Cookson* v. *Swire*. He also contended, alternatively, that, as Mrs. Melland lived in the house where the furniture was, she was in possession of it, and therefore it was not in apparent possession of the defendant.

Cababé replied.

VAUGHAN WILLIAMS, L.J.—In my opinion the judgment of the Divisional Court is right. In November, 1900, Mrs. Melland was the holder of an absolute bill of sale over the furniture given to her by her son-in-law, the defendant. It is admitted that that bill of sale, being an absolute one, is governed by the Act of 1878. That bill was duly registered when it was given, and under the Act it should have been re-registered within five years, which was not done. Then came a bill of sale given by Mrs. Melland, intermediate between the above-mentioned bill of sale and the one given by her to the claimant. That intermediate bill of sale is of no importance in the case except to connect the transactions together. Mrs. Melland, being minded to pay off this intermediate bill of sale, applied to the claimant to advance the money necessary for the purpose, and the claimant did so. The bill of sale was accordingly paid off, and in November, 1900, Mrs. Melland gave a bill of sale over the furniture to the claimant as security for the advance. That bill of sale, being one given by way of security, was governed by the Bills of Sale Act, 1882, and it was duly registered. Subsequently the plaintiffs issued execution upon a judgment recovered against the defendant, and the furniture was taken under the execution. The claimant thereupon claimed the furniture under the bill of sale to him of November, 1900. *Primâ facie* that is a valid claim. It is objected that the claim is not a good one, because the claimant has to trace his title through a bill of sale given by the defendant to Mrs. Melland, which bill of sale was not re-registered as required by section 11 of the Bills of Sale Act, 1878. It seems to me that that objection to the claimant's title to the furniture is not a sound one. Though the bill of sale given to Mrs. Melland was not re-registered at the end of five years—namely, in October, 1898, still when she gave the bill of sale to the claimant in November, 1900, there was at that time no trustee in bankruptcy or execution creditor of the defendant against whom the bill of sale given by the defendant would have been void, and who could have claimed the furniture comprised therein. It must be remembered that section 8 of the Bills of Sale Act, 1878, does not render the bill of sale void *ipso facto* for want of registration, but only avoids it as against (so far as material) the trustee in bankruptcy or execution creditor of the grantor, if the goods are in his possession or apparent possession. In these circumstances it seems to me that the decision of the House of Lords in *Cookson* v. *Swire*, covers the present case. There the bill of sale was defective, as in this case, for want of renewal of registration. In that case the grantee of a bill of sale given in 1873, the registration of which had not been renewed, demanded payment, and on default took possession of the goods and sold them to a purchaser, who, not being able to pay for them, gave the vendor a bill of sale over them which was duly registered. The goods having been afterwards seized under a *fi. fa.* against the grantor of the bill of sale in 1873, it was held that, the sale by the grantee of that bill of sale being an absolute and *bonâ fide* transfer of the property, that bill of sale was spent and satisfied, there being no trustee in bankruptcy or execution creditor of the grantor who at that time could have intervened and claimed the goods. In my opinion that case covers the present case. That conclusion is fortified when we remember that under the Act of 1878 there is no need to register a bill of sale at all unless the goods comprised therein are in the possession, or apparent

possession, of the grantor. At the time of the execution in this case can it be said that the goods were in the apparent possession of the defendant? There are two answers to such a suggestion. First, if the execution creditor desired to rely on such analyzation, he should have asked for a finding from the county court judge upon it. He has not got any finding that the goods at the time of the execution were in the apparent possession of the defendant. In the next place, it would be quite useless to send the case down for a new trial upon the ground that the omission to ask for such a finding was an oversight. So far as the evidence goes there is nothing to dispossess the actual possession of Mrs. Melland, which, in the absence of evidence to the contrary, I should infer from the fact that she was living in the house where the furniture was, where, no doubt, the judgment debtor was also living. It would require cogent evidence to show that in such circumstances the furniture was in the apparent possession of the judgment debtor. There is no such evidence in the present case. From the definition of "apparent possession" in section 4 of the Act of 1878 it would, to my mind, be difficult to prove apparent possession in the grantor where the grantee has taken more than mere formal possession. In these circumstances it would be useless to send the case down for a new trial upon this point. The appeal must therefore be dismissed.

A. L. SMITH, M.R.—I agree.

STIRLING, L.J.—I am of the same opinion. I only wish to add a word with reference to the case of *Karet* v. *Kosher Meat Supply Association*, which is dealt with by Lord Selborne in *Cookson* v. *Swire*. In *Karet's case* there was no registered bill of sale when the goods comprised therein were seized in execution. Lord Selborne said (9 App. Cas., at p. 663): "It is not sufficient to say that the same thing might have happened if it had been an absolute transfer by bill of sale. I assume that it might have been, and I agree that the argument probably would have been the same. If the subsequent transferee in that case, as in this case, leaves the goods in the apparent possession of the person who is the grantor of the original bill of sale, and himself does not register his own title, if his title is by an absolute bill of sale, or if he grants a title to somebody else, whether absolute or conditional, and if that person does not register it, then he in the one case, and his assignee in the other, will be liable, no doubt, to have his title defeated by a subsequent execution; not because the person to whom the first bill of sale was given has not registered it, but because the person who has got the second bill of sale has not registered it, and leaves it in a position of danger." In the present case the claimant, who is the assignee from Mrs. Melland, has duly registered his bill of sale.

Appeal dismissed.

Solicitor for the plaintiff, *W. H. Lane.*

Solicitor for the claimant, *Arthur Price.*

High Court of Justice.

Chan. Div. Byrne, J. — June 6.

In re HARVEY.
HARVEY *v.* HARVEY. (*a.*)

Settlement—Fines and recoveries—Estate tail in personalty — Tenant for life — Disentailing deed — Capital of personal estate to be invested in the purchase of real estate after death of tenant for life—Real estate to be held to the uses of settlement—Fines and Recoveries Act, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 71.

A tenant in tail may, with the consent of the tenant for life under the settlement, disentail an estate tail in personalty whereof the income is directed to be paid to a person still living, and the capital after his death, is directed to be invested in real estate to be settled to the uses of the settlement.

Fordham *v.* Fordham, 13 *W. R.* 197, 34 *Beav.* 59, *followed.*

This was a summons to determine the effect of a disentailing deed upon a residuary personal estate directed to be laid out in the purchase of land.

The plaintiff was Sir Charles Harvey, Bart., and the defendants were Charles Robert Lambart, eldest son of the said Sir C. Harvey, Edward Harvey and Roger Kerrison, and Herbert Haynes Twining and Edward Kerrison.

The facts of the case were as follows:

General Sir Robert John Harvey, Knight, deceased, grandfather of the plaintiff, by his will, dated the 22nd day of January, 1852, gave and devised all and singular his freehold messuages, farms, lands, tenements, and hereditaments situate in the counties of Norfolk and Suffolk and elsewhere in the Kingdom of Great Britain unto Samuel Twining and Roger Allday Kerrison and their heirs, to the use of his first and eldest son, Robert John Harvey Harvey, and his assigns during his life without impeachment of waste, with remainder to the use of his grandson, Robert Lambart Sutton Harvey, the eldest son of the said Robert John Harvey Harvey, and his assigns for his life, with remainder to the use of his first and other sons in tail male, with remainder to the use of the second and every other son of the said R. J. H. Harvey, severally and successively according to their respective seniorities in tail male; and in default of such issue to the use of the testator's second son, John Harvey, and his assigns during his life, and after the decease of the said John Harvey to the use of the first and every son of his body severally and successively according to their respective seniorities in tail male; and in default of such issue to the use of the testator's third son, the defendant Edward Kerrison Harvey, and his assigns during his life, with remainder to the use of the first and every other son of his body severally and successively according to their respective seniorities in tail male; and in default of all such issue to the use of the testator's daughters and the daughters of his several sons as therein mentioned. And the said testator gave and bequeathed all the rest and residue of his personal estate and effects (subject to the payment of his just debts, funeral expenses, the charges of proving and executing his said will, and to the payment of the legacies and annuities thereinbefore bequeathed) to the said Samuel Twining and Roger Allday Kerrison, their executors, administrators, and assigns, upon trust to convert the same into money and to invest the moneys to arise from such conversion

(*a.*) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

and to pay the annual income of the whole of his said residuary estate unto or for the benefit of the testator's sons John Harvey and the defendant Edward Kerrison Harvey, in equal shares during their joint lives, and upon the decease of either of his said sons, to pay the whole of the said annual produce unto the survivor of them during his life, and upon the death of such survivor upon trust to convert all his residuary personal estate into money, and lay out and invest the moneys arising from such sale and conversion in the purchase of freehold lands, tenements, and hereditaments to be conveyed and assured unto the said Samuel Twining and Roger Allday Kerrison and their heirs to the uses and upon and for the trusts thereinbefore limited and expressed of and concerning his real estate.

The testator added a codicil to his will dated the 31st of May, 1855, and revoked the trusts of one moiety of the annual income in favour of John Harvey and any widow that he might leave, and declared that the whole of his residuary personal estate should be paid to the said E. K Harvey for life, and after his death, subject to the payment of an annuity to his widow, the whole of his residuary personal estate should remain and be upon the trusts in the said will mentioned concerning the same.

The testator died on the 18th of June, 1860, and his will and codicil were duly proved on the 21st of February, 1861, by the said S. Twining and R. A. Kerrison. The testator's widow died in 1869, and R. L. S. Harvey died on the 4th of September, 1864, an infant, and without having been married, leaving the plaintiff Sir Charles Harvey, then Charles Harvey, the second son of the said R. J. H. Harvey, surviving. R. J. H. Harvey was created a baronet. By an indenture, being a disentailing assurance, bearing date the 14th of July, 1870, and made between the said Sir R. J. H. Harvey of the one part, and the plaintiff of the second part, and L. E. H. Harvey and E. H. Stracey of the third part, the said plaintiff, with the consent of the said R. C. H. Harvey as protector of the settlement, barred the estate tail in all the freehold hereditaments devised by the said will. And it was thereby also witnessed that the said Sir R. J. H. Harvey thereby assigned and the said Chas. Harvey (with the consent of the said R. J. H. Harvey as protector of the settlement) thereby assigned and disposed of unto the said L. E. Harvey and E. H. G. Stracey all and singular the moneys to arise on the death of the defendant the said G. K. Harvey from the conversion and getting in of the residuary personal estate of the said testator and all and every other sum of money subject to be laid out then or thereafter in the purchase of lands or lands to be settled so that the said R. J. H. Harvey would have therein an estate for life with remainder to the said Chas. Harvey in tail male or tail general, and the stocks, funds, and securities in or upon which such sums and sum of money were or might be invested, to hold the same unto the said L. E. Harvey and E. H. G. Stracey and his executors, administrators, and assigns freed and absolutely discharged from the estate tail of the said Charles Harvey and all other remainders, upon such trusts, and with and subject to such provisoes, agreements, and declarations as the said Sir R. J. H. Harvey and Charles Harvey should jointly appoint. The disentailing assurance was duly enrolled.

By an indenture of even date with the indenture last mentioned, and made between the same parties after reciting that a doubt had arisen whether under the Act for the abolition of fines and recoveries the said disentailing assurance would operate so as to bar the entail in the said moneys, so that the said R. J. H. Harvey would have an estate for life with remainder to the said Charles Harvey in tail male, by reason of the said E. K. Harvey being then alive, the said Sir R. J. H. Harvey and Charles Harvey covenanted with the trustees that within one calendar month after the death of the said E. K. Harvey they would execute and do every such assurance and thing for the further or more perfectly barring the entail of the said Charles Harvey and all remainders over in the said residuary moneys subject to be invested in the purchase of land.

By another indenture of the same date, under the power limited to them by the disentailing assurance above recited, Sir R. J. H. Harvey and Charles Harvey appointed the lands and hereditaments devised as aforesaid to the use of Sir R. J. H. Harvey for his life, and after his death to the use of Charles Harvey for life, and after his decease to the use that if Jane Anne, Lady Harvey, the wife of the plaintiff, should survive the said Sir R. J. H. Harvey and Charles Harvey, that she should receive a rent-charge as therein provided, and subject to a lease for securing such rent-charge and portions for the younger children of Charles Harvey, to the use of the first and other sons of Charles Harvey as therein mentioned in tail male. And the indenture provided as therein mentioned for sale and exchange of lands, with power for investing the moneys arising on such sale or exchange in the purchase of freehold or copyhold lands and for settling the same upon the uses and trusts aforesaid. And the said Sir R. J. H. Harvey and Charles Harvey appointed that the moneys to arise on the death of E. K. Harvey from the conversion of the residuary estate of the testator and all and every the sums and sum of money subject to be laid out then or thereafter in the purchase of lands and hereditaments to be settled so that had not the said disentailing deed of even date therewith been executed, Sir R. J. H. Harvey would have taken therein an estate for life with remainder to Charles Harvey in tail, and the securities upon which such sum or sums of money were or might be invested, should, upon the execution of that indenture, be held upon the trusts and subject to the powers thereinbefore declared concerning the moneys to arise under the power of sale in respect of any of the hereditaments thereinbefore appointed, and the stocks, funds, and securities upon which such moneys were thereinbefore authorized to be invested.

Sir R. J. H. Harvey died on the 19th of July, 1870, and the said Jane Anne, Lady Harvey, died on the 13th of December, 1891.

The point then arose whether the disentailing deed could effectually disentail the personal estate during the lifetime of the said E. K. Harvey.

Levett, K.C., and *Martelli*, for the applicant.—The point turns upon the construction of section 71 of the Fines and Recoveries Act. The expression money subject to be invested in the purchase of land, in section 1 of the Act is there defined as including money whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands. It must follow from this that "money" as used in section 1 is not confined to money presently to be laid out in the purchase of lands. It also includes moneys which may hereafter be laid out in the purchase of land. The case is governed by *Fordham* v. *Fordham*, 13 W. R. 197, 34 Beav. 59.

Cozens-Hardy for the defendant, C. R. L. Harvey; and

Dauney, for E. K. Harvey and his eldest son. —The word money in section 71 means money presently to be invested in the purchase of lands, and

not moneys hereafter to be laid out in such purchase. The section cannot apply to lands not to be purchased until after the death of E. K. Harvey.

Paterson, for the trustees.

BYRNE, J.—In this case the short question raised is, whether a certain disentailing deed is effectual to bar an estate tail in certain lands to be purchased with certain moneys subject to a trust after the death of a person who was at the date of the disentailing deed still alive to be laid out in the purchase of lands. Under the will there was a strict settlement of certain real estate. About that no question arises; the deed executed was effectual to bar that estate tail. Then the testator deals with his personal estate, and he gives that subject to the payment of his debts and legacies and annuities to trustees [his lordship read the portion of the will and continued:] Now the disentailing deed was executed, as I have said, during the lifetime of Edward Kerrison Harvey. It was executed by the tenant in tail with the consent of the person who, if Edward Kerrison Harvey had died, and the money had been laid out in the purchase of land, would have been tenant for life of the land so purchased. The whole question argued before me is as to whether that was effectual, having regard to the fact that this money was not immediately subject to be invested in the purchase of land, but only subject to be invested in the purchase of land after the death of Edward Kerrison Harvey. Now the sections of the Fines and Recoveries Act which have been referred to are first of all the interpretation clause, section 1, when amongst other definitions the definition of money subject to be laid out in land is given; and it is there defined to include money whether raised or to be raised, and whether the amount thereof be or be not ascertained, "and shall extend to stock and funds and rent and other securities, the produce of which is directed to be invested in the purchase of land." The 71st section provides, so far as is material, "that money subject to be invested in the purchase of land, to be settled so that any person, if the lands were purchased, would have an estate tail therein, shall for all purposes of this Act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to." Then passing over certain words the section continues, "and shall in the case of money subject to be invested in the purchase of land to be settled as aforesaid apply to such money in the same manner as if such money was directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled." Mr. Dauney argued the point very neatly. He said the whole question is whether the words in the 71st section refer to moneys presently subject to be laid out in the purchase of land, or whether they mean subject presently or at any future time to be laid out in the purchase of land. First, it is to be observed that the words in the Act are perfectly general. There is this further fact that I may mention, that under section 15 of the Act there is a provision for disentailing estates tail, whether in possession, remainder, contingency, or otherwise, so that the Act is not contemplating merely the disentailing of estates in possession.

Now in the words of this section, independently of authority, I should have come to the conclusion that it would be too narrow a reading to say that these words mean presently subject to be laid out in the purchase of land. But I think that the case is really covered by the case of *Fordham* v. *Fordham*, to which I have been referred. The circumstances in the two cases are not exactly the same; but still I think that that case is an authority which governs the present one, although the words are somewhat different. In that case the testator gave his freeholds, copyholds, and leaseholds to trustees, and he directed them to enfranchise the copyholds within twenty years. And as to freeholds, copyholds, and leaseholds, he declared his will to be that his trustees should "enter into the possession and receipt of the rents and profits of the same estates, and should until the expiration of twenty-one years after his decease manage and pay the expenses and improvement, and invest the surplus in the purchase of freeholds, and in the meantime invest and accumulate the same, which accumulations are to be subject to the trusts hereby declared of the fund from which the same should have proceeded." The testator continued as follows: "I declare my will to be that from and after the expiration of twenty-one years from my decease, my trustees shall stand seised of and interested in all my said freehold estate, and all the freehold estates as to which my said copyhold estates shall be converted by enfranchisement, and the freehold estates hereinbefore directed to be purchased by my trustees upon the trusts following, that is to say, upon trust for Frederick Nash Fordham, of Royston, in the county of Hertford, Banker, during his life, without impeachment of waste, with remainder upon trust for the sons of the said Frederick Nash Fordham successively according to seniority in tail male" with remainders over. The testator died in 1855. Frederick Nash Fordham had one son, who attained twenty-one the 11th of November, 1863, and on the following day he, with the concurrence of his father, joined in disentailing amongst other things all the moneys which, under the trusts of the will, was subject to be invested in the purchase of land, including money invested or to be invested, and whether the amount thereof was or was not ascertained. On behalf of the trustees, Mr. Archibald Smith argued that inasmuch as before the passing of the Act money could not have been disentailed before received, the Statute 3 & 4 Will. 4, c. 74, did not alter the law in that respect, and he referred to section 71, which enables a tenant in tail to acquire the absolute interest "in money subject to be invested in the purchase of lands to be settled," and said that the meaning of the word "money" was governed by the interpretation clause, section 1, which applied to money in hand, and did not include money which might thereafter be received. So that the precise point taken in the present case was taken by Mr. Archibald Smith in arguing that case. Lord Romilly, M.R., said: "The plaintiffs are clearly entitled to have the rents of the present year paid to them, and it is quite unnecessary to invest them in land. The same thing will happen in 1865, and in every succeeding year, and during the whole remaining period of twenty years they will, from time to time, be absolutely entitled to have the annual rents paid to them. I am of opinion that the words of the statute are clear, and that they enable the tenant in tail to acquire an absolute right to any money subject to be invested in the purchase of lands, to be settled including money received, or to be received, and the rents of this and of every succeeding year. As the plaintiffs would be entitled to have the rents paid to them every year, and there is no possibility of investing them in land, nobody else has any interest in them, and they are entitled to an immediate conveyance. If they were entitled to an immediate conveyance, that would only be upon the footing that the disentailing deed was effectual not merely to bar the entail in the moneys already received and liable to be invested in land, but in respect of moneys thereinafter to be received and then to be invested in land."

I think that this case really is an authority which governs the present case in principle, although, as I have said, the words are somewhat different. I have not been referred to any authority suggesting that *Fordham* v. *Fordham* is not good law, and it is treated in Davidson's Precedents, 3rd ed., Vol. 3, Part 2, p. 1302, as a binding authority. I must therefore treat it as being so, and I am of opinion it governs this case. The declaration will be that according to the true construction of the will of the testator, and in the events which have happened, the above-mentioned disentailing assurance of the 14th of July, 1870, was effectual to bar the entail in the moneys upon the death of Edward Kerrison Harvey directed to be laid out in the purchase of land.

Solicitors, *Illiffe, Henley, & Sweet*, for *Preston & Son*, Norwich; *Blake, Haseldine, Child, & Crailsheim*, for *Bensley & Bollingbroke*, Norwich; *Collyer-Bristow, Russell, Hill, Curtis, & Dods*, for *Mills & Reeve*, Norwich.

Chan. Div. }
Buckley, J. } July 5, 6.

BRADSHAW v. WIDDRINGTON. (a.)

Limitation Statutes—Mortgage—Payment of interest by person liable to the mortgagor to pay—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.

The payment to the mortgagee of interest due upon the mortgage debt by a person who, as between himself and the mortgagor, is bound to make the payment, is a sufficient payment within section 8 *of the Real Property Limitation Act*, 1874, *to prevent time running against the mortgagee under the statute.*

Action.

The question to be decided in this case was whether a certain mortgage made in 1879 had become extinguished under the Statutes of Limitation or had been kept alive by the payment of interest by a person only bound to pay it as between himself and the mortgagor.

On the 1st of August, 1879, James E. Bradshaw mortgaged his estate called "Fair Oak" to J. J. Moss to secure the repayment of a sum of £5,171 14s. 6d. and interest at 4 per cent.

Moss was the surviving trustee of the will of Sir Edward Cust, and the mortgage money was part of the trust estate. Moss died, and was succeeded in the trust by the defendant's trustees, and he and they were called in the case the "Cust trustees."

James E. Bradshaw borrowed the money for his son William Bradshaw, to whom it was immediately paid over.

On the same day William Bradshaw executed in favour of his father a bond to secure the repayment to him of the amount lent — that is to say, the principal money due under the mortgage and interest at 4 per cent.

Cartmell Harrison, of the firm of Birch, Ingram, & Harrison, acted as solicitor for all parties, and the deeds were left in his keeping.

In the books of the firm, until 1885, William Bradshaw was treated as paying the interest on the mortgage to his father, J. E. Bradshaw, and the Cust trustees as receiving it, although J. E. Bradshaw, in his account, was not treated as receiving it from his son. After 1885, and down to 1892, in his account William Bradshaw was treated as paying the interest direct to the Cust trustees.

(a.) Reported by NEVILLE TEBBUTT, Esq., Barrister-at-Law.

William Bradshaw was not called as a witness to explain the transaction, and upon the materials before him his lordship concluded that as between his father and himself William Bradshaw was liable to pay the interest, and that there was a special arrangement between them that the son, having had the money, should keep down the interest upon it.

In September, 1887, James E. Bradshaw died, leaving William Bradshaw and Harrison his executors.

In October, 1892, William Bradshaw paid Harrison the mortgage money of £5,171 14s. 6d., but Harrison did not then or subsequently pay it to the Cust trustees.

It appeared in the books of the firm as a credit on the account of William Bradshaw.

In the account of the Cust trustees in their books there was the extraordinary position of affairs that the trustees were treated as having received this money, and they continued also to be treated as receiving from time to time the interest due upon it.

His lordship supposed that what in point of fact happened was that Harrison misappropriated the money, and therefore had to continue paying the interest.

The interest was in fact paid to the Cust trustees, or the tenant for life under the Cust settlement, down to 1898 or 1899.

In November, 1899, Harrison committed suicide.

At that time Colonel J. C. Bradshaw was the owner of Fair Oak. He had had part of it conveyed to him by his father in 1884 in exchange for other land which he gave his father, and he had purchased the remainder from the trustees of his father's estate in November, 1887.

In both cases he bought without knowing of the Cust mortgage, and in both cases the property was expressed to be conveyed free from incumbrances, and consequently as between himself and his father and his father's trustees, the latter were bound to discharge the sum due under the mortgage and the interest.

Harrison acted as his solicitor in these purchases as well as the solicitor of his father and the trustees, and the deeds still remained in his hands.

Upon the death of Harrison the existence of the mortgage was discovered.

The Cust trustees, no longer receiving their interest, gave notice to Colonel Bradshaw to pay off the mortgage, and that in default they would sell the property.

Thereupon Colonel Bradshaw brought this action against them asking for a declaration that their right to the mortgage was extinguished, and for an injunction to prevent them selling the property.

The trustees counterclaimed for payment of the mortgage money, or foreclosure or sale.

H. Terrell, K.C., and *Kenneth Wood*, for the plaintiff.—If payments of the interest upon the mortgage were made by William Bradshaw, these would not prevent the time under the statute from running. He was not the agent of his father, the mortgagor, for the purpose. But even if he were, that agency would be determined by the death of the father in 1887. Nor was he a person bound to pay this interest. He was only bound to pay interest upon the bond, not upon the mortgage. But even if he were bound as between himself and his father to pay the interest, that is not sufficient. He must be bound as between himself and the mortgagee: *Chinnery* v. *Evans*, 13 W. R. 20, 11 H. L Cas. 115; *Harlock* v. *Ashberry*, 30 W. R. 327, 19 Ch. D. 539; *In re Sands and Thompson*, 31 W. R 397, 22 Ch. D. 614; *Newbould* v. *Smith*, 33 W. R. 690, 34 W. R. 690, 29 Ch. D. 882, 33 Ch. D. 127.

Birrell, K.C., and *G. Henderson*, for the defendant William Bradshaw, used the same arguments.

Astbury, K.C., and *Bryan Farrer*, for the defendants.—A payment by a person liable to pay as between himself and the mortgagor is sufficient to take the case out of the statute: *In re Frisby*, 38 W. R. 65, 43 Ch. D. 106; *Lewin* v. *Wilson*, 11 App. Cas. 639, 35 W. R. Dig. 122. Here William Bradshaw was bound to pay the interest on the mortgage, and consequently the rights of the mortgagees have never been barred.

BUCKLEY, J.—The question is, which of two innocent parties is to suffer—Colonel Bradshaw, who purchased the estate without knowing of this mortgage, or the Cust trustees, who advanced their money and had their interest till 1898 or 1899? It turns upon the proper effect of section 8 of the Real Property Act, 1874, and whether the interest received was paid by the person by whom it was payable or his agent. The principle of all the Statutes of Limitation is that to take a case out of the statutes the payment must be made by a person liable as an acknowledgment of right of the person to whom it is paid, and what I have to look to, I think, is to see whether the payment here has been made by a person bound to pay it, and whether by that expression, "by a person bound to pay it," I must find that he is a person bound between himself and the mortgagee to pay it, or whether it is enough if it be paid by a person who is bound to pay it as between himself and the mortgagor. Now, apart from authority, it seems to me that all principle and common sense leads me to the conclusion that it means a person bound to pay as between himself and the mortgagor. You have to see whether the mortgagor has made an admission. That is the basis of it all. If the mortgagor has himself paid, or if he has bound somebody else towards him to pay it, and that person has paid it, in either case it appears to me the mortgagor has made an admission, and when you look at the authorities it appears to me that they have the same effect. Not that I have been able to put my hand on a case in which that exact point has arisen, but the principle appears in the language used by the learned judges. In *Chinnery* v. *Evans*, where the payment was made by a receiver of estates in Ireland who had been appointed on a petition presented by the mortgagee, Lord Cranworth, after saying that a payment by a person who is not a mere stranger to the mortgagor will do for the purpose, says, 11 H. L. Cas. at p. 139: "But the payments in this case were not payments by a stranger; for though a receiver appointed under the Irish statute is an officer of the court, yet he is certainly no stranger to the mortgagor, but a person paying for him, and on his account, what he is bound to pay." In *Harlock* v. *Ashberry*, where a mortgagee had obtained payment of rent from a tenant and the question was whether money which he thus got from the tenant, was a payment for the purpose of excluding the statute, it was held it was not because it was not got from the mortgagor or from any person bound toward the mortgagor to pay the mortgagee, but from a tenant, being obtained by the mortgagee entering into possession of the property. In delivering judgment Sir George Jessel, after reading the passage from *Chinnery* v. *Evans* which I have just read, goes on to say (p. 546): "Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment." I think that Sir George Jessel meant a payment by a person who is bound as between himself and the mortgagor to pay the interest upon the mortgage money. Then Brett, J., 19 Ch. D. at p. 547, says: "Then the question arises whether payment of rent by a tenant to a mortgagee who has exercised the right to demand the rent is a payment of principal or interest within that section. I come to the conclusion that it is not, for three reasons," and the third reason is this, "But even if it could be held to be a payment of principal or interest, it is not a payment at all by the mortgagor or any agent of the mortgagor, or by any person bound to make payment of principal or interest on his behalf, and I think that a payment of principal or interest to be a payment within this section must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor, as was the receiver in the case of *Chinnery* v. *Evans*." I think that the Lord Justice means there the same thing by "bound."

It seems to me, therefore, the language of those judgments is in favour of the view which I take upon the principle—namely, that the person bound to pay and whose payment is material for the purposes of the statute is not a person bound as between himself and the mortgagee, but a person bound as between himself and the mortgagor.

I will only add to those passages one from the case of *Lewin* v. *Wilson*, where Lord Hobhouse in delivering the judgment of the Privy Council, and after quoting *Chinnery* v. *Evans* and *Harlock* v. *Ashberry*, says, 11 App. Cas. at p. 644: "Their lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent." There is no such authority to be found as far as I know. Here, I agree, the payment was not made by the mortgagor, James Edward Bradshaw. Whether it was made by his agent or not is another matter. For the present purpose I am assuming that William was not his agent. Still he was, as between himself and his father, the person who was bound to pay, and his payment, made in pursuance of his contractual obligations towards his father, was his father's admission of liability.

Another ground has been put forward which is very ingenious, and upon which I ought to say a word. James Edward Bradshaw, the mortgagor, died in September, 1887, and, as I have said, William Bradshaw and Cartmell Harrison were his executors. As from 1887 William Bradshaw continues to pay the interest in this sense. Harrison as his agent charged his account with it, and Harrison in fact was paying it to the Cust trustees or the Cust beneficiaries. After 1887, William Bradshaw, the person thus making the payment, was the person liable to pay as mortgagor in the sense that he was legal personal representative of the mortgagor, and Harrison, the other person to whom William was making the payment, or who was making the payment for William, was the other executor. So that as William had paid the money to Harrison, or rather to himself and Harrison as co-executors, and they had paid it on to the Cust trustees or beneficiaries, it is said that that was a payment by James Edward Bradshaw, the mortgagor. It appears to me there is something in that contention.

There is one other thing which I ought to mention. It is quite plain that Colonel Bradshaw, for whom one feels some sympathy and who sustains a loss which must fall upon him for the reason that he had the misfortune to employ as his solicitor the person who had the deeds of this property, and who had them, and properly had them, whether the estate was free from incumbrances or whether it was not free from incumbrances. If it was free from incumbrances

the solicitor had them, and properly had them, for James Edward Bradshaw, the father, if it was not free from incumbrances he had them, and properly had them, for the Cust trustees, the mortgagees; and when the father purported to convey free from incumbrances to Colonel Bradshaw, Harrison would keep them, and properly keep them, because his client Colonel John Charles Bradshaw was entitled to them. If Colonel Bradshaw had employed another solicitor and had asked for the deeds, they would not have been forthcoming unless Harrison had committed a fraud, because he could not have handed the deeds which he held for the Cust trustees as mortgagees to a purchaser from the mortgagor, the owner of the equity of redemption, and the matter would have come out. Colonel Bradshaw in fact never got the deeds. I do not think he is to be blamed for want of prudence in the matter; he never saw the deeds and the deeds remained with Harrison in some one of the many characters which he filled. But Colonel Bradshaw is, I think, guilty of what in the eyes of this court is negligence, in the sense that he relied upon a solicitor who did not get the deeds as he ought to have got them on behalf of his client, and who having regard to the multitudinous character of his agency as solicitor would have had the deeds already in his possession for another client I feel, therefore, less compunction in visiting the loss upon Colonel Bradshaw.

Judgment for the defendants on their counterclaim.

Solicitors for the plaintiffs and William Bradshaw, *Hunter & Haynes.*

Solicitors for the defendants, the trustees, *Nicholl, Manisty, & Co.*

Chan. Div. }
Wright, J. } June 19.

In re SEPTIMUS PARSONAGE & CO. (LIMITED). (a.)

Contempt—Company—Winding up—Creditor's petition—Fraudulent circular—Resolution to wind up voluntarily—Attempt to mislead the court—Contempt of court.

Where, after a creditor's petition for the compulsory winding up of a company has been presented, a circular is issued at the instigation of the directors by a shareholder asking for proxies to be used by him in order to obtain an investigation into the conduct of the directors, and such proxies are intended to be, and are in fact, used in support of the directors and a resolution for voluntary winding up, those responsible for the circular and such action are guilty of a contempt of court, in that they have attempted to mislead the court by representing that a voluntary winding up is already in existence, with the view of inducing the court not to make an order for compulsory winding up.

This was a motion, made by the special direction of the judge, on behalf of the official receiver, that Messrs. Septimus Parsonage and J. V. Criper, directors of the company, and T. R. Grace, an employé of the company, might be committed for contempt of court, in that, whereas a petition was pending for the compulsory winding up of the company, they conspired together to obtain, by misrepresentation to the shareholders thereof and other improper means, the passing of a resolution of the company for the voluntary winding up thereof, with intent to mislead the court as to the real views of such shareholders and prevent a compulsory winding up order being made.

(a.) Reported by W. MORRIS CARTER, Esq., Barrister-at-Law.

A petition for the compulsory winding up of the company was presented on the 21st of March, 1901, by the assignee of a claim for costs of a solicitor. On the following day a board meeting was held, at which four directors, including Parsonage, Criper, and H. T. Gould, were present, and it was then decided to call a meeting of the company to pass a resolution for a voluntary winding up. Later in the day Gould told Parsonage that he had come to the conclusion that it would be improper for the directors to call the meeting, and that he should oppose it; at the same time he intimated that he disapproved of Parsonage's conduct as a director. Thereupon the latter consulted Criper, and proposed to send a circular to the shareholders, to which course Criper apparently agreed. It was alleged that the circular had been submitted to, and approved by, the late solicitor to the company, but it was not shewn that he knew on whose behalf it was issued, or did more than approve its form. Grace, who was in the company's employment at thirty-two shillings a week, and who held 200 preference shares which had been given him by Parsonage, was then sent for by the latter or by Criper and was at length induced to sign the circular bearing his address at Southend, in which, after referring to the notice sent by the directors convening an extraordinary general meeting with a view to voluntary liquidation, he stated that as a large shareholder in the company he was dissatisfied with the conduct of the directors and was at his own expense about to make a thorough investigation into the affairs of the company with the object of ascertaining the truth with regard to the circumstances of the company and the conduct of its affairs, and he asked the shareholders to support him in his action, and, if they were unable to attend the meeting in person, to send proxies (forms of which he enclosed) to enable him to vote for them in support of the inquiry.

This circular was printed on the instructions of Parsonage or Criper and sent to the shareholders by Grace from Southend, and in reply he received proxies representing 60,000 shares.

The directors in addition held a considerable number of other proxies and together with Grace were able to command a clear majority.

The meeting was held on the 1st of April.

A resolution for voluntary winding up was moved by Parsonage and seconded by Criper; an amendment was moved by a shareholder for the appointment of a committee of investigation, but was declared to be lost on a show of hands. Grace alleged that he voted for it but he did not use his proxies or demand a poll. An amendment was then moved for compulsory winding up and seconded by Gould, and on a show of hands was apparently carried, but on a poll being demanded the proxies held by Grace and the directors were used (in spite of protest) in favour of a voluntary winding up, a resolution for which was passed. On the 4th of April another form of circular was sent to Grace with instructions for getting it printed. Grace had it printed and sent it from Southend; it purported to describe what took place at the meeting and explained Grace's action there and expressed the hope that he had acted in accordance with the wishes of those who had given him proxies, and asked the latter to return a form (which was enclosed) expressing their opinion of the way in which he had used their proxies. An order was subsequently made for the winding up of the company.

Sir R. Finlay, A.G., and *R. J. Parker*, for the official receiver, in support of the motion.—It is clear that if in the course of judicial proceedings

attempts are made to mislead the court that is a contempt of court. In this case the existence or non-existence of a voluntary winding up was of importance in determining whether a compulsory winding-up order should be made; the object of sending out the first circular was to enable a voluntary winding-up resolution to be passed by fraudulent means, in order to influence the court not to make a compulsory winding-up order. Some allowance must be made for Grace having regard to his position.

Shee, K.C., and *Edmonds*, said the defendants did not intend to mislead the court; they were not thinking of the court, their object was to defeat Gould. The issuing of circulars is an everyday occurrence in company matters, and was here employed, not to deceive the court, but merely to checkmate Gould and to assist Parsonage by obtaining a voluntary winding up.

WRIGHT, J.—As regards the three persons who are before me, Parsonage, Criper, and Grace, there is no question at all that a fraud of the grossest kind has been committed, and the only question is how far that ought to be regarded as a fraud upon the court, or an attempt to interfere with the action of the court. Grace was a man of straw put forward by Parsonage and Criper to issue a false circular from Southend. Why was the circular posted from Southend except for the purpose of committing a fraud? At the meeting of the shareholders Grace obeyed Parsonage and Criper, and all the proxies which were given to be used against the directors were used in their favour and in support of a resolution for a voluntary winding up. The effect was that the shareholders whose proxies had been obtained were deprived of their power to vote. It was certainly the grossest of frauds on the shareholders, and amounted to obtaining their proxies by false pretences.

Now, so far there is no doubt, and the real and only question is how far I ought to consider that this fraud was directed against the court. I cannot think that Mr. Parsonage and Mr. Criper acted so ignorantly as not to know why they wanted a voluntary liquidation when there was a creditor's petition pending for a compulsory liquidation. I think I must give them credit for knowing perfectly well that if they passed this resolution for a voluntary liquidation it would destroy the power of the court to make the compulsory winding-up order, unless on proof, which it is sometimes not very easy to obtain, that the creditor would be prejudiced by the continuance of the voluntary winding up. It seems to me an obvious inference that all that was done by these people was done for the purpose of defeating the creditor's petition, and that what they wanted to avoid was a compulsory winding up. Mr. Parsonage, Mr. Criper, and Mr. Grace go there with 60,000 proxies, as well as using their own, in favour of a voluntary liquidation, obviously with the knowledge that that would defeat the compulsory winding up; and also why they wanted a voluntary liquidation was that there was already a winding-up petition before the court. I think I should be failing in my duty if I did not consider that the inference ought to be drawn that the intention was to do what was the obvious consequence, and the importance of which in the eyes of these persons may be measured by the frauds to which they were willing to condescend in order to accomplish them. Where there is a real interference with the jurisdiction of the court, which is probably a better phrase than contempt of court, the court has no option but to act, however unwilling it is to deal with matters affecting the liberty of the subject. If a case of the kind I have stated is made out, the court has no option, and therefore under the circumstances of this case it is my duty to commit Mr. Parsonage to prison for six weeks. Mr. Criper, I think, is in some respects less less guilty than Mr. Parsonage, because I do not think he was so much the originator of the matter as Mr. Parsonage, although he took a considerable part in it himself. He will be committed for four weeks. As for Mr. Grace I gladly give effect to the recommendation of the Attorney-General. I am not able to pass his case over, but it is useless making an order upon a man of straw to pay costs; that is quite idle. It is better to treat him with complete mercy than to put an ineffectual penalty upon him of that kind. I think, therefore, no order ought to be made as to Mr. Grace.

As regards Mr. Parsonage and Mr. Criper, they will be committed for the terms I have mentioned, and they must pay the costs of the motion.

Motion allowed.

Solicitors, *The Solicitor to the Board of Trade; Mason, Son, & Turnbull.*

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance and Phillimore, JJ.) — May 13.

GOULDER v. ROOK.
BENT v. ORMEROD. (a.)

Adulteration—Food and drugs—Beer containing arsenic—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 3, 5, 6.

Beer, containing arsenic to such an extent as to render the same injurious to health, was sold to a purchaser. The arsenic had been unknowingly mixed with the beer by the brewer in the course of the manufacture. The vendor of the beer was summoned under section 6 *of the Sale of Food and Drugs Act*, 1875. *The justices who heard the summons found that the beer was not of the nature, substance and quality of the article demanded by the purchaser.*

Held, that there was evidence in support of the finding, and that the vendor ought to be convicted.

These two cases, which involved the same point under the Sale of Food and Drugs Act, 1875, were argued together.

Goulder v. *Rook* was a case stated by the stipendiary magistrate of Manchester.

An information was preferred by the respondent, an inspector under the Sale of Food and Drugs Acts, against the appellant, charging her that she did sell to the prejudice of the purchaser a certain article of food, to wit, beer which was not of the nature, substance and quality of the article demanded by such purchaser, the same containing arsenious acid.

The appellant was a retailer of beer.

A sample of beer taken by the respondent contained arsenious acid to the extent of not less than one-eighth of a grain per gallon.

The case stated that the appellant did not mix the arsenic in the beer herself and did not know of its existence in the beer, nor could she be expected to know of or suspect the existence of such an admixture; that the arsenic was an ingredient injurious to health, and the quantity of arsenic in the beer was such as to render the same injurious to health, but did not form one of the constituents of beer; and that the arsenic had been unknowingly mixed with the beer

(a.) Reported by C. G. WILBRAHAM, Esq., Barrister-at-Law.

by the brewer through having been improperly introduced in the manufacture of some substance used in brewing.

The magistrate found that the beer sold by the appellant was not of the nature, substance and quality of the article demanded by the purchaser and convicted her.

Section 6 of the Sale of Food and Drugs Act, 1875, enacts as follows: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser. . . ."

Section 3 enacts that "No person shall mix, colour, stain, or powder any article of food with any ingredient or material so as to render the article injurious to health, with intent that the same may be sold in that state, and no person shall sell any such article so mixed, coloured, stained or powdered. . . ."

Section 5 provides that "No person shall be liable to be convicted under either of the two last foregoing sections of this Act in respect of the sale of any article of food, or of any drug, if he shows to the satisfaction of the justice or court before whom he is charged that he did not know of the article of food or drug sold by him being so mixed, coloured, stained, or powdered, as in either of those sections mentioned, and that he could not with reasonable diligence have obtained that knowledge."

Fletcher Moulton, K.C. (*Montague Lush* with him), for the appellant.—The proceedings have been wrongly taken under section 6. They ought to have been taken, if at all, under section 3. The reason why they were not taken under the latter section was, that by section 5 it is made a defence to a sale within section 3 that the accused did not know of the article being mixed, &c., as in section 3 mentioned, and there was no such provision with regard to section 6. No offence under section 6 has been committed, the article sold being really beer into which, through no fault of the appellant and without her knowledge, the arsenic has been introduced. Section 6 does not apply to such accidental contamination, but was directed against deliberate fraudulent trade adulteration.

Lawson Walton, K.C. (*Byrne* with him), for the respondent.—Section 3 does not apply. That section applies to cases of deliberate mixing with a trade object; whereas, what took place here was that certain sulphuric acid was used in the manufacture of the glucose from which the beer was made, and there had been an omission to remove the arsenic from the sulphuric acid. The proceedings were rightly taken under section 6, because the beer sold was not of the "quality" of the beer demanded. The word quality has reference to the wholesomeness of the article demanded: see *Betts* v. *Armstead*, 36 W. R. 720, 20 Q. B. D., 771, and *Parker* v. *Alder*, 47 W. R. 142, [1899] 1 Q. B. 20.

Moulton, K.C., replied.

Bent v. *Ormerod* was a case stated by justices of Preston.

The facts were similar to those in *Goulder* v. *Rook*, and the proceedings were taken under the same section.

The case was thus stated:

"Arsenic does not form one of the constituents of beer, and the quantity of arsenic in the beer was such as to render the same injurious to health. No evidence was given as to the constituent parts of pure beer, but it was admitted by the respondent, and we find, as a fact, that pure beer does not contain the quantity of arsenic contained in the sample sold to the inspector. The respondent did not mix the arsenic in the beer and did not know of its existence in the beer, nor could he with reasonable diligence have obtained that knowledge. The arsenic had been introduced into the beer by the brewer using glucose or invert sugar, a substance often used in brewing, which improperly contained arsenic. The brewer did not know when he used it that the glucose or invert sugar was contaminated with arsenic.

In this case the justices found that the beer sold by the respondent was not of the nature, substance and quality of the article demanded, in that there had been mixed with it an ingredient prejudicial to health, but they dismissed the summons on the ground that the proceedings ought to have been taken under section 3.

Joseph Walton, K.C. (*Pickford, E. Sutton*, and *F. Mellor* with him), for the appellant.—The facts that the beer sold was injurious to health and that proceedings could have been taken under section 3 did not make the sale of it any the less an offence within section 6. The overlapping of the two sections is no answer: see *Dickins* v. *Randerson*, [1901] 1 Q. B. 437. Sub-section 1 of section 6, which provides that "an offence shall not be deemed to have been committed under the section where any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof . . ." shows that the sale of articles injurious to health was contemplated by the section.

Montague Lush (*Fletcher Moulton, K.C.*, with him), for the respondents.—In order to support proceedings under section 6 it is necessary to show the substitution in the article demanded of some inferior substance. It is trade adulteration which is aimed at by the section, and where you have an adulterated article sold as the genuine one there you have a case within the purview of the section. The word "quality" has no reference to wholesomeness; it simply refers to cases where articles are usually distinguished in the trade as "first quality," "second quality" and so forth. If it were true to say that the mixture of some injurious substance with an article of food or a drug altered the "quality" of the article, then you could always proceed under section 6, and section 3 would be unnecessary.

Joseph Walton, K.C., replied.

Lord ALVERSTONE, L.C.J.—I am of opinion that the conviction in *Goulder* v. *Rook* should be supported, and that the case of *Bent* v. *Ormerod*, in which there has been a dismissal of the charge, should go back to the justices for conviction. I think a great deal of the difficulty disappears if the language of section 6 is considered by itself for a moment. I quite agree that if it is plain that one group of sections deals with one class of offence, and another group of sections deals with another class of offence, the consideration and comparison of the language of the two groups of sections affords very material assistance. On the other hand, it has not been disputed that sections which create separate offences may overlap, and it may very well be that some facts afford grounds for prosecuting under more than one section. There are numerous instances of that in our criminal statutes, but I think that in proceedings under section 6 the question is whether or not a person has sold an article of food or a drug which is not of the nature, substance and quality of the article demanded by the purchaser. In my opinion, section 6 starts at the sale, if I may use the expression, and ends at the sale. There is no need to consider how that which makes the article otherwise than of the nature, substance and quality of the article demanded has got into it, but the question is whether in fact it is there. I

think it would be cutting the section down unwisely, and cutting it down without sufficient direction in the statute, if we were to hold that it was needful to enter into an examination of the stage at which, or the precise process by which, that which makes the article different has found its place in the article which is being sold. Now, applying that test, the magistrate in *Goulder* v. *Rook* has found as a fact that the beer sold by the appellant was not of the nature, substance and quality of the beer demanded by the purchaser. He has found as a fact, or rather the certificate shows, that arsenious acid to the extent of not less than one-eight of a grain per gallon was there, and he finds "that arsenic was an ingredient injurious to health, and that the quantity of arsenic in the beer was such as to render the same injurious to health, but that it did not form one of the constituents of beer." I read those words as meaning that arsenic does not form one of the constituent parts of beer in any substantial degree under ordinary circumstances. It is plain that if I am right in the view I have expressed as to the *primâ facie* meaning of section 6, since the magistrate has found as a fact that this article was not of the nature, substance and quality of that demanded by the purchaser, then, if there is any evidence which supports that conclusion, the conviction must stand. I have already indicated that the magistrate had before him a case in which a dangerous foreign body is present to the extent of one-eighth of a grain per gallon, which is injurious to health, then it seems to me that if he has drawn the conclusion that the beer sold was not of the nature, substance and quality of the article demanded, it is not possible for us to say that he was wrong. It has been suggested that if what is in the article is the result of some ingredient put into it in the course of its manufacture which in fact makes it injurious to health, that it can only be a "mixing" under section 3, and that the offence can only fall within the terms of that section. The penalty is very much more severe under section 3, and knowledge is made of the essence of the offence—that is to say, the defendant can show there is no offence if he proves that he did not know, and had no means of knowing, that injurious ingredients had been mixed with the article. Under section 6 the penalty is less, and it has been expressly decided in two or three cases that the knowledge of the person charged is immaterial—that is to say, however innocent, however little he may have known, yet he may be convicted under section 6.

In the second case that was argued before us—that is to say, *Bent* v. *Ormerod*—the finding of the magistrates was the same, although the summons was dismissed. They found as a fact that the beer sold by the respondent "was not of the nature, substance and quality of the article demanded by the purchaser, in that there had been mixed with it an ingredient prejudicial to the health of the purchaser." It was proved there was arsenic in the sample to the extent of one-ninth of a grain per gallon at the least; and it is also stated in the case that arsenic does not form one of the constituents of beer, and that the quantity of arsenic in the beer was such as to render the same injurious to health.

Under these circumstances, I come to the conclusion that there was evidence on which the magistrates could find as a fact that there was an article sold different in nature, substance and quality from that demanded, and therefore that the conviction in *Goulder* v. *Rook* ought to stand, and that in *Bent* v. *Ormerod* the case must be remitted to the magistrates with the expression of our opinion that there should be a conviction.

I only desire to add that I must not be understood to suggest that every accidental introduction of deleterious matter in an article sold for food of necessity makes it different in nature, substance and quality from the article demanded. It is for the magistrates in each case to find whether in fact the article supplied is of the nature, substance and quality of the article demanded.

LAWRANCE and PHILLIMORE, JJ., concurred.

Judgment accordingly.

Solicitors for the appellants, in *Goulder* v. *Rook*, and for the respondents in *Bent* v. *Ormerod*; *Grundy, Kershaw, Samson & Co.*, for *Grundy, Kershaw, Samson & Co.*, Manchester.

Solicitors for the respondents in *Goulder* v. *Rook*; *T. Hudson*, Manchester, and for the appellant in *Bent* v. *Ormerod*; *Snow, Fox, & Higginson*, for *Harcourt E. Clare*, Preston.

K. B. Div.
(Lord Alverstone, L.C.J., and Lawrance, J.) — May 9.

DIERKEN v. PHILPOT. (a.)

County court—Practice—Jurisdiction to remit action—Claim on writ for over £100—Abandonment of excess—Jurisdiction of county court judge to proceed with trial—Prohibition—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action commenced in the High Court in which the claim is for more than £100, but which claim is reduced to £100 by abandonment of the excess over £100 after action brought, there is no jurisdiction under section 65 of the County Courts Act, 1888, *to remit the action for trial in the county court except by consent of the parties.*

Where, however, the plaintiff has reduced the claim to £100 by abandonment of the excess and the master at chambers has made an order remitting the action, and the defendant has failed to appeal against such order, the county court judge has jurisdiction to try the action though the order should not have been made, and the High Court under such circumstances will not subsequently grant a prohibition.

This was an appeal by the plaintiff from an order made by Day, J., in chambers, directing that a writ of prohibition should issue to the judge of the Westminster County Court, Lumley-Smith, K.C., prohibiting him from proceeding in the matter of the action.

The grounds of appeal were (1) That the county court judge was not acting without, or in excess of, his jurisdiction in hearing and determining the action, but was bound to hear and determine it; (2) that the defendant had by his *laches*, acquiescence, or neglect, debarred himself from claiming the issue of the writ of prohibition.

The action was brought by Dierken against Philpot to recover the sum of £116 in respect of arrears of salary, the writ being dated the 25th of June, 1900.

On the 5th of November, 1900, the plaintiff made an application before a master in chambers for an order that the action should be tried in the county court, stating that he had abandoned his claim for the excess over £100, and an order under section 65 of the County Courts Act, 1888, was made by the

(a.) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

master remitting the case to the Westminster County Court.

The defendant never appealed against this order, and the action in due course came on for trial in the county court, when the defendant objected to the master's order on the ground that he had no jurisdiction to make it.

The county court judge overruled the objection, holding that he was bound by the order to hear the case, and he proceeded to try the action, and the plaintiff recovered the amount of his claim.

On the 26th of March, 1901, the defendant applied for a writ of prohibition to the county court judge, and Day, J., at chambers, ordered a writ to issue.

This was the order the plaintiff now appealed from.

C. H. Lindon, for the appellant.—The first question is whether a master can remit an action to the county court that is brought to recover more than £100 if the excess over the £100 is abandoned by the plaintiff. In the present case the plaintiff reduced the amount "by payment . . . or otherwise to a sum not exceeding one hundred pounds," and therefore the case comes within section 65 of the County Courts Act, 1888. *Hodgson* v. *Bell*, 38 W. R. 325, 24 Q. B. D. 525, is against this contention so far as it says a payment within section 65 must be a payment before action, but the present case is distinguishable in that here the plaintiff went before the master and abandoned the excess, whereas in the case cited the sum was reduced by payment. The abandonment shows that the plaintiff did not desire to recover more than £100. The abandonment, moreover, was not objected to by the defendant, and he took no steps to appeal from the master's order remitting the action. The defendant's right to a writ of prohibition is therefore precluded. The defendant having let the action go to the county court, the judge there is bound by the master's order and cannot inquire into the circumstances under which it was made nor into the master's jurisdiction: *Blades* v. *Lawrance*, 22 W. R. 643, L. R. 9 Q. B. 374. In the case of *Reg.* v. *Marylebone County Court Judge*, 50 L. T. Rep. 97, Day, J., says: "There can be no doubt that when an order of the court, good on the face of it, is addressed to any person whatsoever, that person is bound to obey it, and cannot question the jurisdiction of the court to make the order." The present case is distinguishable from *Farquharson* v. *Morgan*, 42 W. R. 306, [1894] 1 Q. B. 552, inasmuch as in that case there was a total absence of jurisdiction apparent on the face of the proceedings. In the case of *Marsden* v. *Wardle*, 2 W. R. 455, 3 El. & Bl. 695, Coleridge, J., says: "There is reason for refusing a writ of prohibition after judgment, because, if a party chooses to wait and take his chance of judgment being in his favour before he makes any objection, he cannot complain afterwards." So in the present case *laches* on the part of the defendant prevent him now from obtaining a writ of prohibition.

Lewis Thomas, for the respondent.—The master had no jurisdiction to make the order: *Hodgson* v. *Bell* and *Reg.* v. *Judge of City of London Court*, [1891] 2 Q. B. 71, 39 W. R. Dig. 65. There had been no *laches* on the part of the defendant, as at all stages of the proceedings he had objected to the master's order. The county court judge knew it was a remitted action, and must have seen that the writ was issued for more than £100; and he should have known that, except by consent, he had no jurisdiction to try the case. Where an excess of jurisdiction is once shown a writ of prohibition must issue, *vide* Willes, J., in *Lord Mayor of London* v. *Cox and others*, 16 W. R. 44, L. R. 2 H. L. 239.

Lindon replied.

Lord ALVERSTONE, C.J.—This is a case of some difficulty, but on the whole I have come to the conclusion that the writ of prohibition ought not to issue. In my opinion the master ought not to have made the order remitting the action. In *Hodgson* v. *Bell* it was decided that where an action is brought in the High Court in which the claim indorsed on the writ, though it originally exceeded £100, had been reduced to a sum not exceeding £100 by a payment made by the defendant to the plaintiff, there is no jurisdiction under section 65 of the County Courts Act, 1888, to order the trial of the action in the county court. Nor in the present case, where there has been an abandonment of the excess over £100 by the plaintiff after action brought, is there any jurisdiction to make such an order; and if the point had been taken before the master it would have been his duty to decline to make the order. But if the parties had consented the order could have been made, as such consent would have given the master jurisdiction. The defendant had the right to appeal against the master's order, and he should have done so, but he let the time go by and did not do so. It is now too late for him to raise the point by way of prohibition, and I do not think we ought to grant a writ after the master's order has gone to the county court judge. By not appealing at the proper time and then raising the point by way of prohibition the defendant had put both the county court judge and the plaintiff into an awkward position and necessitated the trial of a kind of preliminary action. It was argued that it must have been apparent on the face of the proceedings that there had been an excess of jurisdiction, and that therefore a writ should issue. I agree that if it so appears a writ will go, but I do not think in the present case there was an excess of jurisdiction on the part of the county court judge. The judge ought not to be compelled to inquire, in the case of remitted actions, whether or not the writ in the action exceeded the sum of £100; it would be putting an excessive burden upon him to hold that it was his duty to decide in the first instance whether he should or should not obey an order of the High Court, apparently good on the face of it, remitting an action to him for trial, and against which order there had been no appeal and the time for appeal had expired. We have a discretion in matters of prohibition, which discretion I think we should in this case exercise by discharging the writ granted by Day, J., who, we think, ought not to have granted it.

LAWRANCE, J.—I agree.

Appeal allowed.

Solicitors for appellant, *G. B. Howard & Fenner.*

Solicitors for respondent, *Robert Todd.*

House of Lords.

From C. A. (England). June 24.

RAINE v. JOBSON & CO. (a.)

Master and servant—Employers' liability—Accident—Compensation—Dock—"Factory"—"Undertakers"—Repair of ship—Factory and Workshop Act, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act,* 1897 (60 & 61 *Vict. c.* 37), *s.* 7.

The appellant's husband was at work on a vessel which was being repaired by the respondents in a dry dock hired by them for the purpose. In the course of his employment, when crossing from the vessel by a plank to the side of the dock the plank tilted, and he was thrown into the dock and killed.

Held (reversing the decision of the Court of Appeal), *that the dock was, by section* 7, *sub-section* 2, *of the Workmen's Compensation Act,* 1897, *a "factory," and that the respondents as occupiers thereof were liable to pay compensation.*

Appeal from an order of the Court of Appeal (A. L. Smith, M.R., and Collins, L.J.).

The respondents carried on business as ship repairers at West Hartlepool, and their works adjoined the docks belonging to the North-Eastern Railway Co., but they had no dock of their own.

When they were about to repair a vessel, and it was necessary to have the vessel in a dry dock, they hired a dry dock from the North-Eastern Railway Co., as was done on the present occasion.

The dry dock was provided with dock gates, a steam crane, pumping machinery, and a blacksmith's shop, all the property of the North-Eastern Railway Co.

On the 29th of January, 1900, the repondents were in exclusive occupation of the dry dock for the purpose of examining and cleaning the bottom of a damaged steamship, and for such occupation they paid the North-Eastern Railway Co.

The water had been pumped out of the dock and the vessel duly shored up by the respondents' workmen.

While the process of examining and cleaning the vessel was going on, the appellant's husband, a labourer in the employment of the respondents, at their works, and then at work on the vessel, was directed to go ashore for some paraffin; and whilst he was walking along a plank connecting the vessel with the side of the dock the plank tilted and he fell to the bottom of the dock, sustaining injuries from which he died.

It was held by the county court judge, and the Court of Appeal held, that the deceased at the time of the accident was not employed on, in, or about a factory within the meaning of the Act.

R. J. Simey and *H. A. Johnston*, for the appellant.

Ruegg, K.C., and *E. Shortt*, for the respondents.

Earl of HALSBURY, L.C.—I am of opinion that this judgment ought to be reversed. It appears to me that some difficulty has arisen from the artificial mode in which the Legislature has applied various sections of various Acts as ancillary to the Workmen's Compensation Act. I quite agree that it would appear from that Act of Parliament that it was not within the contemplation of that statute to deal with the relation between shipowners and sailors when engaged in their ordinary occupation of sailing upon the seas, or to bring them within that statute at all. But although I quite agree that that is the true view of what this Act of Parliament has done, it seems to me a most extraordinary consequence of that omission to suppose that thereupon everything that is done in or upon or near a ship is to be excluded from the operation of the Act of Parliament. It would be to my mind a most unreasonable and extraordinary extension of that immunity given to persons interested in seafaring adventure to suppose, because the accident happened in or upon a ship, that therefore it is to be excluded from the operation of the Act of Parliament generally. I know of no such principle; and therefore one must examine and see what the facts are that we are dealing with as regards the accident which is the subject-matter of this inquiry.

The respondents are a firm, part of whose business consists of repairing ships, and for the purpose of their business they hired a dock. I do not care for what purpose they hired it. For my own part, whether there was a ship in it or not, if they were engaged in some performance for which they required the use of a dry dock, and if in the course of that employment a workman was injured, they would, to my mind, under these Acts of Parliament, be clearly within these Acts and liable to pay compensation. The question of fact whether it happened on a ship or not appears to me an absolutely irrelevant inquiry. The fact that it was, or it is assumed that it was, on a ship is, as I said, irrelevant. It is perfectly immaterial whether it was on a ship or a landing-stage, or a staging, or what not. The respondents were the persons who were at that time the hirers of the dock—a dry dock. The performance intended to be pursued was that a ship was put into the dry dock in order to be cleaned and repaired. It is obvious that for the purpose of cleaning and repairing a ship the external part of that ship must be protected from water; and a dry dock is the appropriate machinery for effecting that object. This man appears to have been an ordinary labourer employed for the purpose of doing anything that was required to be done. In order to fetch something that was intended to be used for the purpose of the work, he was sent from the ship to the land upon a gangway. When he put his foot upon the gangway the gangway slipped, and he was precipitated for a distance of forty-eight feet down and killed. Assuming a dock to be within the statute—and as to that we had a very frank and proper admission that this dock is under the Act a "factory" within the meaning of the Act—here is a man killed by an accident in a "factory," the factory being a dock, and the accident happened in the course of his employment, while he was so employed in the dock by the persons who had hired the dock for the purpose of their trade.

I am not able at present to follow the train of reasoning by which the respondents sought to suggest that because the wooden structure which was inside the dock, and to which the work was being applied, was a ship, which, when floated into the sea, would be capable of being treated as a separate entity, and would be free from the operation of the Act generally—that is to convey to the dock in which the ship is placed the immunity which the ship itself would possess if sailing upon the high seas. Why that should be so I am wholly unable to understand. The place or the thing that is being used, the dry dock, is not at sea; it forms no part of that subject-matter to which this artificial immunity is given by the statute, but it is an ordinary piece of machinery intended for the purpose of repairing ships, of which machinery these defendants are in occupation, I should say, but at all events have the use of it in and about it. Therefore it seems to me that every element required

(a.) Reported by C. H. GRAFTON, Esq., Barrister-at-Law.

by the statute is satisfied by the facts which are proved in this case. Therefore I am of opinion that this judgment should be reversed; and I move your lordships accordingly.

Lord MACNAGHTEN.—I am of the same opinion. The respondents, Messrs. Jobson & Co., are ship repairers at Hartlepool. They have a place of business there which in their evidence they call a "manufactory for the repair of ships," but I do not think it can be described as "a factory which is a shipbuilding yard," to use the expression which occurs in section 7, sub-section 3, of the Act. Having no water frontage they have no means of launching a vessel, nor have they any place of their own into which they can take a vessel for repair. When employed to repair a vessel which requires to be dry-docked, they hire a dock from the North-Eastern Railway Co., who seem to own all the dock accommodation in Hartlepool. That is what was done in the present case. Messrs. Jobson & Co. hired a dry dock, and were cleaning or repairing a vessel in it. A workman employed by them on this job—a labourer, but none the less a workman—met with personal injury by an accident. He slipped off a sort of gangway, fell into the dock, and was killed. Why is that not a case for compensation under the Act? If you translate the account of the accident from ordinary language into the phraseology of the statute, it seems to come under the very words of the enactment. The dock was a "factory" because it was a "dock" "to which some provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." Messrs. Jobson were "undertakers" because they had at the time the "actual use and occupation of the dock." The accident happened to a workman in "the dock," and it was an accident "arising out of and in the course of" his employment. I agree with counsel for the respondents that it is difficult, if not impossible, to reconcile the case of *Merrill* v. *Wilson*, *ante*, p. 161, [1901] 1 Q. B. 35, with *Flowers* v. *Chambers*, 47 W. R. 513, [1899] 1 Q. B. 142. Of the two I prefer the later case.

I think the decision under appeal must be reversed.

Lord SHAND.—I am of the same opinion. It cannot be disputed—indeed, it has not been disputed—that the dock in question is a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7. That statute provides that a "factory" in the Act "has the same meaning as in the Factory and Workshop Acts, 1878 to 1891," and "includes any dock to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." Various provisions of these Factory Acts have been shown to be applied by the Factory and Workshop Act, 1895, and there is therefore no question that this dry dock is a "factory."

It only remains to ascertain whether the defendants were "undertakers" as defined by section 7 of the Workmen's Compensation Act. That section provides that the Act shall apply to employment by the "undertakers" on or in or about a factory, and that in the case of a factory the undertaker means "the occupier thereof within the meaning" (again) "of the Factory and Workshop Acts, 1878 to 1895." I am not able to perceive any ground upon which I can say that these defendants, the employers of the deceased workman, were not occupiers in the use of that factory. They had taken the dock in order to put the ship into it in order to execute work on her. The work upon which they were engaged was the cleaning and repairing of the bottom of the ship; and in order to perform this work the use and occupation of the dock for the time was necessary for them. They were thus in terms of the statute "undertakers" within the meaning of the Act, upon whom the responsibility to their servants for injury by accidents was imposed by the statute. The case is entirely different from that of a ship at sea, where the seaman who is injured is incurring only the ordinary maritime risks of men engaged in navigation. It is a case of shipbuilders or repairers who were in the use and occupation of a dock or factory, as defined in the statute, having servants working for them, one of whom sustained an accident with the fatal result described in the evidence. I cannot see any ground upon which it can be held that the employers and their workmen were not within the purview and terms of the statute.

Lord BRAMPTON.—I also am of opinion that the decision of the Court of Appeal ought to be reversed, and for the reasons which have been so fully stated by the Lord Chancellor in the judgment he has delivered; but I should like to make one observation of my own with reference to the last point which was so ingeniously and so lengthily argued before us, that it was not the dock but only the berth which was hired. The point was never raised at the trial, and I think it ought not to have been raised here, and our time has been occupied unnecessarily in discussing it.

Lord LINDLEY.—I shall confine myself to saying that I do not see how to get out of the language of the two sections—section 7 of the Act of 1897 coupled with section 23 of the Factory and Workshop Act, 1895. I have tried, but I cannot do it. Therefore I agree that the appeal ought to be allowed.

Appeal allowed.

Solicitor for the appellant, *Charles H. Dodd*, for *J. J. Dodd*, West Hartlepool.

Solicitors for the respondents, *William Hurd & Son.*

Court of Appeal.

From K. B. Div. (Vaughan Williams and Stirling, L.JJ.) — August 2.

ALDERTON v. J. & J. W. PALLISER. (a.)

County court—Practice—Prohibition—Judgment debtor outside district—Affidavit on application for judgment summons—Waiver—County Court Rules, 1889, *ord.* 25, *r.* 14a, *App. Form* 52a.

The requirements of ord. 25, *r.* 14a, *of the County Court Rules*, 1889, *as to the form of an affidavit on an application for leave to issue a judgment summons against a debtor who does not dwell or carry on business and is not employed within the district of the court in which the judgment was obtained, cannot be waived by the debtor.*

Appeal from the refusal of Bucknill, J., at chambers to grant a writ of prohibition directed to the judge of the Penrith County Court restraining further proceedings on a judgment summons and order of commitment made by the county court judge against the two defendants, the applicants for the writ.

The plaintiff, who carried on business at Plumpton, in the county of Cumberland, had supplied goods to the two defendants, who resided and carried on business in the city of Bradford as Palliser & Son.

On the 25th of May, 1900, the plaintiff obtained a judgment against the defendants in the county court of Cumberland, held at Penrith, for £15 17s. 4d. in respect of goods supplied, and a sum of 10s. only had been paid on this judgment.

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

The plaintiff proceeded to enforce the judgment by means of a judgment summons issued out of the Penrith County Court, and for that purpose, as the defendants neither dwelt nor carried on business nor were employed within the district of the court, it was necessary to obtain the leave of the judge before such summons could be issued.

The County Court Rules, 1889, ord. 25, provide: "Rule 14*a*.—Where a debtor does not dwell or carry on business and is not employed within the district of the court in which the judgment was obtained, the summons shall not be issued from that court without leave of the judge. The application for leave shall be made upon affidavit according to the form in the appendix, and leave shall not be granted unless the judge is satisfied that the evidence offered by such affidavit, if uncontradicted, would justify the making of an order of commitment against the debtor. If the leave be granted a copy of the affidavit shall be lodged with the registrar and annexed to the judgment summons and served therewith."

The plaintiff obtained leave and issued a judgment summons against the defendants in the Penrith County Court, upon which summons the defendants were (on the 7th of December, 1900) ordered to pay the balance of the judgment debt and costs amounting to £16 11s. 4d. by instalments of £2 every twenty-eight days. Nothing had been paid by the defendants on this order.

The plaintiff again applied on the 1st of March, 1901, to the judge of the county court at Penrith for leave to issue a judgment summons in respect of the instalments then in arrear, and upon an affidavit made by the plaintiff on the 1st of March leave to issue the judgment summons was granted by the judge.

This affidavit of the plaintiff, after setting out the formal paragraphs 1 and 2 of the prescribed form, stated: (3) The defendant John Palliser now lives at Joseph-street, Bradford, and the said J. W. Palliser resides at Greengill-street, Bradford; (4) the defendants carry on business as game and rabbit salesmen in Great James-street Market, Bradford, and are doing a good business on their own account. On the 7th of March, 1901, a judgment summons—returnable on the 15th of April—was issued out of the county court against each defendant. When the judgment summons came before the judge on the 15th of April, a letter from the defendants' solicitor was put in stating that both defendants were undischarged bankrupts and were in extremely poor circumstances, and the learned judge adjourned the hearing until the 10th of May in order to give the defendants time to file a joint affidavit. When the case again came before him, he on the 10th of May made a commitment order on the judgment summonses for the imprisonment of both defendants for twenty-eight days unless they paid £6 5*s*. 6d. into court within six weeks.

A summons was then taken out by the defendants for a writ of prohibition restraining all further proceedings on the judgment summons and commitment order against each defendant upon the ground that the leave of the court was necessary for the issue of the judgment summons; that such leave could only be given by the judge upon an affidavit in the prescribed form; that the plaintiff's affidavit of the 1st of March on which the judge granted leave was not in the prescribed form and was insufficient and defective in that there was no statement contained therein as to the apparent yearly rent or value of the house or shop in which each defendant lived, and that there was no statement showing that their business was profitable or that either of the defendants had the means to pay; and there was no statement as to whether the defendants were married or not and whether they respectively had any children. The defendants also stated in their affidavit that the reason they did not attend the hearing of the judgment summons was that neither of them could pay the railway fares and could not afford to be represented.

In reply the plaintiff stated that the defendants had waived any objection they might have raised to the jurisdiction of the county court by the statements made in their affidavit applying to the court to make an order not exceeding 2s. a month as being under the circumstances the "utmost they could possibly pay."

Bucknill, J., at chambers refused to grant a writ of prohibition on the ground that the defect in the jurisdiction of the county court judge had been waived by the defendants.

The Divisional Court (Ridley and Bigham, JJ.) held that the defect could and had been waived by the defendants, and affirmed the decision of Bucknill, J.

The defendants appealed.

Lowenthal, for the defendants.—The Divisional Court were in error when they held that a defect in jurisdiction apparent on the face of the proceedings could be waived: *McIntosh* v. *Simpkins*, *ante*, p. 241, [1901] 1 Q. B. 487. Where the court is only made cognizant of the defect by evidence such a defect can be waived: see *Farquharson* v. *Morgan*, 42 W. R. 306, [1894] 1 Q. B. 552, and a *dictum* of Collins, L.J., in *McIntosh* v. *Simpkins*.

W. Whateley, for the plaintiff.—Where the inferior court could under circumstances have jurisdiction there can be no waiver. That, I submit, is the distinction to be drawn between the cases where the waiver has been held to be good or bad. In this case, as the county court judge had jurisdiction, and there has only been an irregularity in the proceedings which could be waived and has been waived, the order for prohibition was rightly made: *Jones* v. *James*, 19 L. J. Q. B. 257; *Jones* v. *Owen*, 5 Dowl. & L. 669; *Mouflet* v. *Washburn*, 54 L. T. Rep. 16, 34 W. R. Dig. 51; *Moore* v. *Gamgee*, 38 W. R. 669, 25 Q. B. D. 244.

VAUGHAN WILLIAMS, L.J., said: It cannot be denied that, according to the decision of this court in *McIntosh* v. *Simpkins*, an affidavit substantially in the form required by section 5 of the Debtors Act, 1869, and the County Court Rules, 1889, is a statutory condition precedent to the jurisdiction of the county court. That being so, the next question is whether the absence of this preliminary statutory condition appeared on the face of the proceedings. In my opinion it clearly did. Its absence was apparent on the face of the affidavit, which was certainly part of the proceedings, because, before the county court judge could make the order, he was bound by the statute to have the affidavit before him. It must, therefore, be taken that whatever appeared or did not appear on the affidavit appeared or did not appear on the face of the proceedings. Therefore, the statutory condition precedent to the jurisdiction is wanting, and its want appeared on the face of the proceedings. Is there any reason why the writ of prohibition should not issue? It was said that the want of jurisdiction had been waived. I will assume, for the purposes of the case, that there had been a waiver, though I do not in any way say that in fact there has been a waiver. In my opinion a party could not waive the want of jurisdiction appearing on the face of the proceedings. *Farquharson* v. *Morgan* is a clear authority for that proposition. I think it is impossible to say after the decision in *McIntosh* v.

Simpkins, that total absence of jurisdiction did not appear on the face of the proceedings. The cases which have been relied upon by the respondents' counsel are all cases of an irregularity in the course of the proceedings, and the proceedings were not void *ab initio*. I think it right to add that those who were familiar with the proceedings in county courts and who knew the class of persons affected by those proceedings knew quite well that, if a judgment were issued against a person residing out of the district when it might turn out that it was not right to summon him to the court, great hardship might be inflicted on him by compelling him to go to the court and state his objections to the issue of the summons. For that reason the Legislature has thought it right to say that certain matters must be laid before the county court judge before he issues the summons, and it is made a condition precedent to his jurisdiction that this should be done. This was not a matter of mere technicality, but was a matter of substance and of merit. The court must see that the conditions precedent to the exercise of coercive jurisdiction had been fulfilled. I entirely agree with Lord Davey in *Farquharson* v. *Morgan*, where he said that "the parties cannot by agreement confer upon any court or judge a coercive jurisdiction which the court or judge does not by law possess." The appeal is therefore allowed, and the writ of prohibition must issue.

STIRLING, L.J., in concurring, said he entirely agreed as to the great care that should be used to see that in dealing with the liberty of the subject all the conditions precedent had been strictly observed before an order out of the jurisdiction of the court should be issued. This was not a mere technical objection that the defendants had raised. It would be easy to give cases where a great hardship might be imposed on a defendant if the practice were relaxed and the court allowed such orders to be made. A defendant might constantly be required to attend at a court that was a long distance away, and thus be put to considerable expense and loss of time in defending himself against the order.

Appeal allowed.

Solicitors, *I. Goldman*, for *A. V. Hammond*, Bradford; *Bower, Cotton, & Bower*, for *Scott & Allen*, Penrith.

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) — Aug. 2.

In re MARQUIS OF ANGLESEY. WILLMOT *v.* GARDNER. (*a.*)

Contract—Interest—Tradesman's account—Notification that interest would be charged—Implied agreement by customer to pay interest.

During a period of ten years a tradesman had delivered to a customer, since deceased, a yearly account in which it was stated that interest would be charged on all sums due for more than three years. The customer never objected to the charge, and had from time to time made payments on account generally.

Held, that there was an implied agreement to pay interest.

This was an appeal from a decision of Cozens-Hardy, J.

The action was for the administration of the estate of a testator. A claim was carried in by a firm of tailors whom the testator had employed for a sum of £3,318 5s. 3d., of which £2,162 9s. 3d. was for goods supplied and £1,155 16s. was for interest on overdue accounts.

During a period of ten years the claimants had delivered to the testator a yearly account in which they had charged him with interest on sums which had been due from him for three years and longer. He had never objected to the charge of interest, and he had from time to time made payments to the claimants on account generally. This was the only evidence of any agreement by him to pay interest.

Cozens-Hardy, J., was inclined to think that this course of dealing was evidence of an agreement by the testator to pay interest as charged, but his lordship was of opinion that by reason of the decision in *In re Edwards, Williams* v. *Trench*, 61 L. J. Ch. 22, 40 W. R. Dig. 102, he was bound to hold that an agreement to pay interest was not proved, and he accordingly rejected the claim for interest.

The claimants appealed.

Rawlins, K.C., and *R. J. Parker*, for the claimants.

Eve, K.C., and *Ashworth James*, for the executors.

RIGBY, L.J.—I think there is evidence of an agreement to pay interest on the terms on which it was actually charged—that is to say, not immediately, but after the lapse of three years from the time it became due, and that the claimants are entitled to recover.

COLLINS, L.J.—It is true that the claim is against the estate of a deceased person, but I do not think that that is really material in the sense that the question of a person being dead generally is material in these cases. It is not a question of something that he is said to have said or done as to which there is no evidence at all except the evidence of one living person against the deceased. This is a case where the evidence is the acts and admissions of the deceased himself. There are facts as to which there is no dispute. The fact that the bills were sent in, the fact that on those bills the claim for interest was made, and the fact that payments were made thereupon, all stand outside controversy altogether, and that being the case what is that evidence of? That is for a jury, and it could not be withdrawn from a jury. It seems to me that the reasonable inference from that is that the deceased dealt with these people on the footing that he was to pay interest after three years.

ROMER, L.J., agreed.

Appeal allowed.

Solicitors, *Maude & Tunnicliffe; Farrer & Co.*

From Chan. Div. (Rigby, Collins, and Romer, L.JJ.) — Aug. 2.

HILDESHEIMER *v.* FAULKNER. (*a.*)

Copyright—Penalties—Number of offences—"Sum not exceeding £10"—Minimum sum—25 & 26 Vict. c. 68, s. 6.

The copyright in certain pictures was infringed by the distribution of over a million copies. Upon a summons to fix the amount of the penalties payable under 25 & 26 Vict. c. 68, s. 6, which fixes the penalty for each offence at a "sum not exceeding £10,"

Held, that each copy constituted a separate offence, but that the court was not bound to fix a penalty for each offence but could give an aggregate sum for all, even though that sum if divided by the number of offences would give for each offence a fraction of a farthing.

Decision of Kekewich, J. (48 *W. R* 682). *reversed.*

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

(*a.*) Reported by S. E. WILLIAMS, Esq., Barrister-at-Law.

This was an appeal from a decision of Kekewich, J. (reported 48 W. R. 682).

The action was brought to restrain the defendants from infringing the plaintiff's copyright in twelve pictures used in connection with packets of cigarettes.

On the 22nd of May, 1900, an injunction was granted restraining the defendants from selling or distributing prints of the twelve pictures other than those made by the plaintiff, and an inquiry was directed to be made in chambers how many copies of the pictures printed by certain other named persons for the defendants had been put in circulation by them.

The master by his certificate found that 1,012,600 copies of the pictures printed for the defendants by the persons named had been put in circulation by the defendants.

By section 6 of 25 & 26 Vict. c. 68, "If any person, not being the proprietor for the time being of copyright in any painting . . . shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, or knowing that such repetition, copy, or other imitation has been unlawfully made, shall sell . . . any copy . . . of the work . . . such person for every such offence shall forfeit a sum not exceeding £10."

The plaintiff took out a summons for the determination of the amount of the penalty to be paid by the defendants.

The questions were: (1) Whether the order for the printing of a million copies constituted a million offences or only one offence; (2) whether, if each copy constituted a separate offence, the penalty should be fixed at one farthing for each copy put in circulation, which would amount in the whole to £1,054 15s. 10d., or whether it should be fixed at some smaller fraction of a penny for each copy.

It was stated that the cost of producing a million copies of the pictures was only about £100.

Kekewich, J., held that the plaintiff was entitled to a penalty for each copy circulated, and that he was bound to fix the penalty at not less than a farthing for each copy. His lordship stayed execution pending an appeal on the terms of the defendants paying £200 to the plaintiff and paying the rest of the amount into court.

The defendants appealed.

Warmington, K.C., and *A. J. Walter*, for the defendants, argued that the order given by the defendants for a million copies constituted only one offence and that the court was not bound to impose a penalty of at least a farthing for each copy circulated. The court might give a lump sum and was not to apportion a certain sum to each offence.

Warrington, K.C., *C. A. Russell, K.C.*, and *Hildesheimer*, for the plaintiff, contended that on the true construction of the section a definite sum was to be forfeited for each offence, and that sum must be represented by some existing coin of the realm. The case must be treated as if there were a million actions, one for each offence. This was in accordance with the view of the majority of the Irish Court of Appeal in *Green* v. *The Irish Independent Co.*, [1899] 1 Ir. Rep. 386.

RIGBY, L.J., said it had been agreed that if the court considered that the plaintiff was not entitled to the amount given by the learned judge he was to retain the sum of £200, which had been already paid to him. In his lordship's opinion the court was not bound to fix a sum made up of the separate sums which would have been recovered if there had had been a separate action for each offence. There was no such necessity. In his opinion £200 was a proper sum to give, and it was not necessary to go through the operation of adding up all the sums which would have been given if there had been a separate action in respect of each offence.

COLLINS, L.J., was of the same opinion. The defendants were technically within section 6, and they had become liable for penalties in respect of a million copies of the pictures. It was admitted that there were a million offences and that a million penalties had been incurred. The question was: At what rate were the penalties to be fixed? Section 6 spoke of a "sum" not exceeding £10. The penalty must be between £10 and something else. It was said that the something else must be a "sum," and that a "sum" could not be that which had no equivalent in the coinage of the realm; and the learned judge had given effect to that contention, and had held that he was bound to assess the penalty at not less than a farthing for each offence, though his own view was, if he felt at liberty to follow it, that the aggregate amount of the penalties ought not to exceed £200. But he held that he was bound by authority to assess the penalty at not less than a farthing for each offence. Was there then anything in section 6 which compelled the court to do that which would be a great injustice? The late Lord Esher in *Tuck & Sons* v. *Priester*, 36 W. R. 93, 19 Q. B. D. 629, at p. 638, said, with reference to section 6: "We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections." In the present case the action was brought, not in respect of one infringement, but in respect of a million; there was one judgment and one sum was recovered, though it was assessed with reference to each offence. There was no question of levying more than one sum, and there was no necessity for the purpose of levying execution to assess any particular sum in respect of each offence. As was pointed out by FitzGibbon, L.J., in *Green* v. *The Irish Independent Co.*, at p. 392, the only reason for fixing a farthing as the *minimum* of damages is "because execution cannot be issued for less." But when there was no necessity to issue execution for that sum, what necessity was there for fixing the penalty at a sum which was represented by a coin? His lordship could see no reason why in such a case the penalty should be limited with reference to a coin. In the present case the execution could be only for the aggregate sum, and his lordship could see nothing in the statute to prevent the court from giving an aggregate sum. The decision of the Irish Court did not bind this court, though this court would treat it with the greatest respect. But in that case FitzGibbon, L.J., dissented from the majority, and took the view which he, Collins, L.J., was now taking, and he preferred the reasoning of FitzGibbon, L.J., to that of the other two judges. It was suggested, though this was not pressed by the appellants' counsel, that there was only one offence in the present case. So to hold would involve overruling the decision of the Court of Queen's Bench in *Ex parte Beal*, 16 W. R. 852, L. R. 3 Q. B. 387, which had stood for a number of years, and it could not be overruled now, even if it were not, as his lordship thought it was, a right decision. In two other cases decided respectively by Charles, J., and Wright, J., the point now taken appeared not to have been raised. Now that it had been raised his lordship, for the reasons given by FitzGibbon, L.J., was of opinion that the court was not bound to fix the penalty at a farthing

for each offence. He could see no reason in the words of the statute or in common sense for so doing. The court was not limited by the standard of coinage existing from time to time. His lordship thought that judgment ought to be reversed. In deciding as he did Kekewich, J., felt himself bound by a decision which did not bind this court.

ROMER, L.J., agreed. He should have been sorry if this court had felt bound to affirm the decision of the court below, especially as the court would then really have been doing that which the learned judge would not have wished to do, had he not thought that he was bound by authority to do it. If the plaintiff was right, the Act would lead to great hardship. The court might be bound to award a sum which would obviously be far in excess of what ought to be given; and the judgment would be doing that which the Act had carefully avoided doing—namely, fixing a minimum penalty, when the Act had only fixed a maximum. And, moreover, the sum to be awarded would fluctuate according to the coinage of the country for the time being. These reasons showed that, if the court was not bound to do so, it ought not to put such a construction on the Act. His lordship thought the court was not bound to do that. He agreed that the Legislature did regard each unauthorized copy as constituting a separate offence, and he agreed also that the sum awarded ought to be one which was recognizable and would form the proper subject of execution. But why was the court bound to fix a sum beyond what it thought just when the action was brought to recover penalities for a number of infringements? So long as the judgment was for a sum for which execution could be levied, was there anything which bound the court to give for each offence an amount represented by a recognized coin, and not less than one farthing? His lordship could not think that this was the right construction of section 6. The section did not fix a minimum and did not speak of any coin; it only said, "a sum not exceeding £10." His lordship could see no reason why, when the action was brought for a number of offences, a sum should not be given which, when divided by a number of offences, would give for each a fraction of the lowest coin of the realm. It was said that the court had no power to do this, because when the action was brought for a million offences it must be treated as if there had been a million actions. His lordship declined so to treat it. And, even if it were so treated, it by no means followed that the court would be bound to give a million judgments. So long as the judgment was in proper form his lordship could see no reason why it should not be for one aggregate sum, even though that sum, if divided by the number of offences, would give for each offence something which was not recognized as a coin of the realm. But his lordship was by no means satisfied that a farthing was the least coin recognized in this country.

Appeal allowed.

Solicitors, *Cartwright & Cunningham; Rehders & Higgs.*

From K. B. Div. (Rigby, Collins, and Romer, L.JJ.) — June 26; July 15.

CAMPBELL DAVYS *v.* LLOYD. (*a.*)

Nuisance—Non-feasance—Highway—Abatement—Right of private individual to abate.

Even if the right to abate a nuisance by an individual for purposes of passage exists in the case of a nuisance arising by non-feasance, it does not justify an individual in entering and erecting a permanent structure on another person's land, inasmuch as the right of the public upon a highway is that of going and coming only, and the right of abatement in an individual is merely ancillary thereto. Nor is an individual in such a case justified in his action by the fact that the local authority have the right to enter to abate the nuisance but have failed to do so, for the default of the local authority cannot extend the burden imposed on the land.

This was an appeal from a decision of Bucknill, J.

The plaintiff was the owner of a piece of land in the parish of Llanwrtyd, in the county of Brecon, lying between the River Irfon and the high road leading from Llanwrtyd to Abergweryn and of the moiety of the bed of the River Irfon adjoining the said piece of land.

The defendant Lloyd was the owner of certain lands abutting on the River Irfon opposite the plaintiff's piece of land.

There was a highway across the plaintiff's land and the river by means of a ford, on to the defendants' land, and at one time there had also been a footbridge for passengers across the river.

This bridge had been destroyed for many years prior to the year 1898, in which year the defendants re-erected it.

The plaintiff caused that part of it which was on his land to be removed.

The defendants subsequently re-erected it, whereupon the plaintiff brought the present action for trespass.

The defendants pleaded "not possessed" and that there was a highway over the *locus in quo* by means of a footbridge, and that the defendants, having occasion to use the highway, entered upon the *locus in quo* and did the acts complained of without unnecessary damage for the purpose of repairing the highway.

The jury found the issue on "not possessed" for the plaintiff and the other issue for the defendants.

Bucknill, J., accordingly directed judgment to be entered for the defendants.

The plaintiff appealed.

Eady, K.C., and *Sankey*, for the appellant.—The right to repair is co-relative with the obligation to repair, and where there is no obligation there is no right: *Reg.* v. *Inhabitants of Southampton*, 18 Q. B. 841; Coke's Institutes, vol. 2, p. 697; *Sutcliffe* v. *Surveyors of the Highways of Sowerby*, 8 W. R. 40; *Regina* v. *Wilson*, 18 Q. B. 348. A member of the public who repairs a highway is a mere trespasser: *Eyre* v. *New Forest Highway Board*, 56 J. P. 517; *Robertson* v. *Mayor of Bristol*, 48 W. R. 498, [1900] 2 Q. B. 198. A man as a member of the public has no right to put up a bridge at all or to replace a bridge, and his remedy is to take proceedings against the persons liable to replace the bridge.

S. T. Evans, K.C., and *John Lloyd*, for the respondents.—This is a public nuisance and may be abated by the persons who are prejudiced by it without their being compelled to take proceedings to remedy it: Vyner's Abridgment, vol. 2, p. 282, vol. 16, p. 20; Hawkins' Pleas of the Crown, vol. 1, p. 692; The Practical Register (Lilly), 2nd ed., vol. 2, p. 306; Wood's Institutes, p. 443; *Mayor of Colchester* v. *Brook*, 7 Q. B. 339. [COLLINS, L.J., referred to *Dimes* v. *Petley*, 15 Q. B. 276.] *Dawes* v. *Hawkins*, 8 C. B. N. S. 848, 9 W. R. Dig. 85. It is settled law that a man can abate a nuisance and there is no distinction between different kinds of nuisance.

(*a.*) Reported by J. I. STIRLING, Esq., Barrister-at-Law.

Eady, K.C., in reply, cited *Hubert* v. *Groves*, 1 Esp. 148; *Winterbottom* v. *Lord Derby*, L. R. 2 Ex. 316, 15 W. R. C. L Dig. 93; *Earl of Lonsdale* v. *Nelson*, 2 B. & C. 302; *Lemmon* v. *Webb*, [1895] A. C. 1, 43 W. R. Dig. 125; Hawkins' Pleas of the Crown, vol. 1, p. 711; Coke's Institutes, vol. 2, p. 697.

Cur. adv. vult.

July 15.—COLLINS, L.J.—This was an action of trespass by erecting a bridge over the plaintiff's land consisting of one moiety of the bed of the River Irfon, in Wales. The defendants' pleas were "not possessed," and that there was a highway over the *locus in quo* by means of a footbridge, and the defendants, having occasion to use the said way, entered upon the *locus in quo*, and because the bridge had been destroyed erected and laid a footbridge across the river, and necessarily did the acts complained of, without unnecessary damage, for the purpose of using the said highway. The jury found the issue on "not possessed" for the plaintiff, and the other issue for the defendants. On an appeal by the plaintiff to this court, the finding for the defendants was impeached on various grounds, and in addition it was contended that, even accepting the findings, the defendants were entitled to judgment. We decided to determine this point first, as, if the defendants are right upon it, it disposes of the action. It was contended for the plaintiff that, assuming it to be the fact that a highway for foot-passengers by means of a footbridge across the river existed, the fact that that bridge had been destroyed gave no right to the defendants to come upon the plaintiff's land and erect a new one. I think this contention is well founded. Though there was evidence that a bridge had once existed at the place in question, and the jury found that there was a highway over it, it was proved that for many years before 1898 that bridge had ceased to exist. In that year the defendants had erected a footbridge in the place where it now is, and the plaintiff had caused that part of it which passed over his land to be removed. The defendants had subsequently re-erected it in the present form across the plaintiff's land, and this action was brought. There was no proof of any right in, or obligation on, the defendants to repair the bridge, neither was there any proof of any such obligation on the plaintiff. The only right which the defendants set up is that which is averred in the plea. The defendants do not contend that they are in any better position than any other member of the public who, having occasion to use the way, finds there is no bridge where one once existed. The question is, therefore, whether in such circumstances a member of the public who wishes to cross is entitled, not merely by some temporary makeshift serving the particular occasion to get across, but to build a permanent structure on the plaintiff's land for that purpose. Mr. Evans, for the defendant, contended that it was simply a case of abating a nuisance from which he suffered a special inconvenience, such as was held to be justifiable as long ago as Cro. Car. 185, where a passenger was held entitled not only to open but to throw down a gate placed across a highway. But there is a broad difference between removing an obstruction, which has been wrongfully placed in the highway, and making good by a permanent structure the result of mere non-feasance on the part of those charged with the duty of repairing, and I doubt whether such an operation could properly fall under the term "abatement." Even if the right to "abate" can be said to exist at all in the case of a nuisance arising from mere non-feasance, as to which see the argument of Parke, J., and the judgment of Best, J., in *Earl of Lonsdale* v. *Nelson* I do not think the cases which establish the right to abate by an individual for the purpose of passage would extend to protect such acts as were done by the defendants in this case. If this were the law, every individual who was obstructed in his desire to cross would be equally entitled to erect a permanent structure of his own design, although the obligation to repair and the incidental right to determine the method might be in other persons, who, moreover, might be reached by indictment. The right of abatement by individuals is not regarded with favour by the law. In the words of Lord Hale: "But because this many times occasions tumults and disorders the best way to reform public nuisances is by the ordinary course of justice." See this cited in *Earl of Lonsdale* v. *Nelson*: "If," says Lord Campbell in *Dimes* v. *Petley*, 15 Q. B. 276, at p. 283, "there be a nuisance in a public highway, a private individual cannot of his own authority abate it, unless it does him a special injury, and he can only interfere with it as far as is necessary to exercise his right of passing along the highway; and, without considering whether he must show that the abatement of the nuisance was absolutely necessary to enable him to pass, we clearly think that he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoiding it he might have passed on with reasonable convenience." Again in *Mayor of Colchester* v. *Brooke*, 7 Q. B. 339, at p. 377, Lord Denman, in delivering the judgment of the court, says: "A public nuisance becomes a private one to him who is specially, and in some particular way, inconvenienced thereby, as in the case of a gate across a highway which prevents a traveller from passing, and which he may therefore throw down, but the ordinary remedy for a public nuisance is itself public, that of indictment, and each individual who is only injured as one of the public can no more abate than he can bring an action." It may be that, even in the case of the gate, an action could not have been maintained (see *Winterbottom* v. *Lord Derby*, and that therefore there may, in the case of positive nuisance, be a right to abate where there is no cause of action, there being insufficient special damage. But the difference between public nuisances arising by commission and those arising by omission is in the view of the law radical, since in the latter case, however clear and special the damage to the individual, he can maintain no action. See in the case of a highway, Hawkins' P. C. 707, citing Cowper, 687, a rule which has been followed in many recent cases: see *Cowley* v. *Newmarket Local Board*, [1892] A. C. 345, 41 W. R. Dig. 85. There would be nothing anomalous, therefore, if the rule were that the right to abate a nuisance to a highway does not apply to nuisances due to nonfeasance by the repairing authority, and it is remarkable that no instance apparently can be found in the books of abatement in such a case, unless indeed that which Best, J., described as an exception in *Earl of Lonsdale* v. *Nelson* may be so called. An obstruction may be abated by removing it, but in the case which we have before us considerable constructive work would be necessary to place the road in proper condition so as completely to get rid of the nuisance, and I doubt whether, if "abatement" can be said to include this, the right to abate in such a sense could be held to exist in the case of a nuisance by nonfeasance which has resulted in the obliteration of part of a highway. This is by no means inconsistent with the right to deal with a difficulty in crossing on some particular occasion by putting down a plank or a stepping-stone, for to do this might well be a reasonable incident of

the right of passage, and would throw no additional burden on the dedicating owner. But, however this may be, the right, if it exists, could not, I think, be extended to cover such acts as those admittedly done by the defendants in this case. It must always be borne in mind that the right of the public upon a highway is that of going and coming only, and the right of "abatement" in an individual is only ancillary thereto. The dedicating owner, therefore, is not bound to accept a greater burden, and may complain if it is imposed upon him. I think the appeal should be allowed, and judgment entered for the plaintiff, with an injunction in the terms which will be stated by Romer, L.J.

ROMER, L.J.—The point involved in this appeal is a short one. I will assume for the purposes of the appeal that there was formerly a bridge over the River Irfon at or near the place where the bridge now in dispute was erected by the defendants, and that there was a public right of way over that old bridge, as found by the jury. But it is admitted by the defendants that the plaintiff was under no obligation to repair or replace the old bridge, and that they themselves were under no such personal obligation. It is contended by the defendants that the obligation to repair the old bridge, and to replace it when necessary, is in some local authority, and that consequently that local authority had the right to repair and replace. But admitting this contention to be true for the purposes of the point we have now to decide, it is clear, as pointed out by Wills, J., in *Eyre* v. *New Forest Highway Board*, that, where there is no obligation to repair, there can be (in the absence of any special power given) no right to repair. Although, therefore, the local authority may have the right to come upon the plaintiff's land for the purpose of re-erecting a bridge, the defendants have no such right to do so by virtue of any general right of repairing and replacing the bridge. And it is not established here that what the defendants did in entering upon the plaintiff's land and erecting a new bridge was by the authority and on behalf of the local authority, so that their act can be regarded as the act of the local authority. And, seeing that the plaintiff was under no obligation to repair or replace the bridge, he cannot be prejudiced by any default on the part of the local authority. The default of the local authority cannot extend the burden placed upon the plaintiff's land, and give to other persons a right to go on that land which could not have existed if the local authority had not been guilty of default. But then the defendants say that, though they may have had no right to enter upon the plaintiff's land by virtue of any general right of repairing or replacing, they had, by virtue of the public right of way, and as members of the public, a right to come to the place in question and try and pass over the river, and that, finding a legal nuisance existing by reason of the fact that the old bridge had been allowed to decay and disappear, they had a right to abate the nuisance by re-erecting the bridge. This is a very far-reaching contention on the part of the defendants, and, if well founded, might lead to strange results. For instance, a local authority, bound and entitled to repair, a bridge which falls suddenly into need of extensive repair, or is swept away by a flood, and properly taking advice as to the best means of repairing or re-erecting the bridge, might find itself forestalled by the impatience of some member of the public who wanted to pass over, and some repairs executed or new bridge put up of which the local authority wholly disapproves. It cannot be that in such a case the first member of the public who happens to come to the bridge to pass over has a right to do extensive works, if he chooses to bear the expense. And, if the works necessitate an entry on land of a private owner not part of the highway, it appears to me that it cannot be that any member of the public has a right to go on that land for the purpose of repairing or replacing the bridge. I think that there must be some limitation of the alleged right of abating such a legal nuisance as that I am now considering. In *Earl of Lonsdale* v. *Nelson*, Best, J., said that there was no decided case which sanctions the abatement by an individual of nuisances of omission, except that of cutting the branches of trees which overhang a public road, on the private property of the person who cuts them. This authority has been observed upon by Lord Davey in *Lemmon* v. *Webb*. But, whether or not Best, J., was justified in stating or suggesting that there was such a general rule as he indicated, or whether or not to such a rule, if it exists, there may not be other exceptions than the cutting of trees, I do not think we need decide in this case. For I think that where the question concerns a substantial structure, such as the bridge erected in this case, and when the abatement of the nuisance cannot be effected in ordinary course by the individual going upon and passing along the highway in the way in which he has the right as a member of the public, and where he has (as in the case before us) in order to erect the structure to go and remain and do work upon land, in a manner not justified by the mere exercise of the public right of way, and the land belongs to a person who is not guilty of causing the nuisance, then he cannot justify the entry on the land and the erection of the structure as against the owner of the land by alleging that he was abating a nuisance. I think, therefore, that in this case the defendants were not justified in entering upon the plaintiff's land and erecting their bridge upon it, and that consequently their act was wrongful as against the plaintiff, and entitled him to remove the bridge so far as it was erected on his land. I agree in thinking that the appeal should succeed, and that, notwithstanding the findings of the jury, the judgment for the defendants must be set aside. There must be an injunction restraining the defendants, their agents and servants, from preventing the plaintiff from removing from his land the bridge erected by them. The plaintiff should get the costs of the appeal. He will also get the general costs of the action, except the costs of the issue as to the right of way, which will be paid by him, with set-off.

RIGBY, L.J., concurred.

Appeal allowed.

Solicitors, *Riddell, Vaizey, & Smith; J. B. Somerville*, for *A. G. Vaughan*, Builth.

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) — July 2.

TURNER *v.* SAWDON & CO. (*a.*)

Master and servant—Contract of employment—Salesman—Refusal of master to provide work—Readiness to pay salary—Extent of master's obligation.

By an agreement in writing the defendants agreed to engage and employ the plaintiff as their representative salesman for four years and to pay him a salary of £250 a year, and the plaintiff agreed to devote his time to the service of the defendants. The defendants, considering that they had ground to complain of the plaintiff's con-

(*a.*) Reported by F. G. RÜCKER, Esq., Barrister-at-Law.

duct, ceased to avail themselves of his services during the term of four years, but offered to pay him his full salary.

Held, that the plaintiff was not entitled to maintain an action against the defendants for breach of the contract to employ him.

Application for judgment or a new trial in an action tried before Kennedy, J., and a jury at Leeds assizes.

The plaintiff was a commercial traveller. The defendants carried on business as cotton warp agents at Bradford.

On the 29th of March, 1898, the plaintiff being then in the employment of the defendants, an agreement in writing was entered into between the plaintiff and the defendants, which contained the following material clauses: (1) "The said G. E. Sawdon & Co. agree to continue to engage and employ the said Ernest Turner as their servant and representative salesman from the 1st of March, 1898, for a period of four years ending the 28th of February, 1902." (2) "The said G. E. Sawdon & Co. further agree to remunerate the said Ernest Turner for his services by a payment to him of a salary of £250 a year, to be paid in monthly instalments." (3) "The said Ernest Turner agrees to devote the whole of his time to the business of the said G. E. Sawdon & Co., to faithfully serve them as heretofore in soliciting orders and generally in aiding to conduct the business, and not to divulge to any competitor or other person any of the business secrets of the said G. E. Sawdon & Co. whilst in their service, and to carefully obey their directions from time to time, and will keep, protect, and promote the success of the said business as far as he can."

The plaintiff alleged a breach of the above agreement on the part of the defendants, and brought this action to recover damages.

The evidence showed that the plaintiff continued to perform his duties under the agreement until the 31st of December, 1900, when a letter was handed to him enclosing his salary, and stating that the firm had decided that he should take a month's holiday, receiving his pay all the same, and that he would not be expected to do any more business on behalf of the firm; that he returned on the following day and was requested to leave; and that on the 2nd of January, 1901, circulars were issued by the defendants to customers stating that the plaintiff had no authority to transact any business on their behalf.

Under these circumstances the plaintiff refused to receive any further salary, and claimed the right to treat the defendants as having repudiated the contract.

The defendants contended that, as they were ready and willing to pay the plaintiff his full salary, he could not maintain this action. They asserted that their reason for not giving him any more work was that he had not complied with their orders and directions, and had interfered in the business contrary to his duty, and had commenced carrying on business on his own account in competition with the defendants.

The jury found that the plaintiff was ready and willing to continue to carry out his part of the agreement, that the defendants' conduct was a breach of the contract, and that it was a substantial breach, and they assessed damages at £125.

On further consideration Kennedy, J., gave judgment for the plaintiff for £125.

The defendants applied for judgment or, in the alternative, for a new trial.

Tindal Atkinson, K.C., and *Beverley*, for the defendants.—The question is, What, on the true construction of the agreement, is the obligation imposed upon the defendants? Reading the agreement as a whole, the only obligation on the defendants is to pay the plaintiff a salary of £250 a year for four years. The plaintiff contends that there is a further obligation to give him actual work. The case of *Emmens* v. *Elderton*, 4 H. L. Cas. 624, is a clear authority against that contention. The case of *Turner* v. *Goldsmith*, 39 W. R. 547, [1891] 1 Q. B. 544, is distinguishable from this case. There the plaintiff was to be paid by commission; here the plaintiff is only to be paid a salary, and he is not being deprived of any part of his salary. The question, being one of the construction of a written document, ought to have been decided by the judge, and the case ought not to have been left to the jury at all.

Scott Fox, K.C., and *W. J. Waugh*, for the plaintiff.—The obligation to "engage and employ" the plaintiff is separate and distinct from the obligation to pay him salary. If the word "employ" is ambiguous, the question as to its meaning in this case was rightly left to the jury. If not, it ought to be construed according to its natural and primary meaning. It imports an obligation to give work, if it is possible. The plaintiff is entitled to enjoy the advantage of being able to go on the market as the defendants' representative. The plaintiff was justified in treating the refusal to employ him as a repudiation of the contract.

They referred to *Smith* v. *Thompson*, 8 C. B. 44, and *Bunning* v. *The Lyric Theatre*, 71 L. T. Rep. 396, 10 Times L. R. 583, 43 W. R. Dig. 48.

A. L. SMITH, M.R.—This is an action for breach of contract which was tried before Kennedy, J., and a jury. It has given rise to some complication, chiefly because the learned judge left the question of the construction of the agreement to the jury. The agreement does not contain any doubtful term such as could properly have been left to the jury, and in my opinion it was clearly for the judge to construe it. Kennedy, J., did not put his own construction on the contract, and it is now necessary for us to say what in our opinion is the true construction of it. I do not say that the meaning of the agreement quite clear, but I have come to the conclusion that the result of the trial was not right. The contract itself is an ordinary enough contract, but the action which has been brought on it seems to me to be extraordinary. It is brought by a man against his master. It is not brought to recover wages, and it could not be so brought, for it is clear that the master has always been ready and willing to pay the man the full wages contracted for. The plaintiff's case is that, though his master offered him his full wages, yet the master is under a further obligation—viz., an obligation during the period of the contract to find him continuous employment, or at any rate some sort of employment, and to keep him at work. I never heard of such an action before and I can only say that it is a novelty to me that, where a master is ready to pay his servant every penny of his wages and every pennyworth of the consideration contracted for in the contract of employment, but says that he does not require his services any further, the servant can then sue the master for damages for not employing him. Kennedy, J., had never heard of such an action either, but he left the whole case to the jury, and the jury found a verdict for the plaintiff and assessed the damages at £125. The present case is not like the case of *Turner* v. *Goldsmith*, where wages were to be paid by commission. In that case no doubt there was an obligation on the master to provide work so that commission might be earned. Here the master agreed to continue to engage and employ the servant for a term of four years as his

salesman and to pay him at the rate of £250 a year. The master said in effect, "I will retain you for four years, and will pay you £250 a year." The obligation on the master was to pay the servant £250 a year during the term of four years, but, in my opinion, it was within the province of the master to say at any time that he did not require his services any further. The master considered that he had ground to complain of the servant's conduct, and said that, though he would not dismiss him, but would go on paying him his wages, yet he would not provide him any further with work. Where is the obligation on the master to supply the servant with work? It is said that the contract is to continue to engage and employ the plaintiff, and the reason given for the plaintiff's contention that his master is bound, according to his undertaking, to give him work is this, that if he does not keep his hand in as a salesman, he will not be such a useful salesman as he would otherwise be. But where is any such undertaking to be found in the contract? That argument converts this contract of hiring and employment into a contract to teach a trade or to show the employed person the way in which a trade is carried on. In my opinion there is no obligation on the master to teach a trade, and no obligation to provide the plaintiff with work. Neither can I see what the plaintiff's damages are. The plaintiff was bound by his contract to give his whole time to the service of the defendant. The defendant now says that he does not require the plaintiff's time. It is clear that the plaintiff has lost nothing, for he is offered his full wages and he has the whole of his time too. It is argued that he has lost the opportunity of learning his trade. But, as I have already said, I cannot find that that was part of the contract. In my opinion it would not be right to stretch the meaning of the word "employ" as contended for by the plaintiff. In my opinion the true meaning of the agreement is that it was a retainer, and it was not a bargain to employ the plaintiff continuously *de die in diem* during the term. I therefore think that the judgment of the learned judge was wrong. The case certainly ought not to have been left to the jury, and the verdict must be set aside. I think that the proper order for the court now to make is that judgment should be entered for the defendants.

VAUGHAN WILLIAMS, L.J.—I entirely agree. Taking the case as it was put forward by the plaintiff, I think there was nothing to leave to the jury at all. The action was brought for breach of a contract of employment. At the trial the plaintiff treated the case as one of repudiation of the contract by the master, and it was dealt with as a case of wrongful dismissal. The plaintiff claimed to be entitled to damages based on the loss which he had sustained through being deprived of the advantages of his situation, and that not the less because his master was prepared to pay him his full wages. Assuming that to have been the state of the case, I think there ought to have been a nonsuit. Let us look at the contract. In my opinion the first clause is a retainer. It is argued that the words "engage and employ" ought of necessity to be construed as imposing on the master a wider obligation than would usually arise out of the relation of master and servant. But the case of *Emmens* v. *Elderton* is conclusive authority against that proposition. And in my opinion there is nothing in this particular contract which ought to lead the court to construe the words in question as importing any obligation other than that ordinarily incurred by a master towards a servant. The second clause of the contract fixes the plaintiff's remuneration. The third clause fixes the duties to be performed by the plaintiff in return for his remuneration. I cannot find in the contract any obligation on the defendants to provide work for the plaintiff, or even to give him a reasonable share of such work as the defendants may have to give. The case of *Turner* v. *Goldsmith* is distinguishable from this case, inasmuch as there the remuneration of the employed person was to be by way of commission. The case of *Bunning* v. *Lyric Theatre* also seems to me to be distinguishable; for there was much in that case to show that the opportunity of appearing before the public as the defendants' musical director was part of the consideration which was bargained for by the plaintiff. On the question of the construction of the contract I think that the plaintiff has no cause of action.

STIRLING, L.J.—I feel more doubt as to the meaning of this agreement than my learned brothers. It is an agreement of a simple character, but it seems to me to give rise to a question of some difficulty. The defendants agree to continue to engage and employ the plaintiff as their representative salesman for four years, and to remunerate him by a salary of £250 a year, and the plaintiff agrees to devote his time to the defendants' service. There is therefore an express agreement to engage and employ as a representative salesman. What is the meaning of the word "employ" in this agreement? It is perfectly clear, and, if authority is needed, the case of *Emmens* v. *Elderton* is sufficient authority for the proposition, that the word "employ" is capable of one or other of two meanings. It may mean to retain in service, or it may mean to give actual work to the person employed. In some cases it is quite clear which of the two meanings must be intended. If a medical man was employed to attend a family for a fixed yearly payment, it is obvious that the head of the family would not be under any obligation to find him actual employment. On the other hand, there is the case of the employment of an actor by the manager of a theatre, as in *Fechter* v. *Montgomery*, 33 Beav. 22, where the actor's object is to obtain opportunities of displaying his ability and talents. In such a case the obligation to employ amounts to an obligation to give such opportunities. Again, the employment of a person who is to be remunerated by payment of a commission, as in *Turner* v. *Goldsmith*, imports an obligation on the master to give actual work to the person so employed. The question, what is the proper meaning of the word "employment," really depends on the nature of the contract in each particular case. I feel the force of the argument which has been put forward by the plaintiff's counsel. It is said that it is essential to the plaintiff as a representative salesman that he should be in contact with buyers and sellers on the market and that he should be allowed opportunities of being on the market continually. That is an element which seems to show some approximation to the case of the actor rather than to that of the medical man. But there are other elements in the case which seem to my learned brethren to preponderate, and I do not differ from them in my judgment, and I am the more ready to agree because I do not see anything which entitles the plaintiff to the damages which have been awarded him. I have expressed my doubts, but I agree in the judgment of the court.

Appeal allowed.

Solicitors for the plaintiff, *Wynne-Baxter & Keeble*, for *Beldon & Ackroyd*, Bradford.

Solicitors for the defendants, *Wrensted & Hind*, for *G. H. Blackburn*, Bradford.

From K. B. Div.
(A. L. Smith, M.R., and Vaughan Williams and Stirling, L.JJ.) June 24.

HIRST v. WEST RIDING UNION BANKING CO. (LIMITED). (a.)

Frauds, Statutes of—False representation—Representation as to credit of another person—Company—Signature by agent—Statute of Frauds Amendment Act, 1828 (9 *Geo.* 4, *c.* 14), *s.* 6.

A limited company incorporated under the Companies Acts comes within section 6 *of* 9 *Geo.* 4, *c.* 14, *and is therefore not liable for a false representation signed by an agent of the company as to the credit of another person.*

Application for judgment or a new trial in an action tried before Grantham, J., and a jury.

The action was brought to recover damages for an alleged misrepresentation as to the credit of certain customers of the defendants.

The representation was made by the manager of a branch of the defendants' bank in answer to an inquiry by the manager of the plaintiffs' bank as to the credit of the above-mentioned customers of the defendants. The representation was made within the scope of the manager's authority and in the interests of the defendants.

The jury found a verdict for the plaintiff, and judgment was entered for him.

By 9 Geo. 4, c. 14, s. 6, "No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealing of any other person to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing signed by the party to be charged therewith."

Sir R. T. Reid, K.C. (*Montague Lush* and *Compston* with him), for the defendants.—A signature by an agent is not a sufficient compliance with 9 Geo. 4, c. 14, s. 6: *Swift* v. *Jewsbury*, 22 W. R. 319, L. R. 9 Q. B. 301. The signature must be by the person sought to be charged for the representation. The signature of the manager was in no sense the signature of the bank.

He also referred to *Barwick* v. *English Joint Stock Bank*, 15 W. R. 877, L. R. 2 Ex. 259; *Clydesdale Bank* v. *Paton*, [1896] A. C. 381, 44 W. R. Dig. 41.

Tindal Atkinson, K.C. (*Longstaffe* with him), for the plaintiff.—A limited company does not come within 9 Geo. 4, c. 14, s. 6. Such a company cannot possible satisfy the requirements of that section. It cannot "sign" a document. Therefore the common law applies and the defendants are liable for the act of their agent: *Barwick* v. *English Joint Stock Bank*. Section 19 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), which provides that the word "person" in a statute includes a body corporate, is not retrospective.

Sir R. T. Reid, K.C., replied.

A. L. SMITH, M.R.—In my opinion the statute 9 Geo. 4, c. 14, s. 6, applies to a limited company. The defendants therefore are not liable as they did not sign the representation.

VAUGHAN WILLIAMS, L.J.—I agree. In my opinion the defendants are protected by section 6 of 9 Geo. 4, c. 14.

STIRLING, L.J.—I am of the same opinion. In my judgment a limited company comes within the protection of section 6 of 9 Geo. 4, c. 14. The word "person" in that section seems to me to include a limited company. In *Pharmaceutical Society* v. *London and Provincial Supply Association*, 28 W. R. 957, 5 App. Cas. 857, at p. 868, Lord Blackburn, in discussing the meaning of the word "person" in an Act of Parliament, said: "I own I have no great doubt myself, for instance, that the word 'person' may very well include both a natural person, a human being, and an artificial person, a corporation. I think that in an Act of Parliament, unless there be something to the contrary, probably (but that I should not like to pledge myself to) it ought to be held to include both. . . . In which way it is used in any particular Act must depend upon the context and the subject-matter. . . . I am quite clear about this, that, whenever you see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whatever sense it requires, you should apply the word in that sense, and construe the Act accordingly." We must therefore look at the subject-matter and the context and see which sense is required. The meaning of section 6 is stated in short and clear terms by Lord Bramwell in *Swift* v. *Jewsbury*: "In my opinion the effect of the statute is this, that a man should not be liable for a fraudulent representation as to another person's means unless he puts it down in writing and acknowledges his responsibility for it by his own signature." The Legislature has thought that section 6 is a proper enactment for the protection of human beings. It is argued that the enactment is limited to persons who are capable of signing the document. In my opinion that is not so. It cannot be said that a person who is struck by disease and is rendered incapable of writing his signature is not within the protection of the section. He is, without doubt, a person requiring protection. *Swift* v. *Jewsbury* is an authority for the proposition that a partner in a firm may render himself liable by his signature, but cannot render his co-partners liable. I do not see why a corporation under the Companies Acts should not equally have the protection of the section. The action, therefore, cannot be maintained against the defendant bank.

Appeal allowed.

Solicitors for the plaintiff, *Rowcliffes, Rawle, & Co.*, for *Ramsden, Sykes, & Ramsden*, Huddersfield.

Solicitors for the defendants, *A. M. Bradley*, for *Berry & Berry*, Huddersfield.

(a.) Reported by W. F. BARRY, Esq., Barrister-at-Law.

High Court of Justice.

Chan. Div.
Byrne, J. July 6.

LADY CARDIGAN v. CURZON-HOWE. (a.)

Settlement—Tenant for life—Equitable tenant in tail—Alternative gift in remainder—Contingent interest—Estates in defeasance of estate tail—Fines and Recoveries Act (3 *&* 4 *Will.* 4, *c.* 74), *s.* 15.

Testator by his will devised real estates to trustees on trust after providing for the management of the estates, &c., to pay surplus rents to testator's widow for her life. Testator directed that after the decease of his widow surplus rents should be accumulated for the purpose of paying off certain mortgages on the said estates, and further directed the trustees, after the determination of the period of accumulation and subject to his widow's life estate, to convey and assure the said real estates

(a.) Reported by J. ARTHUR PRICE, Esq., Barrister-at-Law.

so that the same should stand limited to use of G. in tail male, but if G. should be dead to the use of the person who should be the first heir male of the body of G. in tail male, with remainder to the person who should be entitled to the title of Earl of C. in tail male, with remainder to testator's right heirs. By a codicil to his will testator, after reciting the devise to the said G., thereby revoked the said devise and gave and devised the said estates after the death of testator's widow to R. in tail male, with all the limitations as testator's will mentioned. The trusts for accumulations being treated by the court for the purpose of the application as at an end, and R., with the consent of testator's widow, having barred the estate tail in a fund in court representing the proceeds of the sale of part of the said estates, and assigned the same to trustees subject to widow's life interest,

Held, that R. took a vested estate tail in remainder expectant on the death of testator's widow, that subsequent estates had been barred by the disentailing assurance, and that the fund in court might be paid out to the assignees of testator's widow and R.

Petition.

This was a petition by Adeline Louisa Maria, Dowager Countess of Cardigan, and the Earl of Stradbroke, and Gerard B. Lawrence, trustees of an indenture of settlement dated the 19th of April, 1901, the Norwich Union Life Insurance Society, and E. C. Griffith, incumbrancers of the life interests of the said Lady Cardigan in the estates the subject-matter of the petition, for payment out of court to the said Lord Stradbroke and G. B. Lawrence of a sum of £100 000 New Consols, proceeds of the sale of certain settled estates.

The petition raised a point of construction on the will and second codicil of James Thomas Brudenell, late Earl of Cardigan.

The facts of the case were as follows: By his will bearing date the 24th day of May, 1866, Lord Cardigan appointed Earl Howe (then Viscount Curzon) the Honourable J. C. W. Vivian, and B. G. Bennett executors of his will, and after giving divers pecuniary legacies and life annuities and charging the said annuities on real estate in the county of Leicester and bequeathing a leasehold house, testator devised all his real and personal estates other than estates situate in the counties of Northampton, Leicester and York, to his trustees, being the same persons as his (testator's) executors, upon trust for sale and conversion and out of the proceeds to pay debts (except mortgages on estates, above excepted) and funeral and testamentary expenses and legacies and duties (as therein mentioned), and to apply the surplus, if any, towards paying the sums charged on testator's estates in the counties aforesaid as his trustees should think fit; and testator devised his freehold hereditaments and real estate in the said three counties unto and to the use of his said trustees upon trust to permit Lady Cardigan to inhabit and occupy rent free testator's mansion-house at Deene, with the gardens, deer park and appurtenances, and such of the adjoining farms and lands which she should think fit to occupy therewith, and during her life to manage and let all other the said hereditaments and premises, and to receive the rents and profits. And after the death of the said Lady Cardigan to manage and let the whole of the said premises and receive the rents thereof. And upon further trust by mortgaging, as therein mentioned, all or any part of the testator's said estates in the said three counties, except the mansion-house and such farms and lands as aforesaid, to raise such sums as, together with so much of the testator's personal estate and the produce of so much of the sale of testator's real estate as were theretofore made applicable for such purpose, should in the opinion of the trustees be sufficient to pay his debts (other than sums charged by way of mortgage on any of the testator's estates in the said three counties) and funeral and testamentary expenses debts and legacies and duties and annuities, and the costs of raising such sums by mortgage. And testator directed that his trustees do stand possessed of the said rents and profits in the first place to pay thereout all expenses of the management and outgoings of his said estates, and to pay thereout the interest of any mortgage charged thereon. And to pay the surplus of the said rents and profits to Lady Cardigan for her own use during her life. And after her death testator directed that his trustees should, during the lives of B. G. W. Bennett and W. J. G. Bennett and the survivor them, and during twenty years after the death of such survivor invest and accumulate the surplus of the rents and profits which should remain after paying thereout such expenses and interest as aforesaid, and apply such accumulations in or towards the payment of mortgage debts and charges charged or to be charged on testator's estates in the said three counties, and testator directed that upon the expiration or other determination of such period of accumulation (subject to Lady Cardigan's life interest) his trustees should convey and assure all his said estates in the said three counties, so that the same might stand limited, settled, and assured to the use of George William Thomas Bruce (in the said will described as George Thomas Bruce, Esq., the eldest son of George Bruce, Esq., and grandson of Lord Ernest Bruce) in tail male, and if the said George Thomas Bruce should be then dead, to the use of the person who should then be the first heir male of the body of the said George Thomas Bruce in tail, with remainder to the use of the person who for the time being should be entitled to the dignity and title of Earl of Cardigan in tail male, with remainder to the use of testator's right heirs for ever. And the said will contained divers powers of leasing, &c., exercisable with regard to the said estates by the trustees with the consent of Lady Cardigan and a power for the trustees while the estates should remain vested in them or on trust as aforesaid, but during Lady Cardigan's lifetime not without her consent by deed, to sell or exchange the said estates. And testator devised his copyhold estates to his trustees on trusts similar to those of his freehold estates.

The testator on the 21st of January, 1867, made a codicil to his will not materially affecting the point at issue in this case. The testator made a second codicil to his will bearing date to the 17th of October, 1867, in the following words: "This is a codicil to be added to and taken as part of the last will and testament of me, James Thomas Brudenell, Earl of Cardigan. Whereas I have in and by my last will and testament given and devised all my estates in the counties of Northampton, Leicester and York (after the death of Lady Cardigan) to George William Thomas, the eldest son of Lord Ernest Bruce in tail. Now I do hereby revoke and make void the said devise by me made to the said George William Thomas Bruce, and I do hereby give and devise my said estates in the counties of Northampton, Leicester and York, after the death of Lady Cardigan, to my godson Robert Thomas Bruce, fourth son of Lord Ernest Bruce in tail male, with all the limitations as in my said will mentioned. And in all other respects I ratify and confirm my said will, except as revoked by this codicil dated the 17th day of October, 1867."

The testator died on the 27th of March, 1868, and his will was proved on the 23rd of June, 1868.

On the 27th of January, 1869, the Countess of

Cardigan filed a bill of complaint against the trustees for administration of testator's estate, and the usual accounts and inquiries were directed, and it was certified that the estates were subject to certain mortgages.

By an order made in 1869 the trustees were permitted to raise the sum of £6,300 on mortgage of testator's estate in the said three counties. Divers portions of the real estate were sold from time to time by the trustees or by Lady Cardigan as tenant for life under the Settled Land Acts, and the proceeds of the sales were paid to the credit of the action and invested in the purchase of £3 per cent. Consolidated Annuities or £2 15s. per cent. Consolidated Stock or otherwise. And out of the funds so paid into court the incumbrances upon such parts of the said estates as remained unsold had been discharged.

Lady Cardigan had created several mortgages on her life interest under the said will. R. T. Bruce in the codicil mentioned had also charged his interest therein by his marriage settlement and otherwise.

At the time of the death of testator his cousin and heir-at-law, George William Frederick, Marquis of Ailesbury, succeeded him in the title Earl of Cardigan. The said Lord Ailesbury died on the 6th of January, 1878, whereupon Lord Ernest Bruce succeeded as Marquis of Ailesbury and Earl of Cardigan, and the said Robert Thomas Brudenell Bruce in the said will called Robert Thomas Bruce acquired the courtesy title of Lord R. T. B. Bruce. The last-named Lord Ailesbury died on the 18th of October, 1886, and the said George William T. Bruce succeeded to the Ailesbury and Cardigan titles. He died without having had issue on the 10th of April, 1894. Lord H. A. B. Bruce then succeeded to the said titles.

By an indenture bearing date the 10th of February, 1901, and made between the said Lady Cardigan and the said Lord R. T. B. Bruce, and duly enrolled as a disentailing assurance, the said Lady Cardigan and the said Lord R. T. B. Bruce with the consent of the said Lady Cardigan as protector of the settlement, purported to bar the estate in all that sum of £100,000 £2 15s. per cent. Consolidated Stock then standing in court to the credit of the cause of *Lady Cardigan* v. *Curzon-Howe*, being part of the sum of £111,340 13s., or any other sum of like stock standing in court and representing capital moneys arising under the Settled Land Acts from the sale of the said estates.

By an indenture bearing date the 19th of April, 1901, the said Lady Cardigan and Lord R. T. B. Bruce appointed the fund to the said Lord Stradbroke and G. B. Lawrence, subject to Lady Cardigan's life interest on the trusts therein mentioned but not here material.

The petitioners claimed that the disentailing assurance was valid, and that the trustees of the said indenture were entitled to have the fund paid out to them. Lady Robert Bruce, the wife of Lord R. T. B. Bruce, the mortgagees of her interest under the will, and the mortgagees of Lady Cardigan's life interest consented to the application.

Rowden, K.C., and *Cyprian Williams*, for Lady Cardigan and the trustees of the indenture.—The joint effect of the will and codicil is to give Lord Robert Bruce an equitable estate tail vested in remainder expectant on the death of Lady Cardigan, and not subject to any contingency. The effect of the codicil is to substitute Robert for George and to put Robert in the place of George: *Milbank* v. *Vane*, [1893] 3 Ch. 79, 41 W. R. Dig. 249. There is nothing in the direction to convey; but if the direction means anything, it means that effect shall be given to the estate tail given by the will and codicil to Lord Robert.

Levett, K.C., and *Dighton Pollock*, for Lord Robert Bruce, in support of the application.—The gift to Lord Robert Bruce is an equitable estate subject to the life estate to Lady Cardigan and the trust for accumulation. It is not affected by the inaccurate reference in the codicil to the limitations contained in the will. There is nothing in the codicil to show that the gift to Lord Robert is in any way contingent.

Frobisher Mills, for Lady Robert Bruce.

A. Adams, for the mortgagees of Lady Cardigan.

Fellows, for the mortgagees of Lord R. Bruce.

Norton, K.C., and *Hornell*, for the Marquis of Ailesbury.—The estate limited to Lord Robert Bruce is not a vested estate tail. It is an estate tail contingent on his surviving Lady Cardigan. The aim of the testator was to create alternative estate tails one of which must take effect on the happening of the particular event—viz., the death of the Countess of Cardigan. The estate limited to the present Earl of Cardigan (Lord Ailesbury) is not an estate in defeasance of the prior estate of Lord Robert Bruce. It is, therefore, not an estate tail which can be barred under section 15 of the Fines and Recoveries Act. Accordingly the disentailing assurance established by Lady Cardigan and Lord R. Bruce is inoperative, and the trustees of the indenture are not entitled to receive the fund in court.

T. Carson, K.C., and *Stallard*, for the trustees of the will of Lord Cardigan.—The question is not one for the trustees of the will to argue, if the court is satisfied that the time has arrived to decide the point and that all necessary parties were before it.

[BYRNE, J., before giving judgment, stated that, in his opinion, the point was ripe for decision, as Lady Cardigan and Lord R. Bruce claimed that they had made a title to the fund in court. His lordship considered that all interests were sufficiently represented by the trustees of the will, but gave directions for the protection of any interest not sufficiently represented, and for payment of the duties.]

BYRNE, J.—The case falls to be argued upon the footing that the trust for accumulation can never arise, there being ample funds to discharge and satisfy the only remaining charge or charges, which funds are immediately available for the purpose. It appears to me that Robert Thomas Bruce is now entitled to a vested equitable estate tail in remainder expectant upon the decease of Lady Cardigan. I think that this estate is vested, because there is a present capacity in Robert to take, although it is uncertain whether it can ever take effect in possession. It is therefore not contingent. The next remainder, whether it be to the first heir male of the body of Robert in tail male (George Thomas having died without issue) or to the Earl of Cardigan, is contingent, being dependent upon the death of Robert in the lifetime of Lady Cardigan, and there being no present capacity in any person to take, Robert being alive. Robert having duly disentailed claims that the assignees of himself and Lady Cardigan are now absolutely entitled in fee simple subject only to Lady Cardigan's life interest. He claims first as having taken under a direct legal devise to him in the codicil, which, as I understood, he says supersedes the equitable estates given by the will to George and to the first heir male of George or Robert in a certain event. In my opinion, however, upon the true construction of the will and codicil the legal estate remains vested in the trustees and but for the disentailing assurance by Robert the equitable interests would now stand

limited in trust for Lady Cardigan for life with vested remainder to Robert for an estate in tail male with contingent remainder in the event of Robert dying in the lifetime of Lady Cardigan in favour of the heir male of the body either of George or of Robert (which of them it is not now necessary to decide) with contingent remainder in favour of the Earl of Cardigan for the time being.

The next question is, What effect, if any, has the disentailing assurance had upon the contingent estates in remainder? This depends upon the true construction to be placed upon the 15th section of the Fines and Recoveries Act, which runs as follows: "After the 31st of December, 1833, every actual tenant in tail whether in possession, remainder, contingency, or otherwise shall have full power to dispose of, for an estate in fee simple absolute or for any less estate, the lands entailed as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by the person making the disposition at the time of his making the same, and also as against all persons including the King's Most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail, saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against such disposition is by this Act authorized to be made."

It appears to me that an actual tenant in tail in remainder has disentailed, and has thereby barred his own issue male claiming under the estate in tail male limited to him and his heirs male; he has also barred the contingent estates limited in remainder, if they are to be deemed estates to take effect after the determination or in defeasance of Lord Robert's estate in tail male, but not otherwise. It is argued that the limitation in favour of the heir male of George or Robert as the case may be is not one to take effect after the determination or in defeasance of Robert's estate tail, but is a limitation to take effect alternatively with the limitation in favour of Robert according to the event, and that consequently it is not barred. The point is new, so far as I know, but I think that the reasoning in support of the contention fails, because the Act does not say after the determination or in defeasance of any estate tail which shall fall into possession, but of any "such" estate tail, *i.e.*, any estate tail in possession or remainder. I think that the estates in question are barred as being estates to take effect in a certain event after, if not in defeasance of the vested estate in tail male in remainder of Robert. Under these circumstances the money in court may be paid out subject to the directions I have already given as to any other interests not sufficiently represented and subject to providing for the duties.

Solicitors, *G. B. Lawrence & Co.; A. R. & H. Steele; Merriman, Pike, & Merriman; Warren, Murton, & Miller; Hunter & Haynes; Burch, Whitehead, & Davidson; Rooper & Whateley.*

K. B. Div.
(Kennedy and Phillimore, JJ.) May 8.

MARQUIS OF BRISTOL v. THE COMMISSIONERS OF INLAND REVENUE. (a.)

Inland revenue—Stamp duty—Family arrangement—Conveyance on sale—Consideration—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57.

By two deeds made between B. and H. (who was the heir to B.'s unsettled estates), after reciting that H. had undertaken the payment of a mortgage on the estates and that B. was indebted to H. in certain sums, it was witnessed that in pursuance of a family arrangement B. conveyed his unsettled estates to H. subject to the mortgages, and also certain specified chattels; but power was reserved to B. and H. to cancel, alter, or make void the family arrangement at any time.

Held, that the deeds were liable to ad valorem *duty as being conveyances on sale.*

Case stated by Commissioners of Inland Revenue under the Stamp Act, 1891, raising the question whether certain deeds executed by the Marquis of Bristol and embodying a family arrangement constituted a sale for the purposes of stamp duty.

On the 8th of December, 1899, three deeds were presented on behalf of the Marquis of Bristol, the appellant, to the Commissioners of Inland Revenue, the respondents, under the provisions of section 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the same were chargeable.

The three deeds constituted one transaction only, and two of them alone were the subject of this case.

On the 6th of December, 1899, the date when the transaction affected by the deeds was entered into, the appellant was entitled absolutely to certain freeholds and copyholds and to valuable personal chattels. The freeholds and copyholds were subject to certain mortgages, which had, by virtue of an instrument dated the 31st of December, 1898, been consolidated into one charge of £62,000.

The appellant was also tenant for life of certain other freeholds and copyholds, with remainder (in default of male issue born to him) to Captain Frederick Hervey, as to the freeholds in tail male, and, as to the copyholds, to uses corresponding thereto.

On the 6th of December, 1899, the appellant was indebted to Captain Hervey in the sum of £123,800 for moneys expended at the appellant's request.

The first deed, dated the 6th of December, 1899, was a deed of arrangement to which the mortgagees were parties, and it exonerated the appellant from payment of the mortgage debt of £62,000, and contained a covenant by Captain Hervey with the mortgagees for payment of the same. The second deed, also dated the 6th of December, 1899, was a conveyance or assurance by the appellant to Captain Hervey of the unsettled freeholds and copyholds subject to the mortgage of £62,000. By a third deed, dated the 7th of December, 1899, made between the appellant and Captain Hervey, after setting forth a certain family arrangement made between them, power being reserved to them by any deed or deeds executed by both of them to alter, cancel, or make void the arrangement in such manner and to such extent as they should think fit, in pursuance of such family arrangement, and, in consideration of the agreements by the appellant therein contained and the assignment after made, Captain Hervey released the appellant from the debt of £123,800. Further,

(a.) Reported by ERSKINE REID, Esq., Barrister-at-Law.

the appellant assigned and conveyed to Captain Hervey certain valuable personal chattels absolutely.

The commissioners were of opinion that the second and third deeds—no question as to the assessment of duty upon the first deed arising—were conveyances on sale within the meaning of the Stamp Act, 1891, and that the sums of £62,000 and £123,800 were consideration for the sale, and were assessable to *ad valorem* duty. They also assessed the third deed to 10s. further duty in respect of the family arrangement to which no objection was made.

The marquis appealed.

Danckwerts, K.C., and *W. B. Coltman*, for the appellant.—This transaction was never intended to be a sale, but a family arrangement, and on the following authorities the documents are not chargeable with *ad valorem* duty: *Foster* v. *Commissioners of Inland Revenue*, 42 W. R. 259, [1894] 1 Q. B. 516; *Denn* v. *Diamond*, 4 B. & C. 243; *Massy* v. *Nanney*, 3 Bing. N. C. 478; *Waring* v. *Ward*, 7 Ves. 332; *Attorney-General* v. *Hawkins*, *ante*, p. 320, [1901] 1 Q. B. 285.

Sir R. B. Finlay, A.G., and *S. A. T. Rowlatt*, for the respondents.—The power of cancellation does not apply to the release of the appellant from the covenants in reference to the mortgage, that release being absolute. Therefore, although a family arrangement, the transaction is a sale, and the price is the mortgage for £62,000 to Captain Hervey, to whom at that time the marquis was indebted to the extent of £123,800.

The COURT gave judgment for the Crown, dismissing the appeal with costs.

KENNEDY, J.—In this case I am of opinion that the decision of the Commissioners of Inland Revenue is right. The Crown claims to treat the deeds as conveyances on sale within the meaning of the Stamp Act, and therefore its contention that the stamp must be calculated as if the consideration was £62,000 and £123,800 is a good contention. It was said as to the second deed that there was really no sale at all, and that a covenant by the donee to indemnify the donor would be implied in law from the fact of what had been done by the first deed. For myself, I cannot agree with this contention, as the three deeds must be treated as one arrangement; and while Captain Hervey took over the equity of redemption, entering into covenants in place of the marquis, he did, in fact, get a conveyance of the unsettled estates, subject to a mortgage of £62,000, in consideration of entering into a covenant to pay the £62,000. In my view of that transaction, it would be impossible to treat it as a family arrangement so as to exclude a conveyance on sale. There may very well be transactions which, in a sense, were family arrangements, but which also involve a conveyance on sale. If the machinery is really a sale for money, it matters not that the purpose of the parties did not necessarily involve a money gain to the one side or the other. If money is given for the conveyance, it matters not that the transaction is entered into because it would facilitate the relations of the parties or help to preserve the estate intact. The cancellation clause does not mean that there is not to be a conveyance on sale, but that the family arrangement might at any time be varied, while there was an absolute sale of the interests under the deed.

For these reasons I think the contention on behalf of the Crown is right, and that the deeds constituted a conveyance sale, and the documents accordingly are chargeable with an *ad valorem* stamp.

PHILLIMORE, J., delivered judgment to the same effect.

Solicitors, *Coe & Co.; The Solicitor to the Inland Revenue.*

K. B. Div. (Lord Alverstone, L.C.J., and Lawrance, J.) — April 23.

SNEATH (*Appellant*) v. TAYLOR (*Respondent*). (*a.*)

Adulteration—Food and drugs—Certificate of public analyst—Sufficiency of—Omission to insert weight of sample—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.

In a prosecution under the Sale of Food and Drugs Act, 1875, *for selling adulterated butter to the prejudice of the purchaser, the certificate of the analyst which was given in evidence omitted to state the weight of the sample supplied for the purpose of analysis.*

Held, that the certificate was valid. The insertion of the weight in the certificate is only obligatory where it is shown that the weight of the sample is material and the accuracy of the analysis depends in any way upon the weight of the sample.

This was a case stated by justices of the peace in and for the parts of Kesteven, in the county of Lincoln, and acting in and for the petty sessional division of Sleaford.

On the 14th of January, 1901, an information preferred by William Taylor, the respondent, against Alfred Petchel Sneath, the appellant, charging that the said appellant on the 13th of November, 1900, did unlawfully sell to the prejudice of the said respondent, the purchaser, certain butter which was adulterated with 15 per cent. of margarine and was not of the nature, substance, and quality demanded by the purchaser, contrary to section 6 of the Sale of Food and Drugs Act, 1875, was heard and determined by the said justices, who duly convicted the appellant.

The appellant was an assistant in the employ of Edward Allen & Sons, grocers carrying on business at Sleaford, and the respondent was an inspector under the Sale of Food and Drugs Act, 1875.

On the 13th of November, 1900, the respondent purchased from the appellant one pound of butter for the purpose of analysis.

The butter was divided into three parts, and one part thereof was submitted to the public analyst to be analyzed in accordance with the provisions of the said statute.

At the hearing of the information the certificate of the public analyst was produced by the respondent and tendered in evidence in support of the prosecution, but was objected to by the appellant on the ground that the weight of the sample of the butter received to be analyzed was not stated in the certificate, and therefore the certificate was not in the form required by section 18 of the Sale of Food and Drugs Act, 1875.

The following is a copy of the material parts of the said certificate: "I . . . do hereby testify that I received on the 15th day of November, 1900, from Mr. W. Taylor a sample of butter (No. 94 S. K.) for analysis, and have analyzed the same and declare the result of my analysis to be as follows: I am of opinion that the said sample contained the parts as under—15 per cent. of margarine, 85 per cent. of butter . . ."

No evidence of adulteration was given in support of the prosecution other than the said certificate. A copy of this certificate was served with the summons.

(*a.*) Reported by E. G. STILLWELL, Esq., Barrister-at-Law.

It was contended on behalf of the appellant that the sample of butter could have been conveniently weighed. That the weight of the sample not being stated the certificate was not in the form required by section 18 of the Sale of Food and Drugs Act, 1875, and that it was invalid and inadmissible in evidence. It was further contended that as the certificate was not in the form required by section 18 of the said Act, the respondent had not complied with section 19 of the Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), which provides that a copy of the analyst's certificate must be served with the summons.

It was contended on behalf of the respondent that the omission in the certificate of the weight of the sample was immaterial. That the certificate was in the form required by section 18 of the said Act of 1875, and that it was valid and admissible in evidence. It was also contended that the service with the summons of a copy of the certificate was a compliance with section 19 of the said Act of 1899.

The contention on behalf of the appellant that the butter could have been conveniently weighed was not contested on behalf of the respondent. There was no expert evidence that it could have been conveniently weighed, but there was uncontested evidence that there was approximately about a third of a pound of butter sent for analysis.

The justices held that the omission in the certificate of the weight of the sample was immaterial; that the certificate was in the form required by section 18 of the said Act of 1875, and that it was valid and admissible in evidence. They also held that the service of a copy of this certificate with the summons was a compliance with section 19 of the said Act of 1899.

The question for the opinion of the court was whether upon the above facts the justices were right in law in holding that the said certificate was in the form required by section 18 of the Sale of Food and Drugs Act, 1875, and that it was valid and admissible in evidence, and whether, having regard to the form of the certificate, they were right in holding that section 19 of the Sale of Food and Drugs Act, 1899, had been complied with.

Bonsey, for the appellant.—The certificate omitted to state the weight of the sample, and therefore was not in accordance with the form provided in the schedule to the Sale of Food and Drugs Act, 1875, section 18 of which Act says that certificate is to be given in the form set out in such schedule, which form provides for the statement of the weight of the sample received for the purpose of analysis, the words being: "I, the undersigned public analyst for . . . , do hereby certify that I received on the . . . day of . . . from . . . a sample of . . . for analysis which then weighed . . ." The certificate was therefore invalid and ought not to have been received in evidence. There was no evidence that the sample of butter could not have been conveniently weighed. There had also, therefore, been a noncompliance with section 19 of the Act of 1899, which, being a penal Act, must be construed strictly: *Fortune* v. *Hanson*, 44 W. R. 431, [1896] 1 Q. B. 202; *Bridge* v. *Howard*, 45 W. R. 78, [1897] 1 Q. B. 80; *Peart* v. *Barstow*, 44 J. P. 699.

W. H. Leese, for the respondent.—The certificate was not rendered invalid by the mere omission to state the weight of the sample received for the purpose of analysis. The weighing of the sample is in the discretion of the analyst. If the defendant in the prosecution is not satisfied with the certificate he can under section 21 of the Act of 1875 require the analyst to be called as a witness. [The court here stopped the learned counsel.]

Bonsey replied.

Lord ALVERSTONE, L.C.J.—The question raised in this case is whether the words "which then weighed" in the form of the analyst's certificate given in the schedule to the Sale of Food and Drugs Act, 1875, are obligatory, so that the certificate is invalid if they are omitted, or whether they are merely directory. It is very plain that where the weight of the sample is material the words must not be omitted and the weight must be filled in, but it is impossible to decide as a matter of law that when it is not shown to the justices that the weight of the sample is in any way material it is necessary to fill in the words. A certain latitude is of necessity given to the analyst, for a note at the foot of the form says, "When the article cannot be conveniently weighed this passage may be erased or the blank may be left unfilled." On behalf of the appellant it was contended that the words must be filled in unless the sample cannot be conveniently weighed, and that as butter, the article in question, can be conveniently weighed the weight ought to have been filled in in the certificate. In my opinion, if the accuracy of the analysis of the butter depended in any way upon the weight of the sample, and if the certificate did not give the necessary information to enable the court to judge of the accuracy of the analysis, I should have come to a very different conclusion to that which in fact I have come to in this case. The direction as to the insertion of the weight is intended to apply to ordinary cases, but I cannot say that the mere omission of the weight of the sample in the present case, having regard to the discretion given to the analyst, necessarily renders the certificate invalid. The appeal must therefore be dismissed.

LAWRANCE, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Truss & Enever*, for *Godson*, Sleaford.

Solicitors for the respondent, *Peacock & Goddard*, for *Phillips*, Lincoln.

[THE END.]

THE

WEEKLY REPORTER DIGEST

OF ALL THE

CASES DECIDED IN THE SUPREME COURT OF JUDICATURE;

WITH

APPEALS TO THE HOUSE OF LORDS AND PRIVY COUNCIL;

FROM THE 24TH OF OCTOBER, 1900, TO THE 12TH OF AUGUST, 1901.

VOL. XLIX.

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1901.

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TOGETHER ALSO WITH CERTAIN OTHER CASES REPORTED THEREIN DURING THE SAME PERIOD, BUT DECIDED PREVIOUSLY THERETO.

*** In the following Digest the letters H.L. after a case indicate the House of Lords; P.C., the Privy Council; C.A., the Court of Appeal; LUN., Lunacy; CH.D., the Chancery Division; K.B.D., the King's Bench Division; Q.B.D., the Queen's Bench Division; BKCY., the King's Bench Division sitting in Bankruptcy; P.D. & AD.D., the Probate, Divorce, and Admiralty Division; C.C.R., the Court for Crown Cases Reserved.

*** *This Digest will contain at the end thereof a Tabular Index of the Names of all Cases Reported up to the end of August,* 1901, *as well in this Volume* (49) *of the* WEEKLY REPORTER *as in certain other Contemporaneous Reports. In this Digest, figures following the name of a case denote the page in the* WEEKLY REPORTER *at which it will be found. Where the name of a case has no figures attached, the case is not reported in this Volume of the* WEEKLY REPORTER; *but the references to the case in other Reports are given in this Digest.*

ACCUMULATION.—See Infant, 1; Will, 1-4.

ADMINISTRATION:—

1. *Creditor administrator—Right of retainer—Form of administration bond—"Not unduly prefer."*—An administrator may retain his own debt as against debts of equal degree, notwithstanding that the administration bond provides for a due course of administration "rateably and proportionably and according to the priority required by law, and not unduly preferring his own debt."

Nunn v. *Barlow*, 1 Sim. & St. 588. and *Davies* v. *Parry*, 47 W. R. 429, [1899] 1 Ch. 602, considered and followed.—BELHAM, RE, RICHARDES *v.* YATES (No. 2), *C.A.*, 498; [1901] 2 Ch. 52; 70 L. J. Ch. 474; 84 L. T. 440.

2. *Executor—Right of retainer.*—An executor's right of retainer extends only to funds actually or constructively in his possession.

The insolvent estate of a deceased person, the subject of an old administration suit, became entitled to a fund in court to the credit of another suit. The fund was transferred to the credit of the administration suit, and outstanding costs paid out of it.

Held, that the present administrator of the deceased, a creditor, had no right of retainer against the balance in court.—PULMAN *v.* MEADOWS, *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 233; 70 L. J. Ch. 99; 84 L. T. 26.

3. *Insolvent estate—Voluntary settlement—Postponement of voluntary debts—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10.—By virtue of section 10 of the Judicature Act, 1875, whatever rules are for the time being in force in bankruptcy with regard to debts provable are to apply in the administration of insolvent estates in the Chancery Division.

Consequently, voluntary creditors of a deceased insolvent are entitled to rank *pari passu* with

creditors for valuable consideration, the old rule in Chancery, whereby their claims were postponed, being now abrogated.

Decision of Cozens-Hardy, J. (*ante*, p. 56, [1900] 2 Ch. 676), confirmed.

In re Maggi, Winehouse v. *Winehouse*, 30 W. R. 729, 20 Ch. D. 545, overruled.—WHITAKER, RE, WHITAKER *v.* PALMER, *C.A.*, 106; [1901] 1 Ch. 9; 70 L. J. Ch. 6; 83 L. T. 449.

4. *Intestacy—Domicil—Person authorized to take out administration—Distribution.*—The widow (who lived abroad) of an intestate authorized W. to take out lettters of administration of the intestate's estate in this country. W. got in all the estate, and after paying debts had a sum in hand.

Held, that W. was the proper person to distribute the estate among the next-of-kin.—RENDALL, RE, WOOD *v.* RENDALL, *Ch.D. Cozens-Hardy, J.*, 131; [1901] 1 Ch. 230; 70 L. J. Ch. 265; 83 L. T. 625.

5. *Separate account—Rights of parties—Fund in court—Claims against separate accounts—Lien.*—Where, upon an administration order made in presence of all interested parties, and declaring their rights in a fund, money is paid to various separate accounts, then, although it is open to the parties to the suit to show that they have claims enforceable against a separate fund which were not known or not existent when the fund was separated, still, until such step is taken, the separation must be considered as showing that the separated funds are free from claims by the other sharers in the estate.

Bonâ fide assignees of distinct shares are not liable to claims by the other sharers arising out of matters subsequent to the separation or latent at the time.—EDGAR *v.* PLOMLEY, *P.C.*, 142; [1900] A. C. 431.

See also Executor, 1, 2; Trustee, 7.

ADMIRALTY.—See County Court, 1, 4; Ship, 1, 6.

ADULTERATION:—

1. *Food and drugs—Beer containing arsenic—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 3, 5, 6.—Beer, containing arsenic to such an extent as to render the same injurious to health, was sold to a purchaser. The arsenic had been unknowingly mixed with the beer by the brewer in the course of the manufacture. The vendor of the beer was summoned under section 6 of the Sale of Food and Drugs Act, 1875. The justices who heard the summons found that the beer was not of the nature, substance, and quality of the article demanded by the purchaser.

Held, that there was evidence in support of the finding and that the vendor ought to be convicted.—GOULDER *v.* ROOK BENT *v.* ORMEROD, *K.B.D.*, 701; [1901] 2 K. B. 290; 70 L. J. K. B. 747; 84 L T. 719.

2. *Food and drugs—British Pharmacopœia—Standard strength of drugs—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *s.* 15.—A purchaser went into a chemist's shop and asked to be supplied with "mercury ointment." Mercury ointment is one of the medicines contained in the British Pharmacopœia. The chemist supplied him with an ointment containing a less proportion of mercury than that prescribed by the formulary of the Pharmacopœia.

Held, that, although the purchaser did not refer to the Pharmacopœia, he must be taken to have demanded that the ointment should be compounded of the proportions therein prescribed, and that upon a complaint under section 6 of the Sale of Food and Drugs Act, 1875, the vendor was rightly convicted of having sold a drug not being of the quality demanded by the purchaser.

White v. *Bywater*, 19 Q. B. D. 582, followed.

Held, also, that the fact of the ointment being a compounded drug did not make the sale of it as above-mentioned any the less an offence within section 6.—DICKINS *v.* RANDERSON, *Q.B.D.*; [1901] 1 Q. B. 437; 70 L. J. K. B. 344; 84 L. T. 204.

3. *Food and drugs—Certificate of analysis, sufficiency of—Arsenic in beer—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.—In two prosecutions under the Sale of Food and Drugs Act, 1875, for selling beer not of the nature, substance, and quality demanded, certificates of analysts were tendered as evidence which, in the one case, stated that the samples submitted to them contained "arsenic," and, in the other, "a serious quantity of arsenic."

Held, that neither of the certificates were sufficient.—LEE *v.* BENT, BARLOW *v.* NOBLETT, *K.B.D.*, 684; [1901] 2 K. B. 290; 70 L. J. K. B. 747; 84 L. T. 719.

4. *Food and drugs—Certificate of public analyst—Sufficiency of—Omission to insert weight of sample—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 18.—In a prosecution under the Sale of Food and Drugs Act, 1875, for selling adulterated butter to the prejudice of the purchaser, the certificate of the analyst which was given in evidence omitted to state the weight of the sample supplied for the purpose of analysis.

Held, that the certificate was valid. The insertion of the weight in the certificate is only obligatory where it is shown that the weight of the sample is material and the accuracy of the analysis depends in any way upon the weight of the sample.—SNEATH *v.* TAYLOR, *K.B.D.*, 719; [1901] 2 K. B. 376.

5. *Food and drugs—Milk—Sale on highway from vehicle or can—Name and address of vendor on vehicle or can.*—The respondent's servant, who was going from house to house in a village supplying milk, went into a shop carrying a three-gallon milk-can, from which he supplied the shopkeeper with a pint of milk, and on going out went to a cart standing about twenty yards off, in which the can and other similar cans were carried. The respondent's name and address were on the cart, but not on the can.

Held, that section 9 of the Sale of Food and Drugs Act, 1899, required the person selling the milk to have his name and address upon the cart where the milk was sold from the cart, or upon the can where the milk was sold from the can, and that there should be a finding of fact whether in the circumstances of the above case the milk was sold from the cart or from the can.—CRABTREE *v.* SKELTON, *K.B.D.*; 70 L. J. K. B. 560.

6. *Food and drugs—Milk—Warranty in writing—Defence.*—The Sale of Food and Drugs Act, 1875, does not require a specific warranty with each consignment of milk delivered under a contract; and a general warranty in writing that future deliveries of milk shall be "new, unadulterated, and with all its cream on," affords the retailer the protection of section 25 as a defence.—ELLIOT *v.* PILCHER, *K B.D.*; 70 L. J. K. B. 795.

7. *Food and drugs—Purchase of several bottles for analysis—Division of samples—Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *s.* 14.—An inspector purchased at the same time and place, for analysis, six bottles of camphorated oil, and divided

the bottles into three lots of two bottles each without opening any of them. One lot he handed back to the vendor, one lot to the analyst, and one lot he retained himself.

Held, that the inspector had not complied with section 14 of the Sale of Food and Drugs Act, 1875, as each bottle was a separate "article" within that section, and should itself be divided into three parts.—MASON *v.* COWDRAY, *Q.B.D.*, 28; [1900] 2 Q. B. 419; 69 L. J. Q. B. 667; 82 L. T. 802.

AGENT.—See Banker, 3; Contract, 14, 15; Frauds, Statutes of, 2; Principal and Agent, 1, 2, 3, 5, 6; Stock Exchange, 2, 3; Vendor and Purchaser, 15

ANIMAL:—

1 *Dog—Dangerous and not under proper control—Order for destruction—Form of order—Conviction for disobedience—Dogs Act*, 1871 (34 & 35 *Vict. c.* 56), *s.* 2.—The appellants obtained rules *nisi* for *certiorari* to quash two orders that had been made by justices for the destruction of two valuable dogs, on the ground (1) that the justices could under section 2 of the Dogs Act, 1871, only make an alternative order either to destroy or to keep under proper control the dog in question; (2) that the first order was bad in form, since there was no adjudication that the dogs were not under proper control; (3) that the second order was bad, as it wrongly cited the first order.

Held, discharging both rules, that an order for the destruction of a dangerous dog need not contain an adjudication by the justices that the dog was not under proper control, nor by section 2 of the Dogs Act, 1871, need the justices give the owner of the dog the option of keeping the animal under proper control before ordering its destruction.

Pickering v. *Marsh*, 22 W. R. 798, 43 L. J. M. C. 143, followed.—REX *v.* DYMOCK; REX *v.* MOGER, *K.B.D.*, 618.

2. *Slaughter of—"Brought to or delivered at such place for the purpose of being slaughtered"—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 8.—The respondent, a licensed horse slaughterer, purchased a mare for 10s., for working which the seller had been fined, and sent it by his servant to his premises licensed for the slaughter of such animals. He entered it in his statutory register " . . . bought . . . brown mare to kill for 10s." The mare was kept on those premises for nine days, and after being cautioned, the respondent had cut the hair from its neck.

Held, that the mare had been brought to the premises for the purpose of being slaughtered within section 8 of the Cruelty to Animals Act, 1849.—EDGAR *v.* SPAIN, *K.B.D.*; 84 L. T. 631.

ANNUITY.—See Will.

APPOINTMENT.—See Power, 1-7.

ARBITRATION:—

1. *Arbitrator—Counsel—Disqualification—Bias.*—Counsel habitually employed by the solicitors of one of the parties to an arbitration is not disqualified from acting as arbitrator merely on that account.—BRIGHT *v.* RIVER PLATE CONSTRUCTION CO., *Ch.D. Cozens-Hardy, J.*, 132; [1900] 2 Ch. 835; 70 L. J. Ch. 59.

2. *Award—Umpire* functus officio—*Power to remit—Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 10, *sub-section* 1.—An umpire made an award in an arbitration which was taken up by one of the parties. The award did not deal with all the questions submitted by the agreement of reference. The umpire thereupon made a second award, which he substituted for the first award.

Held (following *Mordue* v. *Palmer*, 19 W. R. 86, L. R. 6 Ch. App. 22), that, after making the first award, the umpire was *functus officio*, and that the second award was therefore bad; but that the court had power, under section 10, sub-section 1, of the Arbitration Act, 1889, to remit the case to the umpire for reconsideration.—STRINGER AND RILEY'S ARBITRATION, RE, *Q.B.D.*, 111; [1901] 1 Q. B. 105; 70 L. J. Q. B. 19.

3. *Costs—Practice—Agreement for purchase of gas undertaking—Price to be fixed by arbitration—Agreement to pay costs, charges, and expenses "to be taxed"—Taxation by master—Jurisdiction to review.*—By an agreement, confirmed by a private Act, a district council agreed to purchase the undertaking of a gas company at a price to be fixed by arbitration, and it was provided that the agreement should be "deemed a 'submission' within the meaning of the Arbitration Act, 1889."

The council also agreed to pay "all the costs, charges, and expenses of the company preliminary and incidental to the negotiation for the sale and the said arbitration, the same to be taxed in case the parties differ."

An award was made which did not deal with costs. The costs were taxed by a master, who allowed costs upon a scale lower than the scale as between solicitor and client. A judge at chambers ordered a review of taxation.

Held, that there was jurisdiction to review the taxation of the master; and that the company was entitled to costs as between solicitor and client.—MALVERN URBAN COUNCIL *v.* MALVERN LINK GAS CO., *C.A.*; 83 L. T. 326.

See also Contract, 3.

BANKER:

1. *Account current—Mortgage—Power of sale—Closing of account*.—A customer mortgaged to his bankers a policy of assurance on his life to secure the amount owing by him to the bank from time to time in account current. The mortgage provided that the statutory power of sale should be exercisable by the bank if (*inter alia*) the customer made default in payment of the balance due on the account current for the space of one month after the account current had been closed. The customer got into difficulties, and, after some correspondence with the bank, wrote to the manager on the 9th of November, 1899, informing him that there had been a meeting of his creditors and a trustee had been appointed. By a deed of the 17th of November he assured all his real and personal estate to the trustee for the benefit of his creditors. On the 28th of November notice of the deed was given to the bank, who, on the 18th of December, sold the policy under the power.

Held, that, though the bank had not itself closed the account, the debtor's letter of the 9th of November must be taken to have amounted to a closing of the account within the meaning of the clause in the mortgage deed; and, consequently, that the power of sale had been properly exercised by the bank.—BERRY *v.* HALIFAX COMMERCIAL BANKING CO., *Ch.D. Kekewich, J.*, 164; [1901] 1 Ch. 188; 70 L. J. Ch. 85; 83 L. T. 665.

2. *Cheque—Crossed cheque—Agents to collect—Holders for value—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61, *ss.* 60, 82—*Revenue Act*, 1883 (46 & 47 *Vict. c.* 55), *s.* 17.—J., a clerk of the plaintiff, stole certain cheques and forged the endorsement thereon. He paid them into his accounts at the

defendants' banks, and his accounts were at once credited with them. The accounts were sometimes in credit and sometimes overdrawn.

The stolen cheques were paid in at various times over a period of some four years.

The cheques were, when paid in by J., (1) drawn in favour of G. or order on other banks and uncrossed; (2) drawn in favour of G. or bearer on other banks and uncrossed; (3) drawn on another branch of the defendants' bank, payable to order, and uncrossed; (4) drawn on another branch of the defendants' bank and crossed; (5) drawn on other banks, crossed, and marked "not negotiable"; (6) drawn to order on other banks and crossed; (7) drawn to bearer on other banks and crossed.

In collecting the cheques the defendants acted *bonâ fide* and without negligence.

Held, that the defendants received all the cheques as agents to collect for their customer; that as to (1) and (2) they are liable for the conversion of the proceeds, but that as to (3), (4), they were protected by section 60 of the Bills of Exchange Act, 1882, and as to (5), (6), (7), they are also protected by section 82 of the same Act.

The defendants also received, crossed, a document addressed to a banker, stating: "Pay to —— the sum named below on presentation of the subjoined receipt duly signed and dated."

Held, that the defendants were entitled to the protection of section 82 of the Bills of Exchange Act, 1882, by virtue of section 17 of the Revenue Act, 1883.

Bankers are not deprived of the protection of section 82 of the Bills of Exchange Act, 1882, by reason of crossing, for the purpose of collection, crossed cheques received by them.—GORDON *v.* LONDON, CITY, AND MIDLAND BANK, *Q.B.D.*; 63 L. T. 762.

3. *Principal and agent—Authority of agent—Consideration moving from the principal—Special damage—Appeal from New Zealand.*—The plaintiff's agent obtained from the defendant bank a promise to pay certain cheques drawn by the plaintiff, in consideration of his depositing with it a store warrant in lieu of the cash which the plaintiff had instructed him to pay to the credit of the plaintiff's account. The store warrant belonged to the plaintiff, was under pledge to the agent, and was accepted by the bank with full knowledge of the circumstances.

Held, in an action for dishonouring the cheques, that the agent in substituting the deposit for cash did not exceed his authority, but that even if he had, the contract was complete, for there was consideration for the bank's promise. The deposit conferred on the bank some right, interest, profit, or benefit within the legal meaning of consideration; and in the circumstances it could not be heard to say that that consideration did not move from the plaintiff.

Held, further, that evidence of special damage—that is, of plaintiff's loss of custom and credit from particular individuals—was wrongly admitted; special damage not having been alleged.—FLEMING *v* BANK OF NEW ZEALAND, *P.C.*; [1900] A. C. 577; 69 L J. P. C. 120.

BANKRUPTCY:—

1. *Act of bankruptcy—Assignment of property for the benefit of creditors generally—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (a)—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *s.* 19.—Where the act of bankruptcy alleged in a petition is a deed of assignment for the benefit of creditors generally, a receiving order ought not to be made if the deed relied upon is for the benefit of trade creditors only. The expression "creditors generally" must be construed to mean "all creditors."—PHILLIPS, RE, BARTON, EX PARTE, *Bkcy.*, 16; [1900] 2 Q. B. 329; 69 L. J. Q. B. 604; 82 L. T. 691.

2. *Act of bankruptcy—Transfer of whole of assets—Arrangement for payment of creditors—Relation back of trustee's title—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4 (1) (a) (c) 49.—In December, 1899, S., a publican, owed about £3,000 to trade creditors; his trade premises were mortgaged to W. & Co. his lessors, and he was insolvent. It was agreed that S. should surrender his lease, that W. & Co. should release the mortgage and should take over the stock-in-trade, being the whole of S.'s assets, for £2,800; this sum was the total amount of a list of his debts furnished by S. and stated to be a complete list; a cheque for £2,800 was handed by W. & Co. to S., who, according to the arrangement, immediately indorsed and delivered it to the respondents, who proceeded to pay all the debts set out in the said list furnished by S. This list did not in fact contain all the creditors. The arrangement was entered into honestly and without any fraudulent motive.

A receiving order having been made against S. within three months of this transaction, the trustee sought to recover the sum of £2,800 from the respondents.

Held, that the transfer by S. was an act of bankruptcy as necessarily tending to defeat the creditors omitted from the list, and as substituting for the administration of the estate in bankruptcy a different mode of administration.

Also, that section 49 of the Bankruptcy Act, 1883, does not protect payments made, not in the ordinary course of business, but for the purpose of doing that which in law constitutes an act of bankruptcy, and that the present transaction was therefore not protected by that section.—SHARP, RE, GUNDRY, EX PARTE, *Bkcy.*; 83 L. T. 416.

3. *After-acquired property—Personal earnings—Interpleader—Wagering contract—Money deposited as stakes—Stakes claimed by trustee in bankruptcy—Gaming Acts*, 1845 (8 & 9 *Vict. c.* 109), *s.* 18; 1892 (55 & 56 *Vict. c.* 9), *s.* 1—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c* 52), *ss.* 44, 53.—The defendant, a professional billiard player, who was then an undischarged bankrupt, agreed to play a match at billiards with another billiard player for £100 a side, and each party deposited that amount with stakeholders. The defendant won the match, and thereupon both the defendant and the plaintiff, his trustee in bankruptcy, claimed the stakes. The stakeholders interpleaded; and, the money having been paid into court, an issue was directed to try whether the plaintiff or the defendant was entitled to the money.

Held (varying the order of Phillimore, J., [1899] 2 Q. B. 560), that the plaintiff was entitled to the whole of the money.—SHOOLBRED *v.* ROBERTS, *C.A.*; [1900] 2 Q. B. 497; 69 L. J. Q. B. 800; 83 L. T. 37.

4. *Agreement to assign bills when completed—Assignment of debt by bankrupt—Notice of the assignment—Order and disposition—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44, 49.—D. carried on business as a coal exporter. In January, 1900, he sold a cargo of coal to a company carrying on business at Athens. D. shipped the coal to the purchasers and forwarded them bills of exchange for the price, to be accepted by them and returned. D. being in want of funds to meet cheques falling

due, on the 3rd of February arranged with the N.E. Bank they should pay these cheques on their being presented, and he agreed in writing that these payments should be against the bills to be accepted, and he thereby "undertook to hand to the N.E. Bank the above-mentioned bills immediately on receipt." On the 3rd of March, the bills not having arrived, D. gave to the N.E. Bank a letter addressed by him to the company in Athens requesting them to "hand the bills on demand to the N.E. Bank." This letter the bank on the 3rd of March forwarded to the company, inclosed in one from themselves, to the following effect: "We shall be glad if you will post direct to us the four bills in accordance with the inclosed instructions." D. committed an act of bankruptcy on the 3rd of March, before giving the letter to the bank, but the bank had no notice of an act of bankruptcy till the 6th of March.

A receiving order was subsequently made against D., and his trustee in bankruptcy moved for a declaration that he was entitled to the proceeds of the bills as being property in the order and disposition of the bankrupt within section 44 of the Bankruptcy Act, 1883.

Held, that, even if the document of the 3rd of February only amounted to an assignment of the debt and not of the bills, yet the letters of the 3rd of March constituted a sufficient notice of the assignment to prevent the operation of section 44. —DIXON, RE, *Bkcy.*; 83 L. T. 433.

5. *Annulment—Payment of debts in full—Discretion to refuse annulment—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 35.—Where a bankrupt has been guilty of serious misconduct in the course of the bankruptcy, the court will refuse to annul the adjudication, even though the bankrupt has paid his debts and the costs of the bankruptcy in full.—TAYLOR, RE, TAYLOR. EX PARTE, *Bkcy.*, 510; [1901] 1 Q. B. 744; 70 L. J. K. B. 531; 84 L T. 426.

6. *Bankruptcy notice—Final judgment—Order for revocation of patent—Bankruptcy Act* 1883, (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (g)—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict.* c. 57), *s.* 26.—An order of the Chancery Division revoking a patent, with costs, under section 26 of the Patents, Designs, and Trade-Marks Act, 1883, is not a final judgment within the meaning of section 4, sub-section 1 (*g*), of the Bankruptcy Act, 1883, and a bankruptcy notice cannot be founded thereon.—OWEN, RE, *Bkcy.*, 379; 70 L. J. Q. B. 92; 86 L. T. 572.

7. *Bankruptcy notice—Notice of suspension of payment under section* 4 (1) (h) *of the Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52)—*Existence of debt due to petitioning creditor at time of notice—Petition.*—V. T. paid £2,000 into a bank to the use of S. M., with the view of his subsequently becoming a partner of S. M. on the Stock Exchange. It was agreed, however, that, if S. M. should use the said sum for any other than certain specified purposes, or if V. T. should not by a certain specified day become a member of the Stock Exchange and enter thereupon into partnership with S. M., then the said sum of £2,000 should be repayable by S. M. to V. T., and the agreement should be at an end. Prior to the fulfilment of either of these two conditions, S. M. was "hammered" on the Stock Exchange, and informed V. T. that he was utterly penniless and unable to pay his debts.

Held, that, inasmuch as, at the date of the information in question, the sum of £2,000 was not then due from S. M. to V. T. under the terms of the contract, and inasmuch as V. T. was not at that date in a position to sue S. M. for the said sum as money had and received, there was no debt due at that date from S. M. to V. T., and V. T. was not then accordingly a creditor of S. M. within the meaning of section 4 (1) (*h*) of the Bankruptcy Act, 1883.—MILLER, RE, TALBOT, EX PARTE, *C.A.*, 65; [1901] 1 Q. B. 51; 70 L. J. Q. B. 1; 83 L. T. 545.

8. *Bankruptcy notice issued by trustee in bankruptcy of judgment creditor—"Person entitled to enforce a final judgment"—Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 4, *sub-section* 1 (g)—*Bankruptcy Act*, 1890 (53 & 54 *Vict.* c. 71), *s.* 1—*R. S. C.*, 1883, *ord.* 17, *r.* 4; *ord.* 42, *r.* 23.—A trustee in the bankruptcy of a creditor who has obtained a final judgment may not issue a bankruptcy notice against the judgment debtor until he has obtained an order under ord. 42, r. 23, declaring that he is entitled to issue execution. — CLEMENTS, RE, CLEMENTS, EX PARTE, *Bkcy.*, 176; [1901] 1 Q. B. 260; 70 L. J. Q. B. 58; 83 L. T. 464.

9. *Bill of sale—Bankruptcy of grantor—Costs of preparation and redemption—Taxation—Jurisdiction —Solicitors Act*, 1843 (6 & 7 *Vict.* c. 73, *s.* 38—*Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *s.* 102.—The grantor of a bill of sale became bankrupt and the grantee having sold the chattels therein comprised, realized a sum more than sufficient to discharge the amount secured by the bill of sale. By an antecedent agreement the grantor was liable to pay all the expenses of the bill of sale, and the grantee now claimed to deduct out of the fund in his hands his solicitor's costs in connection with the preparation and redemption of the bill. The official receiver, as trustee, having paid the costs under protest, moved in the bankruptcy for a declaration that certain heads of these costs could not be charged. The county court judge held that he had no jurisdiction.

Held, on appeal, that the court having jurisdiction in the bankruptcy had a discretionary power under the Bankruptcy Act, 1883, s. 102, to tax the costs of the grantee's solicitor, and that the third party taxation provided by the Solicitors Act, 1843, s. 38, did not exclude this discretionary jurisdiction.—FORD, RE. OFFICIAL RECEIVER, EX PARTE, *Bkcy.*; 84 L. T. 329.

10. *Company—Fraudulent preference—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict.* c. 52), *ss.* 28 (*repealed*), 48. —Section 164 of the Companies Act, 1862, although it uses the words "undue or fraudulent preference," does not extend the operation of the fraudulent preference clause (section 48) of the Bankruptcy Act, 1883, which is thereby applied to companies being wound up under the Companies Acts.

Within three months before the commencement of its winding up a company was indebted to H., and was to the knowledge of its directors unable to pay its debts as they became due from its own moneys. The chairman of its directors was personally liable on an acceptance of the company for part of the debt due to H. In pursuance of a scheme resolved upon by the directors with the very object of relieving the chairman from his liability, debentures of the company were allotted to H. as a collateral security for his debt.

Held, that the transaction was not a fraudulent preference, and that the debentures were valid.—THE STENOTYPER (LIMITED), RE, HASTINGS BROTHERS *v.* THE STENOTYPER (LIMITED). *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 250; 70 L. J. Ch. 94; 84 L. T. 149.

11. *Deed of arrangement—Registration—Foreign debtor*—Mobilia sequuntur personam—*Deeds of Arrangement Act*, 1887 (50 & 51 *Vict. c.* 57), *s.* 5.—The provision of the Deeds of Arrangement Act, 1887, requiring that a deed of arrangement shall be void unless registered in accordance with the Act does not apply to a deed executed abroad by a foreign debtor.

Two foreigners trading as V. & Co., having personal property situated in England, executed in their own country a deed assigning all their property, wherever situated, to a trustee for the benefit of their creditors. The deed was not registered under the Deeds of Arrangement Act, 1887. It was good and unimpeachable in the country in which it was made, and would have been sufficient to pass property according to English law had it been duly registered. A creditor of V. & Co., having obtained judgment against them, issued execution against their goods in England. The trustee claimed the goods.

Held, in an interpleader issue, that the trustee was entitled to the goods as against the execution creditor.—DULANEY *v.* MERRY, *K.B D.*, 331; [1901] 1 Q. B. 536; 70 L. J. K. B. 377; 84 L. T. 156.

12. *Deposit of securities to make good a breach of trust—Fraudulent preference—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.—A payment by a bankrupt trustee to his *cestui que trust*, made with a view to make good his breach of trust, is not a fraudulent preference within section 48 of the Bankruptcy Act, 1883.

Decision of Wright, J. (*ante*, p. 280), reversed.—LAKE, RE, DYER, EX PARTE, *C.A.*, 291; [1901] 1 Q. B. 710; 70 L. J. K. B. 390; 84 L. T. 430.

13. *Interpleader—Property of the bankrupt divisible among his creditors—Property held on trust—Assignment for the benefit of creditors—Right of an assignee to an indemity over the assets—Lien passing to trustee in bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—The assignee of a business under a deed of assignment for the benefit of creditors who incurs debts in carrying on the business has a right of indemnity or lien over the assets of the business which on his bankruptcy would pass to his trustee.

The assignee of such a business, having incurred debts in carrying it on, became bankrupt.

Held, that, although the assets of the business were property held on trust, and so, by virtue of section 44 of the Bankruptcy Act, 1883, were not divisible among his creditors, yet the trustee of the bankrupt had such an interest in them as to entitle him to succeed in an interpleader issue as against an execution creditor who had obtained judgment against the bankrupt.—JENNINGS *v* MATHER. *Q.B.D*, 495; [1901] 1 Q B. 108; 70 L J. Q. B. 53; 83 L T. 506.

14. *Landlord and tenant—Lease—Covenant not to assign—Proviso for re-entry on bankruptcy or breach of covenant—Receiving order and adjudication on lessee's own application—Forfeiture—Peaceable re-entry by lessor—Notice—Relief—Conveyancing Act*, 1881, *s.* 14, *sub-sections* 1, 2, 6—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13)—*Bankruptcy Rules*, 1886, *r.* 190.—The filing by a debtor of his own petition and his application to be adjudged bankrupt, followed by receiving order and adjudication, does not constitute a breach of a covenant in a lease not to assign the demised premises.—RIGGS, RE, TRUSTEE, THE, EX PARTE, *Bkcy.*, 624; [1901] 2 K. B. 16; 17 L. J. K. B. 541; 84 L. T. 428.

15. *Landlord and tenant—Rent guaranteed by third party—Bankruptcy of lessee—Disclaimer of lease by trustee—Liability of surety after date of disclaimer—Bankruptcy Act*, 1883, *s.* 55 (2).—Where a lessee for a term of years becomes bankrupt, and his trustee disclaims the lease under section 55 of the Bankruptcy Act, 1883, the term, as between the lessor and the lessee, is put an end to; and, therefore, a surety for the payment of the rent under the lease is released from his liability under the guarantee as and from the date of the disclaimer, there being no rent due from the lessee after that date.—STACEY *v.* HILL, *C.A.*, 390; [1901] 1 Q. B. 660; 70 L. J. K. B. 435; 84 L. T. 410

16 *Lease—Assignment—Mortgage by sub-demise—Bankrupt assignee—Disclaimer—Vesting order—Exclusion—Application by lessor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-section* 6).—Where the trustee in bankruptcy of an assignee of a lease has disclaimed the lease which the bankrupt had mortgaged by a sub-demise, the original lessor is, under section 55 of the Bankruptcy Act, 1883, entitled, notwithstanding the solvency of the original lessee, to apply to the court for an order vesting the property in the mortgagee subject to the same liabilities as the bankrupt was subject to under the original lease at the date when the bankruptcy petition was filed, and if the mortgagee declines to accept such an order he will be excluded from all interest in and security upon the property.—BAKER, RE, LUPTON, EX PARTE, *C.A.*, 691.

17. *Partnership—Equitable assignment of debt—Bankruptcy of continuing partner—Order or disposition—True owner—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—C. and S. traded in partnership, and in the course of business lent money to R. In 1894 the partnership was dissolved by deed, whereby the assets of the partnership were assigned to C., who agreed to pay over to S. one fifth part of any money which he might receive from R. in respect to R.'s debt to the firm. In 1898 C. became bankrupt. S. gave no notice to R. of his interest in the debt due from R. to the firm under his agreement with C. In 1900 the trustee in C.'s bankruptcy received from R. £150 in settlement of R.'s debt. S. now claimed to recover one-fifth of this sum from the trustee.

Held, that the agreement between C. and S. amounted to a valid equitable assignment to S., but that S. was the "true owner" of the share assigned to him, which, however, was in the order or disposition of the bankrupt with his consent, within section 44 of the Bankruptcy Act, 1883, and that he therefore could not recover from the trustee.—CROUCH, RE, SMITH, EX PARTE, *Bkcy.*; 83 L. T. 746.

18. *Petition—Receiving order—Fraud—"Sufficient cause"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-section* 3.—In July, 1899, the debtor proposed to pay his creditors a composition of 10s. in the pound. Gill, one of the creditors, refused to accept the composition unless the debtor gave him a promissory note for the balance of his debt. The composition fell through, and in August, 1900, Gill and Sutcliffe presented a joint petition against the debtor.

Held, that the conduct of Gill with reference to the proposed composition constituted "sufficient cause" why no order ought to be made, and dismissed the petition.

Decision of the Divisional Court (Wright and Phillimore, JJ.), *ante*, p. 141, reversed.—SHAW, RE, GILL, EX PARTE, *C.A.*, 264; 83 L. T. 754.

19 *Petition by company—Officer of the company—Amendment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.*

52), *s.* 148.—Any person *bonâ fide* chosen by a company to be their agent for the presentation of a bankruptcy petition becomes an officer for that purpose.

Where, therefore, the person so nominated is only a clerk, and not in any ordinary sense an officer of the company, he thereby becomes sufficiently for the purposes of section 148 of the Bankruptcy Act, 1883, an officer of the company to present the petition, although his appointment under the seal of the company was only made subsequently to the presentation of the petition.—TOMKINS, RE, *C.A.*, 294; [1901] 1 Q. B. 476; 70 L. J. Q. B. 223; 84 L. T. 341.

20. *Practice—Costs—Appeal—Security for costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52)—*General Rules*, 1886, 1890, *r.* 131.—The deposit of £20 which an intending appellant is required by Bankruptcy rule 131 to lodge in the High Court as security for the cost of his appeal may be applied to satisfy the costs of an unsuccessful application to diminish or dispense with such security, as well as to the costs of the actual appeal.—CHILD, RE, CHILD, EX PARTE, *Bkcy.*, 447; 84 L. T. 326.

21. *Practice—Receiving order—Foreigner resident abroad but trading in England—Jurisdiction—"Debtor"—Assignment executed abroad for benefit of creditors generally—Notice of suspension of payment—Receiving order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-section* 1 (*a*), (*h*); *s.* 6, *sub-section* 1 (*d*).—The Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident abroad who, without coming into the jurisdiction, has in this country had a place of business, contracted debts, and acquired assets, and has executed abroad an assignment of his property for the benefit of his creditors generally. Such a person is not a "debtor" within the meaning of the Bankruptcy Act, 1883, s. 6, sub-section 1 (*d*).

Decision of Court of Appeal, reported as *In re A. B. & Co.*, [1900] 1 Q. B. 541, affirmed.—COOKE *v.* VOGELER, *H.L.*; [1901] A. C. 102; 70 L J. Q. B. 181; 84 L T. 10.

22. *Practice—Receiving order—Stay of proceedings—Appeal—Service of notice of appeal—"Parties directly affected by"—R. S. C.*, 1883, *ord.* 58, *r.* 2—*Bankruptcy Rules*, 1886, *r.* 134.—A receiving order having been made against a debtor upon a creditor's petition, the registrar, on the application of the debtor, supported by the majority of persons claiming to be creditors, including the petitioning creditor, stayed the issue of advertisements and all proceedings under the receiving order for a limited period. The official receiver appealed against the stay, the debtor alone being served with notice of the appeal.

Held, that the notice of appeal must be served also on the petitioning creditor as being a party "directly affected by the appeal" under R. S. C., 1883, ord. 58, r. 2 (applied to bankruptcy appeals by rule 134 of the Bankruptcy Rules, 1886), but not on any other of the alleged creditors.—DEBTOR, A, RE, *C.A.*; [1901] 2 K. B. 354; 70 L. J. K. B. 699; 84 L. T. 666.

23. *Practice—Summary case—Release of trustee—Subsequent assets—Right of creditors to appoint new trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 82, 121—*Bankruptcy Discharge and Closure Act*, 1887 (50 & 51 *Vict. c.* 66), *s.* 6, *sub-section* 2.—Where a bankrupt's estate is administered in a summary manner under section 121 of the Bankruptcy Act, 1883, the official receiver is to be the trustee in the bankruptcy, and after he has obtained his release as such trustee he still remains an *ex officio* trustee by virtue of section 82, sub-section 4, of the same Act.

The creditors, therefore, have no power to appoint a new trustee after the official receiver's release because there is no vacancy in the office.—LEACH, RE, BARNES, EX PARTE, *Bkcy.*, 76; [1900] 2 Q. B. 649; 69 L. J. Q. B. 931; 83 L. T. 222.

24. *Practice—Withdrawal of proof—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *Sched. II.*—A creditor will not be allowed to withdraw his proof otherwise than unconditionally while a motion is pending to expunge such proof.—CLARK, RE, BUENOS AYRES RAILWAY, EX PARTE, *Bkcy.*, 528; [1901] 1 Q. B. 655; 70 L. J. Q. B. 259; 84 L. T. 208.

25. *Property of bankrupt—Undischarged bankrupt carrying on business—Knowledge of the trustee—Second adjudication—Profits of business—Right of trustee in second bankruptcy—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54.—Where an undischarged bankrupt carries on business with the knowledge of the trustee for the time being, and subsequently while still undischarged is again adjudicated a bankrupt, the present trustee in the first bankruptcy (though not aware of the trading) is not entitled to the proceeds of the business, carried on with the knowledge of his predecessor, against the trustee in the second bankruptcy.

Troughton v. *Gitley* (Amb. 629) and *Tucker* v. *Hernaman* (4 D. M. & G. 395) followed.

The fund in dispute having been acquired under circumstances which themselves necessitated investigation, the costs of both trustees ordered to be paid thereout.—BURR, RE, PANNELL, EX PARTE, *Bkcy.*; 84 L. T. 327.

26. *Property passing to trustee—Right of action—Action for personal tort and injury to goods—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 168.—The action was for trespass and conversion of the plaintiff's goods, and damages were also claimed for the personal annoyance caused thereby to the plaintiff. After the cause was entered for trial the plaintiff became bankrupt, and, on the application of the defendants, before the jury were sworn, Grantham, J., stayed all proceedings in the action, on the ground that the causes of action had vested in the trustee in the bankruptcy. The trustee did not desire to continue the action. The bankrupt appealed.

Held, that this action was one in which, to use the words of Cresswell, J., in *Beckham* v. *Drake*, 2 H. L. C. 579, at p. 613, "the primary personal injury to the bankrupt is the principal and essential cause of action," and though the facts, so far as one could surmise them from the pleadings and the materials before Grantham, J., made "vindictive" damages in the popular sense improbable, the court would not be justified in interfering with the plaintiff's right to have the stay of proceedings removed, if the cause of action was in point of law vested in him, notwithstanding his bankruptcy.—ROSS *v.* BUCKETT, *C.A.*; [1901] 2 K. B. 449; 70 L. J. K. B. 736; 84 L. T. 670.

27. *Receiving order—Judgment debt—Guaranty—Release of co-guarantor—Release of debt—Agreement not to sue.*—The release of one co-guarantor operates as a release of the other co-guarantors, notwithstanding that the contractual liability has passed into a judgment.

The difference as regards co-debtors between the release of a debt and the release of liability to be sued, considered and explained.

Ex parte Good, In re Armitage, 25 W. R. 422, 5

Ch. D. 46, distinguished.—E. W. A., Re, *C.A.*, 642; 70 L. J. K. B. 810.

28. *Reputed ownership—Bill of sale—Grantor licensed victualler—Mortgagees in possession of premises—Goods in possession of debtor in his trade or business—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44.—A debtor was lessee of three public-houses; the licence of one was in his name, that of the other two in the names of nominees of his. He granted a bill of sale over trade utensils and equipment in and upon the three public-houses. At the commencement of the bankruptcy the mortgagees of the houses had entered, and had appointed managers who were carrying on the business, but they allowed the debtor to reside at the house of which he held the licence. The goods in the bill of sale remained on the premises; there was no default under the bill of sale.

Held, that the goods at all three houses were at the commencement of the bankruptcy in the possession of the bankrupt in his trade or business within section 44 of the Bankruptcy Act, and that they passed to the trustee as part of the bankrupt's property divisible among his creditors.—Elliott, Re, *Bkcy.*; 84 L. T. 325.

29. *Rescission of receiving order—Debtor's petition—Abuse of process of the court—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 8.—Where a receiving order has been made upon a debtor's petition, the court may rescind such receiving order upon proof that the presentation of the petition was an abuse by the debtor of the process of the court.

In re Painter, 43 W. R. 144, [1895] 1 Q. B. 85, distinguished.—Betts, Re, Official Receiver, Ex parte, *Bkcy.*, 447; [1901] 1 Q. B. 39; 70 L. J. Q. B. 511; 84 L. T. 427.

30. *Secured creditors—Security on property represented by debtor to be that of his wife—Right of proof—Bankruptcy Act*, 1883 (46 & 47 *Vict c.* 52), *ss.* 39, 168, *and Schedule II., r.* 9.—C. in 1898 owed a considerable sum to P. & Co. for goods supplied and for money lent. In August, 1898, P. & Co. agreed to advance to C. a further sum of £2,000. As security for this advance it was arranged that C.'s wife should mortgage to P. & Co. a property called the Yacht Tavern; C. represented to P. & Co. that this was his wife's separate property, and that it had been bought exclusively with her own money. On the 6th of September, 1898, the mortgage was executed, C. joining therein. C. subsequently became bankrupt, and the trustee in his bankruptcy obtained an order from the court declaring that the Yacht Tavern was part of his estate, and that his wife was merely his nominee.

P. & Co. having sold the Yacht Tavern under the powers in the mortgage, sought to prove against C.'s estate for the full amount of their debt, without giving credit for the amount realized by the sale, arguing that the trustee was estopped from denying that the Yacht Tavern was the separate property of the wife.

Held, that there was no such estoppel against the trustee, and that P. & Co. could prove against C.'s estate only for the balance of their debt, after giving credit for the amount realized by the sale of the security.—Cooksey, Re, Portal, Ex parte, *Bkcy.*; 83 L. T. 435.

31. *Ship—Mortgage—Act of bankruptcy before mortgage—Merchant Shipping Act*, 1894, *s.* 36—*Bankruptcy Act*, 1883, *ss.* 43, 44, 49.—Where a mortgage is granted on a ship after the mortgagor has committed an act of bankruptcy, in respect of which he is subsequently adjudicated a bankrupt, the mortgage is protected by section 49 of the Bankruptcy Act if the mortgagee had no notice of the act of bankruptcy at the date of the mortgage, notwithstanding the fact that the ship remains in the possession of the mortgagor up to the date of the receiving order.—"Ruby," The, *P.D. & Ad D.*; 83 L. T. 438.

32. *Trading under assumed name—Mortgage of freehold property—Second bankruptcy—Rights of trustees and mortgagees—Vesting order—Annulment of bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 25), *s.* 35.—An undischarged bankrupt started business under an assumed name, acquired freehold property, and mortgaged it in that name. A second receiving order was made, the assets being the equity redemption of the property, and personal property of which realized £113. Subsequently the identity of the bankrupt was discovered.

On motion it was ordered that the mortgaged property should vest in the mortgagees upon the registrar being satisfied that all the debts in the first bankruptcy, with all costs and expenses, had been paid in full; the £113 to be applied towards payment of the debts.—Adie, Re, Rushforth, Ex parte, *Bkcy.*; 84 L. T. 508.

33. *Vendor and purchaser—Contract for sale—Leaseholds — Disclaimer of contract — Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55.—A trustee in bankruptcy cannot disclaim a contract for the sale of leaseholds entered into by the bankrupt before the bankruptcy unless he also disclaims the leaseholds.—Bastable, Re, Trustee, The, Ex parte, *C.A.*, 561; 70 L. J. K. B. 784; 84 L. T. 825.

34. *Voluntary settlements of policies of life assurance—Payment of premiums of settled policies within ten years of bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 47.—Although circumstances might easily arise in which moneys paid within ten years of bankruptcy for the purpose of effecting a policy of assurance which is taken out and settled within that period might constitute a settlement within the meaning of section 47 of the Bankruptcy Act, 1883, yet, where the policy has been taken out and settled at a period more remote than ten years from the date of the settlor's bankruptcy, the premiums subsequently voluntarily paid by the settlor within the said ten years in order to keep alive the policy do not constitute such a settlement.

No proportionate part of the moneys ultimately payable under a policy of assurance is represented by the payment of any particular premium.

Decision of Wright, J. (44 Solicitors' Journal, 451, 82 L. T. Rep. 623, 48 W. R. Dig. 21), reversed.—Harrison, Re, Whinney, Ex parte, *C.A.*, 2; [1900] 2 Q. B. 710; 69 L. J. Q. B. 942; 83 L. T. 189.

35. *Will — Determinable life interest — Would become vested in some other person—Vesting of bankrupt's property in trustee in bankruptcy—Relation back to act of bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 43, 44 (1), 54 (2).—By his will, J. G., who died in 1858 gave a share of his residue upon trust to permit H. G. to receive the income until he should do, or omit to do, or should suffer to be done, any act whereby the same, if payable to himself, would become vested in some other person, and, on the determination of the interest so given to H. G., upon other trusts. A bankruptcy notice which was served on H. G. expired on the 8th of July, 1900, without his having complied with it. On the 17th of August a receiving order was made, and on the 1st of October H. G. was adjudicated bankrupt.

A dividend was payable on the 5th of October for the quarter—5th of July to the 5th of October; and the question was, Who was entitled to the apportioned part from the 8th of July, the date of the act of bankruptcy, to the 1st of October, the date of the adjudication. It was admitted that the Apportionment Act applied.

Held, that, inasmuch as the dividend, if it had been payable before the adjudication, would have vested in the applicant the trustee of the will, to be dealt with according to the will by reason of H. G. —on the 8th of July—omitting to comply with the bankruptcy notice, and the same was true of all daily apportioned parts of the dividend, therefore the applicant was entitled to an apportioned part of the dividend as from the 8th of July.—MONTEFIORE *v.* GUEDALLA, *Ch.D. Buckley, J.*, 269; [1901] 1 Ch. 435; 70 L. J. Ch. 180; 83 L. T. 735.

See also Company, 1, 3, 44. 45; Married Woman, 1, 2; Settlement, 5; Stock Exchange, 1; Vendor and Purchaser, 1.

BASTARDY:—

1. *Order of quarter sessions quashing affiliation order—Subsequent action for seduction by mother—Estoppel.*—The fact that an affiliation order made (on the application of a girl who was the mother of an illegitimate child) by justices against the putative father has been quashed on appeal to quarter sessions, does not raise an estoppel as against such girl's mother in an action claiming damages for the seduction of the girl.

Reg. v. *Glynne*, 20 W. R. 94. L. R. 7 Q. B. 16, considered and distinguished.—ANDERSON *v.* COLLINSON, *K.B.D.*, 615; [1901] 2 K. B. 107; 70 L. J. K. B. 626; 84 L. T. 465.

2. *Summons against putative father — Married woman living with her husband—Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 3 — A married woman is not entitled to a bastardy summons against the putative father of a bastard child born to her during wedlock if, at the time of her application, she is living with her husband.—JONES *v.* DAVIES, *Q B.D.*, 136; [1901] 1 Q. B. 118; 70 L. J. Q. B. 38; 83 L. T. 412.

BILL of EXCHANGE.—See Banker, 2.

BILL of SALE:—

1. *Registration—Absolute bill of sale—Non-renewal of registration—Bill of sale given by grantee of first bill of sale—Subsequent execution against grantor of first bill of sale—Apparent possession—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 8, 11.—In 1893 the defendant, by an absolute bill of sale, assigned the furniture in the house in which he resided, and of which he was the tenant, to a person who also resided in the same house. This bill of sale was duly registered, but the registration was not renewed. In November, 1900, the grantee gave a bill of sale of the furniture to the claimant to secure an advance, and this bill of sale was duly registered. Subsequently the furniture, which had remained at the same house where the defendant and the grantee of the first bill of sale resided, was seized in execution of a judgment recovered by the plaintiff against the defendant, and was claimed by the claimant under his bill of sale. Upon an interpleader issue,

Held, that, as there was no execution creditor of the defendant in existence at the time when the bill of sale to the claimant was given, so as to avoid the first bill of sale under section 8 of the Bills of Sale Act, 1878, the claimant's title to the furniture was valid.—ANTONIADA *v.* SMITH, *C.A.*, 693.

2. *Statutory form—True ownership—Two grantors —Chattels belonging to each grantor in severalty—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 5, 7, 9.—A bill of sale by way of security for the payment of money was given by two persons as grantors, of whom each was the owner of some only of the chattels comprised in the bill.

Held, that the form of a bill of sale in the schedule to the Act of 1882 does not contemplate a bill of sale being given jointly by two independent owners of chattels, and that the bill of sale was void as not being in accordance with that form.—SAUNDERS *v.* WHITE, *Q.B.D.*, 127; [1901] 1 Q. B. 70; 70 L. J. Q. B 34; 83 L. T. 712.

3. *Validity—Registration—Name of grantor—Bill of sale given and registered in true name—Grantor known by assumed name—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 10, *sub-section* 2.—The Bills of Sale Act has no provision that the name of the grantor of a bill of sale should be correctly stated in the affidavit filed on the registration of the bill of sale; and therefore, if the grantor of a bill of sale, who has assumed and become known by a name other than his own, is described in the bill of sale and in the affidavit filed on its registration by his true name instead of the name by which he is known, such registration is valid in the absence of an intention on the part of the grantor to defraud or mislead creditors.—STOKES *v.* SPENCER, *Q.B.D.*, 13; [1900] 2 Q. B. 483; 69 L. J. Q. B. 792; 83 L. T. 199.

See also Bankruptcy, 9, 28.

BUILDING SOCIETY:—

1. *Winding up—Unincorporated society certified after* 1862 *and before* 1874—*Repeal of statute under which certified—Illegal company—Jurisdiction to wind up—Building Societies Acts*, 1836 (6 & 7 *Will.* 4, *c.* 32); 1874 (37 & 38 *Vict. c.* 42), *s.* 40; 1894 (57 & 58 *Vict. c.* 47), *s.* 25—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 4, 199.—A building society was established and certified in 1868 under the Building Societies Act, 1836. but was never incorporated. By section 25 of the Building Societies Act, 1894, the Act of 1836 was repealed as from August, 1896, as to all societies certified under it after 1856.

Early in 1900 the society was found to be insolvent, and the winding-up petition was then presented against the society, but C., one of its creditors, did not appear on that petition. which was withdrawn, all the other undisputed creditors of the society agreeing to accept 12s. 6d. in the pound, which was paid to them. There was nothing for distribution amongst the shareholders, as the assets when sold did not realize enough to pay the composition. The balance of this was provided by the directors out of their own pockets, and they took an assignment of the claims of the assenting creditors, and retained in hand enough to pay and offered C. 12s. 6d. in the pound on his debt.

C. refused the offer, and petitioned for a winding-up order, alleging irregularities by the society's officers, and that an investigation into its affairs was necessary. The court was of opinion that nothing substantial would result from a winding-up order.

Held, on the facts above stated, that the petition must be dismissed.

Semble, that, the Act of 1836 having been repealed, the society came within the class of companies forbidden by section 4 of the Companies

Act, 1862, and that there was no jurisdiction to wind it up under the Companies Acts.

Held, also, that the society had no status to ask to be paid its costs of the petition while it relied on this point against the petitioner.—ILFRACOMBE BUILDING SOCIETY, RE, *Ch.D. Wright, J.*; [1901] 1 Ch. 102; 70 L. J. Ch. 66; 84 L. T. 146.

2. *Withdrawal of members—Construction of rules—Priorities—Executor of deceased member—Right to "set off."*—In a building society incorporated in 1880 under the Act of 1874, notice was given on the 26th of June, 1895, for a meeting on the 10th of July, to consider the question of dissolution. On the 8th of August, at the adjourned meeting, a resolution was carried for voluntary winding up. On the 1st of November, 1895, the deed of dissolution was registered. The notices of withdrawal given by different members under the rules of the society and matured before the four above-mentioned dates respectively, and one member had died before the 26th of June, 1895, without giving notice of withdrawal.

This was a summons by the trustees of the deed of dissolution to determine the priorities of such members *inter se* in the distribution of the surplus assets of the society. An advance, on the security of his share, had been made *ultra vires*, on the terms of a circular issued by the secretary, to a member who had given notice of withdrawal before the 26th of June, 1895.

Held, on the construction of the rules, (1) that the members who gave notice of withdrawal prior to the date of the resolution for winding up were entitled to the surplus assets in priority to the other members; (2) that the deceased member took precedence of all persons who had given notices of withdrawal, and that his executor took priority accordingly; (3) that the member to whom the advance had been made was to be treated as having waived his notice of withdrawal, and was not entitled, as against those whose notices of withdrawal matured prior to the 26th of June, 1895, to set off the moneys due from him against the sum due to him from the society on his fully paid-up share, but was bound to contribute the moneys to satisfy the claims of those entitled to the assets in priority to himself.

In re West London and General Permanent Building Society, 78 L. T. Rep. 393, 46 W. R. Dig. 19, followed.

Brownlie v. *Russell*, 8 App. Cas. 235, 31 W. R. Dig. 28, distinguished.—COUNTIES CONSERVATIVE BUILDING SOCIETY, RE, DAVIS *v.* NORTON, *Ch.D. Stirling, J.*, 71; [1901] 2 Ch. 819; 69 L. J. Ch. 798.

CANADA, LAW of:—

Builder's privilege—Hypothecary privilege—Civil Code of Lower Canada, arts. 2013 *G and* 2103—59 *Vict. c.* 42.—Held, that under the Civil Code, as amended by 59 Vict. c. 42, a builder's privilege is limited to one year from the date of registration thereof; and, with regard to an hypothecary privilege conferred on suppliers of materials, it only arises on notice being given to the proprietor under art. 2013 G, and registered under art. 2103, and lapses unless the prescribed legal proceedings are taken within three months from the date of notice.—BANQUE D'HOCHELEGA *v.* STEVENSON, *P.C.*; [1900] A. C. 600; 69 L. J. P. C. 139.

CAPE OF GOOD HOPE, LAW of:—

Contract — Construction — "Flotation" — British South Africa Co.'s Mining Ordinance, 1890, *ss.* 26, 27, 28—*Company.*—Where a prospector agreed with a syndicate that his pay for services rendered in Matabeleland or Mashonaland should be £250 on flotation by the syndicate of every block of ten claims pegged by him, and the syndicate agreed to sell 330 claims pegged by the prospector to a substantial company which had for one of its principal objects the developing and working of gold mines,

Held, that this was a flotation of the claims within the meaning of the agreement, and that the provisions of the Mining Regulations of 1890, ss. 26, 27, and 28, were not imported into the agreement so as to limit the meaning of flotation to one by the British South Africa Co. or by the claimholder with their consent, in either case after the grant of an inspection certificate. — TORVA EXPLORING SYNDICATE *v.* KELLY, *P.C.*; [1900] A. C. 612; 69 L. J. P. C. 115.

CEYLON, LAW of:—

1. *Practice—Code of Civil Procedure*, 1889, *chap. xii., art.* 87—*Setting aside proceedings—Defendant lunatic not so found by inquisition—Order in Lunacy—Admissibility in evidence*—Chap. 12, art. 87, of the Ceylon Code of Civil Procedure provides that where a plaintiff has obtained a decree absolute by default, the court may set it aside if within a reasonable time the defendant appears and satisfies the court that he was prevented from appearing to show cause "by reason of accident or misfortune, or by not having received due information of the proceedings."

Held, that in the case of a lunatic defendant it is not necessary to show that he has been formally found lunatic on an inquisition on an application under the section to set aside proceedings if there is sufficient evidence of the lunacy in fact.

Orders in Lunacy, being made by a competent tribunal in matters within its jurisdiction, are admissible as *primâ facie* evidence of the facts recited in them which are essential to their validity in all parts of his Majesty's dominions.—HARVEY *v.* REX, *P.C.*; 84 L. T. 849.

2. *Will, Execution of—Wills—Ordinance No.* 7 *of* 1840, *s.* 3—*Notary present without attesting—Testamentary capacity.*—Ceylon Ordinance No. 7 of 1840, s. 3, requires that a testator's signature shall be made or acknowledged in the presence of a licensed notary public and two or more witnesses duly attesting the execution, or, if no notary be present, then in the presence of five or more witnesses duly attesting.

Held, that the words "if no notary be present" mean present acting in his notarial capacity.

Where a notary was present but refused to act in that capacity by attesting, and the will was in consequence attested by five witnesses, held, that it was validly executed.

Where a testator is of sound mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, held, that he must be deemed to be of sound mind when it is executed.

Parker v. *Felgate*, 8 P. D. 171, approved.—PERERA *v.* PERERA, *P.C.*; [1901] A. C. 354; 70 L. J. P. C. 46; 84 L. T. 371.

CHARITY:—

1. *Action by school board to enforce trust—Consent of Charity Commissioners—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137) *s.* 17.—The managers of a national school demised the school buildings and the income of the endowment of the school for the term of sixty years to a school board. During the term the school board brought an action in the

county court against the Official Trustees of Charitable Funds, alleging that the income of the endowment had been paid to and received by the defendants, and claiming inquiries and payment of the income so received.

Held, that the action was one to which section 17 of the Charitable Trusts Act, 1853, applied, and that it did not come within the proviso to that section; and that, therefore, it could not proceed without the consent of the Charity Commissioners. —LLANBADARNFAWR SCHOOL BOARD *v.* OFFICIAL TRUSTEES OF CHARITABLE FUNDS, *C.A.*, 363; [1901] 1 Q. B. 430; 70 L. J. K. B. 307; 84 L. T. 311.

2. *Invalid bequest followed by gift of residue to charity—Will.*—Testator by his will, dated in 1864, gave the sum of £1,000 out of his personal estate to trustees, and directed that it should be invested in the names of the vicar and churchwardens of a certain church, upon trust in the first place out of the income to maintain yearly and keep in good repair and condition a tomb belonging to the testator in the churchyard, and in the next place to divide and distribute the remainder among the poor recipients of certain almshouses.

Held, that, the gift to maintain the tomb being invalid, the whole income of the fund went to the vicar and churchwardens on behalf of the almshouses.

Fisk v. *Attorney-General*, L. R. 4 Eq. 521; *Dawson* v. *Small*, L. R. 18 Eq. 114; and *In re Birkett*, 9 Ch. D. 576, followed.—ROGERSON, RE, BIRD *v.* LEE, *Ch.D. Joyce, J.*; [1901] 1 Ch. 715; 70 L. J. Ch. 444; 84 L. T. 200.

3. *Mortmain — Real estate—Devise—Sale—Extension of time—Jurisdiction—Mortmain and Charitable Uses Act*, 1891 (54 & 55 *Vict. c.* 73), *ss.* 5, 6.—Where land had been devised to a charity the court has jurisdiction, under section 5 of the Mortmain and Charitable Uses Act, 1891, when and so often as the circumstances render it desirable, to extend the time for sale beyond the year from the testator's death; and the power of granting an extension of time is not confined merely to an extension for the purpose of carrying into effect a contract for sale made within the year from the death.—SIDEBOTTOM, RE, BEELEY *v.* SIDEBOTTOM, *C.A.*; [1901] 2 Ch. 1; 70 L. J. Ch. 448.

4. *Scheme—Construction—Parish—Privileged and non-privileged townships — Chapelries — Overseers—Tithe—Church rate—Private Act—Endowed Schools Acts*, 1869 *to* 1874 (32 & 33 *Vict. c.* 56; 36 & 37 *Vict. c.* 87; 37 & 38 *Vict c.* 87).—On the construction of an Act of Parliament and two schemes regulating charitable trusts for the benefit of "the deserving poor of the parish of Sandbach," in which parish there were, besides the parish church, two chapelries with chapels of ease, and thirteen townships, only six of which latter were privileged under the original foundation,

Held, that the word "parish" meant the whole ecclesiastical parish, including all the thirteen townships and the two chapelries.

The payment of the whole tithe to the incumbent of the parish church points to this as the true construction, and evidence as to the local levying of rates by different overseers and of funds for chapel repairs and as to the local election of churchwardens cannot avail to the contrary.—SANDBACH SCHOOL, RE, ATTORNEY-GENERAL *v.* CREWE (EARL), *Ch.D. Farwell, J.*, 647; [1901] 2 Ch. 317; 70 L. J. Ch. 604.

5. *Trustees—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 66.—J. S. by his will, made in 1558, directed his executors to erect an almshouse for ten poor persons, and gave his executors the rents of certain real estate for five years after his death, for the purpose of founding and maintaining the intended almshouses, and gave his residue to his executors on condition that they should procure the creation of a corporation to enable the corporators to take on themselves his real estate "for the finding of such poor persons." Some time after the death of the testator legal proceedings were taken and the money recovered from the executors was invested in lands at M. A deed was executed declaring the trusts of the property to be for the relief of the poor, lame, and impotent people dwelling within A. "or otherwise to employ the same for the raising and maintenance of a school according to the statute in that behalf made so as and where the same should be thought convenient by the greatest number of inhabitants being also the most chargeable to the relief of the poor" until a charter of incorporation should be obtained.

Until 1818 the income was applied in aid of the rates for the relief of the poor. In 1818 the vestry of A. resolved to erect a school, and since 1819 the rents of M. were applied in supporting the school which was then erected. The governors of the school, who were trustees now retired, and the parish council appointed new trustees in their place. The churchwardens now petitioned against the decision of the Charity Commissioners that the parish council had power to appoint. They said in 1819 the income had been definitely appropriated to educational purposes, and trustees of the income of a permanent endowment of a school were in the same position as trustees of a school. Secondly, it was said that the charity was ecclesiastical.

Held, that section 66 of the Local Government Act, 1894, did not include trusteeship of property temporarily devoted to the use of the school.

Held, also, that the charity was not ecclesiastical. —SPENDLUFFE'S CHARITY, RE, *Ch.D. Cozens-Hardy, J.*; 83 L. T. 498.

6. *Voluntary association—Clifford's-inn—Failure of objects.*—By a deed made in 1618 a messuage and premises known as Clifford's-inn were assured in consideration of £600 to certain members of a voluntary association as trustees; and it was declared that the true intent of the deed was that the premises "shall for ever be continued and employed as an inn of Chancery for the good of the gentlemen of that society and for the benefit of the Commonwealth, and not otherwise nor to any other use, intent, or purpose." The property had long been dealt with by the Society of Clifford's-inn as its own and for its own purposes; and the surviving members of the society contended that it was not now subject to or affected by any charitable trust, but belonged to the individual members for their own personal benefit, and capable of being divided and disposed of between them as they might think fit.

Held, that the deed of 1618 negatived the contention of private ownership and proved a dedication to public or charitable objects, and that the property now vested in the present trustees must be held by them upon trust for charitable purposes.—SMITH *v.* KERR, *Ch.D. Cozens-Hardy, J*; [1900] 2 Ch. 511; 69 L. J. Ch. 755; 82 L. T. 795.

7. *Will—Gift to the Corps of Commissionaires—Gift to an institution not charitable—Gift to members of voluntary institution as such—Perpetuity.*—The Corps of Commissionaires is a society existing to find employment for discharged or disabled soldiers and sailors. The institution is self-supporting. A

gift to the committee for the time being of the Corps of Commissionaires to aid in the purchase of their barracks, or in any other way beneficial to that corps, held to be valid on the grounds that (1) if the institution was a charity the gift was good; (2) in so far as the institution was not a charity the gift was good, as the governing body could deal with it in any way they pleased, and the gift did not tend to a perpetuity.—CLARKE *v.* CLARKE, *Ch.D. Bryne, J.*, 628; [1901] 2 Ch. 110; 70 L. J. Ch. 631; 84 L. T. 811.

8. *Will—Perpetuity—Gift without reference to age or poverty.*—Testator bequeathed to the Vintners Company a certain portrait "to be hung by them in a conspicuous part of their hall, and always to be so retained; and upon condition that they accept the bequest of the said portrait with the obligation aforesaid" the testator bequeathed to the said company the sum of £4,000, enjoining the said company out of the income of the said sum of £4,000 to keep the portrait in proper repair, cleaning and regilding its frame not less than once in every four years, and the surplus of the said income to be applied for the benefit of individuals answering a certain description, without any reference to age or poverty.

Held, that the gift of the portrait was valid, the condition imposed being a condition subsequent, but that no part of the gift of the £4,000 could be supported as a charitable gift, and therefore wholly failed as infringing the rule against perpetuities.—GASSIOT, RE, FLADGATE *v.* VINTNERS COMPANY, *Ch.D. Cozens-Hardy, J.*; 78 L. J. Ch. 242.

COMMON:—

Scheme for regulation under Metropolitan Commons Act, 1866 (29 & 30 *Vict. c.* 122), *and Metropolitan Commons Amendment Act*, 1869 (32 & 33 *Vict. c.* 107) *—Metropolitan Commons (Mitcham) Supplemental Act*, 1891 (54 & 55 *Vict. c. xxvi.*)*—Land delineated in the plan.*—An Act of Parliament confirmnig a scheme under the Metropolitan Commons Act, 1866, and the Metropolitan Commons Amendment Act, 1869, provided, by section 17, that the conservators should maintain the commons as delineated on a plan free of all encroachment. Section 37 was a saving clause as regards estates, interests, or rights of a profitable or beneficial nature in, over, or affecting the commons as could or might have been enjoyed if the scheme had not been confirmed by Act of Parliament.

Held, that where land was delineated on the plan, it could not be denied that it was subject to the provisions of the scheme of the Act; and that it was then too late for any person to set up for the first time a claim of ownership in fee to such land or any part thereof.—COOK *v.* MITCHAM COMMON CONSERVATORS, *Ch.D. Farwell, J.*, 201; [1901] 1 Ch. 387; 70 L. J. Ch. 223; 83 L. T. 519.

COMPANY:—

1. *Articles of association—Restriction on transfer of shares—Perpetuity—Fraud on bankruptcy law.*—The rule against perpetuities does not apply to personal contracts.

A provision in the articles of association of a company that a shareholder who was not a manager or assistant should sell his shares to a manager or assistant at a price to be assessed in a particular way is not invalid.

A *bonâ fide* provision in the articles of association that a person should sell his shares is not obnoxious to the bankruptcy law.—BORLAND'S TRUSTEE *v.* STEEL, *Ch.D. Farwell, J.*, 120; [1901] 1 Ch. 279; 70 L. J. Ch. 51.

2. *Association not for profit—Alteration of objects—Addition of "Limited"—Board of Trade—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 23—*Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62).—An association not for profit, registered under licence from the Board of Trade without the word "Limited," applied to the court for confirmation of alterations of its objects as stated in its memorandum of association.

By the direction of the court the sanction of the board to the alterations was applied for and obtained.

The court granted the application.

Held, also, that, if the sanction of the board had not been obtained, the court could only have allowed the alterations if the word "Limited" were added to the name of the association.—ST. HILDA'S COLLEGE, CHELTENHAM, RE, *Ch.D. Buckley, J.*, 279; [1901] 1 Ch. 556; 70 L. J. Ch. 266.

3. *Bankruptcy — Debenture-holder's action — Receiver in possession—Poor and district rates—Water rate payable by meter—Apportionment—Preferential Payments in Bankruptcy Act*, 1888 (51 & 52 *Vict. c.* 62), *s.* 1, *sub-section* 1 (*a*)*—Preferential Payments in Bankruptcy Amendment Act*, 1897 (60 & 61 *Vict. c.* 19), *ss.* 2, 3.—On the 9th of November, 1898, holders of debentures of a company commenced an action to enforce their security, and a receiver was appointed. The debentures were a charge on the undertaking of the company and its property present and future. On the 1st of December, 1898, the company went into liquidation. In January, 1899, the receiver paid poor rate and district rate made in October, 1898, and water rate, which was payable according to meter. He claimed to be recouped these payments as preferential payments under the Preferential Payments in Bankruptcy Act, 1888, and Amendment Act, 1897.

Held, that the question being one between mortgagor and mortgagee, not between successive occupiers, and the poor rate and district rate being due from the company at the date of the commencement of the winding up, the liquidators must pay the whole amounts out of the general assets of the company; but that the water rate was not due until the water was supplied, and must be apportioned, the liquidators paying only so much as was due at the date of the commencement of the winding up.—SIEMENS *v.* MANNESMANN TUBE Co., *Ch.D. Kekewich, J.*; [1901] 2 Ch. 93; 70 L. J. Ch. 565; 84 L. T. 579.

4. *Capital—Appreciation of assets*—Ultra vires—*Payment of dividend out of assets—Debt written off as bad subsequently paid with interest.*—A new company purchased the assets of an old company, and there was included in such assets a debt (then considered valueless) due to the old company from a third company, and secured by promissory notes. For some time the debt due on the notes was treated as of no value in the new company's annual accounts. Ultimately the debt was paid in full.

Held, on motion for injunction by a shareholder, that the company ought to be restrained from distributing the amount so paid as dividend except with reference to the other business or assets of the new company.—FOSTER *v.* NEW TRINIDAD LAKE ASPHALT Co., *Ch.D. Byrne, J.*, 119; [1901] 1 Ch. 208; 70 L. J. Ch. 123.

5. *Capital—Reduction—Available assets—Goodwill—Reserve—Unappropriated profits—Preference shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 11—*Companies Act*, 1877 (40 & 41 *Vict. c.* 26).—The court will not confirm a reduction of capital unless

satisfied that it will not work unjustly or inequitably.

Share capital comprised ordinary shares and shares carrying a fixed cumulative preference dividend, with no preference as to capital and no voting power. The court refused to confirm a reduction on the ground (*inter alia*) that the reduction would benefit the ordinary shareholders at the expense of the preference shareholders.

In ascertaining the available assets of a company for the purpose of a reduction of capital, the amounts of reserve and unappropriated profit and the value of goodwill are to be taken into account.

On an opposed petition to confirm a reduction of capital the court will not act on the balance of speculative expert evidence as to the value of mining property.—BARROW HÆMATITE STEEL CO., RE, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 846; 83 L. T. 397.

6. *Contract on behalf of intended company—Adoption—Inference—Privity of contract.*—The plaintiff company entered into an agreement with A. B. to grant to him, or a company to be formed by him, an exclusive licence to use certain patents. A. B. then entered into an agreement with C. D. to sell the licence to him on behalf of the intended company, and this agreement was adopted by the intended company, the defendants, by another agreement, to which A. B., C. D., and the defendants were parties.

Held, that there was no privity of contract between the plaintiffs and defendants, and that no contract between them could be inferred from the facts of the case.

In re Northumberland Avenue Hotel Co., 33 Ch.D 16, 35 W. R. Dig. 38, followed.

Howard v. *Patent Ivory Manufacturing Co.*, 36 W. R. 801, 38 Ch. D. 156, and *Werderman* v. *Société Générale d'Electricité*, 30 W. R. 33, 19 Ch. D. 246, discussed.—BAGOT PNEUMATIC TYRE CO. *v.* CLIPPER PNEUMATIC TYRE CO., *Ch.D. Kekewich, J.*, 265; [1901] 1 Ch. 196; 70 L. J. Ch. 128; 83 L. T. 667.

7. *Debentures—Contract to issue debentures—Charge—Execution creditor—Priority.*—Where a company contracts for consideration to issue debentures charging its property, and before the debentures are actually issued goods intended to be thereby charged are seized in execution of a judgment recovered against the company, the execution creditor is only entitled to the goods subject to a charge in favour of the intended debenture-holders.—SIMULTANEOUS COLOUR PRINTING SYNDICATE *v.* FOWERAKER, *Ch.D. Wright, J.*; [1901] 1 K B 771; 70 L. J. K. B. 453.

8. *Debentures—Floating security—Sale of assets to another company—Dissentient debenture-holders—Ultra vires.*—Where a company sells its assets to another company, dissentient debenture-holders, having a floating security, are not entitled to insist on payment unless the sale is *ultra vires*, or the undertaking has ceased to be a going concern, or their debentures give them an express right to veto the transaction.—BORAX CO., RE, FOSTER *v.* BORAX CO., *C.A.*, 212; [1901] 1 Ch. 326; 70 L. J. Ch. 162; 83 L. T. 638.

9. *Debenture—Unauthorized issue—*Bonâ fide *holder for value—Rights as against execution creditor.*—The right of a *bonâ fide* holder for value of a debenture, which is in proper form and charges all the property of the company as security for the debenture debt, prevail over those of an execution creditor, even where the debenture is issued without authority, no directors of the company having been appointed and no resolution to issue debentures passed; provided that the holder had no notice of any irregularity in the issue of the debenture.—DUCK *v.* TOWER GALVANIZING CO., *K.B.D.*; [1901] 2 K. B. 314; 70 L. J. K. B. 625; 84 L. T. 847.

10. *Director—Fiduciary character—Contracts with company—Declaration of interest—Collateral profits.*—The articles of association of a company provided that the rules as to vacating the office of director should be subject to the exception that "No director shall vacate his office by reason of his being a member of any company or partnership which has entered into contracts with, or done any work for, the company, or by reason of his being interested, either in his individual capacity or as a member of any company or partnership, in any adventure or undertaking in which the company may also have an interest."

Held, that, having regard to the above article, a director was not liable to account for profits arising out of contracts with another company or partnership in which he was a shareholder or partner.

Imperial Mercantile Credit Association v. *Coleman*, 18 W. R. 570, L. R. 6 Ch. App. 558, followed.

Decision of Byrne, J. (48 W. R. 553, [1900] 1 Ch. 756), affirmed.—COSTA RICA RAILWAY CO. *v.* FORWOOD, *C.A.*, 337; [1901] 1 Ch. 746; 70 L. J. Ch. 385; 84 L. T. 279.

11. *Director—Powers of reduced directorate.*—Articles of association provided that four named persons should be the first directors of a company; that the number of directors should not be more than nine or less than three; that continuing directors might act notwithstanding any vacancy; and that the directors might fix a quorum.

Held, that, although the number of directors was reduced to two and no quorum had ever been fixed, the two directors had power to charge the property of the company.

In re Scottish Petroleum Co., 31 W. R. 846, 23 Ch. D. 413, followed.—BANK OF SYRIA, RE, OWEN AND ASHWORTH'S CLAIM, *C.A.*, 100; [1901] 1 Ch. 115; 70 L. J. Ch. 82; 83 L. T. 547.

12. *Directors' remuneration—Yearly payment—Apportionment Act*, 1870 (33 & 34 *Vict. c.* 35).—By the articles of association of a joint-stock company it was provided, *inter alia*, that "the directors shall be paid out of the funds of the company by way of remuneration for their services, and exclusive of their travelling expenses, the sum of £125 per annum per director, and such further sums as shall from time to time be determined by the company in general meeting, and the same shall be divided among them in such proportions and manner as the directors by agreement may determine, and in default of such determination, equally."

Held, that, according to the true construction of such article of association, no director is entitled to remuneration except for service for a whole year, and therefore any director who retires before the end of the year cannot claim a proportionate remuneration.

Salton v. *New Beeston Cycle Co.*, 47 W. R. 462, [1899] 1 Ch. 775, approved.

Swabey v. *Port Darwin Gold Mining Co.*, 1 Megone C. C. 385, distinguished.—INMAN *v.* ACKROYD, *C.A.*, 369; [1901] 1 Q. B. 613; 70 L. J. K. B, 450; 84 L. T. 344.

13. *Director—Remuneration fixed by articles of association—Resolution of board to forego—Vacating office of director by absence for specified period—Date from which period runs.*—By the articles of

association of a company each of its directors was to be paid out of its funds by way of remuneration £300 per annum, and the office of a director was to be vacated if he absented himself from directors' meetings during a period of three calendar months without special leave of absence from the directors. M. was appointed a director on the 3rd of August, 1898, and attended meetings of directors down to the 3rd of February, 1899, on which last-named date he attended a meeting at which they, including himself, passed a resolution "that no remuneration be received by the directors for their services until a dividend is declared on the ordinary shares of the bank." There was no further meeting from the 3rd of February to the 3rd of March, 1899. From the 3rd of February he absented himself without leave until after the 7th of May, 1899, on which another directors' meeting was held, and on the 8th of May, 1899, received a written notice from the board stating that he had ceased to be a director pursuant to the articles, and that the fact of his non-attendance for three months had been ordered to be entered on the minutes. M. did not insist on being reinstated and did not attend a meeting of directors on the 3rd of June. The company went into liquidation on the 29th of December, 1899, and no dividend was declared on the ordinary shares. M. claimed to prove for remuneration from the date of his appointment until the winding-up.

Held, (1) distinguishing *Lambert* v. *Northern Railway of Buenos Ayres Co.* (1869), 18 W. R. 180, that, the remuneration not being due until the end of a year, and the agreement to pay it being on the 3rd of February only partially performed and not broken, the resolution was effective; (2) that the period of absence only began to run from the 3rd of March, 1899, terminating on the 3rd of June; (3) that the remuneration was not apportionable, and that the claim of M. failed.

Observations as to when a director absents himself. —LONDON AND NORTHERN BANK, RE, MCCONNELL'S CLAIM, *Ch.D. Wright, J.*; [1901] 1 Ch 728; 70 L. J. Ch. 251; 84 L. T. 557.

14. *Dividend—Profits available for dividend—Memorandum—Articles—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Schedule I., Table A, art.* 74.—The memorandum of association of a company declared that "the profits available for dividend" should be applicable in payment of a preferential dividend on ordinary shares, and in payment, as to two-thirds of the surplus, of a further dividend on the ordinary shares, and, as to the remaining third, of a dividend on founders' shares.

The articles of association provided for a payment of dividend out of profits in accordance with the memorandum. Table A. was adopted by the company, except so far as it was excluded or varied by the articles.

Held, that, under article 74 of Table A, which was neither expressly excluded by the articles nor excluded by implication, the directors had power to appropriate any sum they thought fit out of profits to the formation of a reserve fund, even though the effect of the appropriation was to prevent the holders of founders' shares receiving any dividend at all; and that the words "profits available for dividend" meant the profits available after all proper appropriations had been made by the directors.—FISHER *v.* BLACK AND WHITE PUBLISHING CO., *C.A.*, 310; [1901] 1 Ch. 174; 70 L. J. Ch. 175; 84 L. T. 305.

15. *Meeting — Extraordinary general meeting—Notice—Unauthorized notice—Ratification.*—On the 10th of December, 1900, the secretary of a company sent out a notice convening an extraordinary general meeting to be held on the 18th of December. The notice purported to be issued by order of the board. A requisition had been served on the company in accordance with the articles requiring the calling of the meeting. In fact no meeting of directors was held after the receipt of the requisition, but a meeting of directors was held on the 16th of December, the day after the writ was issued, at which it was resolved that the directors should adopt, ratify, and confirm the action of the secretary in issuing the notice convening the meeting.

The only question for determination was whether the meeting had been validly summoned.

Held, that on ratification by the directors the notice became good for all purposes.—HOOPER *v.* KERR, *Ch.D. Cozens-Hardy, J.*; 83 L. T. 729.

16. *Meeting of shareholders—Power of chairman—Declaration as to passing of resolution—Companies Act*, 1862 (25 & 26 *Vict. c.* 89). *s.* 51.—At a meeting of a company duly convened to pass an extraordinary resolution to wind up voluntarily, the chairman declared the resolution carried on a show of hands; a poll was not demanded by five members.

On a petition by a holder of paid-up shares to have the company wound up compulsorily, the court refused to entertain the question whether the resolution was carried by the requisite majority.—HADLEIGH CASTLE GOLD MINES, RE. *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 419; 69 L. J. Ch. 631; 83 L. T 400.

17. *Memorandum—Right to issue pre-preference shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 12.—Clause 5 of the memorandum of a limited company was as follows: "The capital of the company is £60,000, divided into 6,000 preference shares of £5 each and 6,000 ordinary shares of £5 each. Such preference shares shall confer a right to a fixed cumulative preferential dividend at the rate of £7 per centum per annum. Any shares of the present or any increased capital of the company may be guaranteed or have any special privilege or advantage, or may be deferred and may be issued on such special conditions as to priority or postponement, either for dividends or repayment of principal, or as to voting power, and generally on such terms as the company may from time to time determine."

Held, that the company had power to increase its capital by issuing preference shares having priority over the original preference shares.—UNDERWOOD *v.* LONDON MUSIC HALL. *Ch.D. Cozens-Hardy, J.*, 507; [1901] 2 Ch. 309; 84 L. T. 759.

18. *Memorandum — Verbal alteration — Memorandum of association—Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-section* 5.—The Companies (Memorandum of Association) Act, 1890, does not authorize alterations in the memorandum which merely amplify the description of objects clearly comprised in the original memorandum of association.—CONSETT IRON CO., RE, *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 236; 70 L. J. Ch. 198; 84 L. T. 258.

19. *Promoters—Secret profit—Duty as to extent of disclosure.*—A syndicate of which S. was a director and member, was formed in February, 1895, to acquire and work a mine, and in the same month issued a prospectus showing that the directors were aware that similar properties were often resold "to the public" at a profit, and were "not unmindful of the benefit that" might "arise by converting the syndicate into a very much larger company within a short period."

In October, 1895, the directors promoted and brought out a company, with a larger share capital than that of the syndicate, to purchase the mine on the terms of an agreement, already entered into in the same month with a trustee for the company, which provided for the payment of a purchase-money much larger than what had been paid for and expended upon the mine by the syndicate. The same persons were the directors of both the syndicate and the company. In the same month the company issued a prospectus offering some of its shares for public subscription and stating the names of its directors, that they were directors of the syndicate selling to the company, and the date of, parties to, and consideration for the sale to the company. Inspection of the contract was also offered. The amount of profit on the resale to the company was not stated, and, subject as aforesaid, there was nothing in the prospectus to show that the sale was at a profit.

The court found as a fact that when the syndicate acquired the mine it had no present intention of reselling to or forming another company, but contemplated working it in the first instance.

In the winding up of the company it was sought to make S. liable on a misfeasance summons for the secret profit received by him as a promoter of the company.

Held, (1) that the syndicate and its directors were not promoters of the company when the syndicate acquired the property.

(2) That the disclosure in the prospectus of the company of the fact that the directors of the syndicate were directors of the company was a disclosure that some profit was being made.

(3) That S. and the other directors were guilty of a breach of duty in not disclosing what profit had been made on the resale to the company.

(4) That although the company might have had a right to rescind the contract, S. could not be ordered to repay the profit which he had derived from the resale to the company.

Gluckstein v. *Barnes*, [1900] A. C. 240, distinguished.—LADY FORREST (MURCHISON) GOLD MINE (LIMITED), RE, *Ch.D. Wright, J.*; [1901] 1 Ch. 582; 70 L. J. Ch. 275; 84 L. T. 559.

20. *Register of members—Inspection—Copies—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 32.—A person paying a shilling for inspection of the register of members of a company, under section 32 of the Companies Act, 1862, is not entitled, without any further payment, to take copies on his own account. His only right with regard to copies is to be furnished by the company with copies on payment of sixpence for every hundred words required to be copied.

Boord v. *African Consolidated Land and Trading Co.*, 46 W. R. 150, 14 Times L. R. 116, overruled.—BALAGHAT GOLD MINING CO, RE, *C.A.*, 625.

21. *Shares—Calls—Liability of past member—Forfeited shares—Liquidation—Reduction of capital—Irregularity in resolutions—Certificate of registration—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss* 38, 51—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131, *ss.* 11, 15, 16—The defendant was the holder of certain part-paid shares in the plaintiff company. The articles of association did not contain any power to reduce the capital of the company. The articles empowered the company to forfeit the shares of members who made default in paying calls, and provided that any member whose shares were so forfeited should nevertheless be liable to pay to the company all calls owing upon the shares at the time of the forfeiture. A resolution was passed to amend the articles by empowering the company to reduce its capital, and a further resolution was subsequently passed to reduce the capital. Each of these resolutions was confirmed, but in neither case did an interval of fourteen days elapse between the passing of the original resolution and the confirmation, as required by section 51 of the Companies Act, 1862. An order of the court giving effect to the resolutions was duly registered, and the registration was duly certified in accordance with section 15 of the Companies Act, 1867. A resolution was passed to call up the balance of the uncalled capital, and the defendant having made default in payment of the calls in respect of the shares of which he was the holder in consequence of the order of the court, his said shares became forfeited. More than a year after the forfeiture a resolution was passed to wind up the company. In an action for the calls,

Held, first, that the defendant was not protected from liability by section 38 of the Companies Act, 1862; secondly, that any irregularity in the confirmation of the resolutions for amending the articles and reducing the capital was cured by the certificate of the registrar, by virtue of sections 15 and 16 of the Companies Act, 1867.—LADIES' DRESS ASSOCIATION *v.* PULBROOK, *C.A.*, 6; [1900] 2 Q. B. 376; 69 L J. Q. B. 705.

22. *Shares—Contract—Issue of fully-paid shares for consideration other than cash—Omission to file contract—Memorandum in lieu of contract—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1 (4)—*Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *ss.* 33, 36.—Shares of one company taken in exchange for shares of another company are not shares paid for in cash, and therefore an agreement to take such shares ought to have been filed under section 25 of the Companies Act, 1867.

Quære, whether section 25 has been wholly repealed by the Companies Act, 1900.—BRUTTON & BURNEY, RE, BURNEY'S NEW CROSS BREWERY, RE, *C.A.*, 360; [1901] 1 Ch. 637; 70 L. J. Ch. 309; 84 L. T. 130.

23. *Shares — Deposit—Equitable mortgage —Foreclosure.*—Where a certificate of shares in a limited company was deposited as a security for the repayment of a debt owing to A.,

Held, that the deposit of the certificate amounted to an equitable mortgage, and that A. was entitled to a decree for foreclosure.—HARROLD *v.* PLENTY, *Ch.D. Cozens-Hardy, J.*, 646; [1901] 2 Ch. 314; 70 L. J. 562.

24. *Shares—Surrender of shares—Invalidity—Sale and purchase transaction—Release of liability on shares—Rectification—Discretion of court—Lapse of time—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 35.—Action to determine whether a surrender of shares in the defendant company made to the company in 1893, was valid.

Held, that the surrender of the shares was a transaction of purchase and sale, and on that ground bad, according to what was laid down in *Trevor* v. *Whitworth*, [1887] 12 App. Cas. 409, the company having purchased the shares at the price of discharging the directors from the liability of £1 per share. The court could not, however, accede to the claim for rectification. Under section 35 of the Companies Act, 1862, the court will only exercise the power of rectification if satisfied of the justice of the case, and it lay on the applicants to satisfy the court that justice required that their application should be granted. In the present case more than seven years had elapsed since the

surrenders, and nothing had happened in the meantime except that the company which had been embarrassed had become prosperous; and the plaintiffs, if placed on the register, would share in the fruits of prosperity which they had formerly renounced. They had not satisfied the court that there was an equity in their favour to disturb the existing state of things.—BELLERBY *v.* ROWLAND AND MARWOOD'S STEAMSHIP CO., *Ch.D. Kekewich, J.*; [1901] 2 Ch. 265; 70 L. J. Ch. 616; 84 L. T. 651.

25. *Shares—Underwriting—Application of shares in payment of commission—Companies Act*, 1900 (63 & 64 *Vict. c.* 48), *s.* 8.—A company agreed to grant the underwriters of an issue of shares proposed to be made to existing shareholders of the company an option to an agreed date to take 15,000 £1 shares, part of the proposed issue, at the price of £2 10s. per share. The shares in fact stood at a much higher price than £2 10s. per share.

Held, that the proposed arrangement was an application of shares in payment of commission in consideration of underwriting, and was prohibited by section 8 (2) of the Companies Act, 1900.

Decision of Farwell, J. (*ante*, p. 428), confirmed. —BURROWS *v.* MATABELE GOLD REEFS CO., *C.A.*, 500; [1901] 2 Ch. 23; 70 L. J. Ch. 434; 84 L. T. 478.

26. *Special resolution — Requisite majority — Declaration of chairman—Conclusive evidence—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 61.—The declaration of the chairman of a company meeting that a special resolution has been duly carried is conclusive, unless challenged by means of a poll demanded by five members; and, in the absence of any evidence of *mala fides* on the part of the chairman, the court will not receive evidence impeaching the declaration.

In re Gold Co., 27 W. R. 341, 11 Ch. D. 701, and *In re Hadleigh Castle Gold Mines (Limited)*, [1900] 2 Ch. 419, followed.

In re Horbury Bridge Coal, &c., Co., 27 W. R. 438, 11 Ch. D. 109, distinguished.—ARNOT *v.* UNITED AFRICAN LANDS, *C.A.*, 322; [1901] 1 Ch. 518; 70 L. J. Ch. 306; 84 L. T. 309.

27. *Voting—Disqualification—Forfeiture of shares —Purchaser of forfeited shares disqualified from voting whilst calls remain due from original holder.* —By the articles of association of a company it was provided that after the forfeiture of shares the directors of the company should be entitled to recover from the shareholder calls and other sums due in respect of the forfeited shares, and that no member should be entitled to vote whilst any calls or other sums should be due and payable to the company in respect of the shares of such member.

Shares were forfeited for non-payment of calls, and resold by the company to a purchaser, to whom a certificate was issued stating that he was to be deemed to be the holder of the shares discharged from all calls due.

Held, that the purchaser of the shares was not entitled to vote whilst any calls or other sums remained due and payable to the company from the original holder of the shares.—RANDT GOLD MINING CO. *v.* WAINWRIGHT, *Ch.D. Kekewich, J.*; [1901] 1 Ch. 184; 70 L. J. Ch. 90; 84 L. T. 348.

28. *Winding up—Assets — Distribution.* — The articles of association of the A. Co. made no provision as to the distribution of its assets on winding up. The A. Co. made an agreement to sell its business and property to the C. Co. in part consideration of the transfer of certain of the C. Co.'s stock to the shareholders of the A. Co. There were two classes of the shareholders of the A. Co.—preferred and deferred. The A. Co. gave notice to its shareholders calling a meeting for the purpose of passing a resolution to carry out this agreement. Both the agreement and the resolution made no mention as to the distribution of this stock between the two classes of shareholders. With the notice calling the meeting, the secretary of the A. Co. sent out a circular saying that at the wish of the C. Co. the stock would be distributed between the preferred and deferred shareholders in certain proportions, and not *pro rata*. The resolutions were carried, but not unanimously, certain shareholders voting against them and some refraining from voting.

Held, that it was impossible to make an order affecting all the shareholders collectively; that an inference could not be drawn that all parties had agreed on a principle of distribution not in accordance with the legal rights of the two classes of shareholders in a winding up; and that the liquidator must distribute the stock in accordance with the legal rights of the shareholders.—NORTH-WEST ARGENTINE RAILWAY CO., RE, *Ch.D. Wright, J.*, 134; [1900] 2 Ch. 882; 70 L. J. Ch. 9; 83 L. T. 675.

29. *Winding up—Assets—Distribution—Previous loss of capital—Last year's profits—No dividend declared—Preferred and ordinary shareholders—Articles.*—Where, on a limited company going into liquidation, there is standing to the credit of its revenue account a sum representing undivided net profits,

Held, that such sum, though it might have been made available for dividend to preference shareholders, in spite of a previously existing debit for loss of capital, was not to be applied as dividend if, prior to the liquidation, no dividend had been recommended by the directors or declared by the company in accordance with the articles.—CRICHTON'S OIL CO., RE, *Ch.D. Wright, J.*, 556; [1901] 2 Ch. 184; 70 L. J. Ch. 639; 84 L. T. 864.

30. *Winding up — Assets — Undistributed assets—Payment in to Companies' Liquidation Account—Inspector-General—Shareholder—Garnishee order—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 15.—In order to put into force the garnishee procedure the judgment creditor must show that there was a debt due from the garnishee to the judgment debtor.

Payment to the Companies' Liquidation Account by a liquidator of a sum due to a judgment debtor does not constitute the relation of debtor and creditor as between the Inspector-General and the judgment debtor, and therefore the garnishee procedure does not apply.—SPENCE *v.* COLEMAN, *C.A.*, 516; [1901] 2 K. B. 199; 70 L. J. K. B. 632; 84 L. T. 703.

31. *Winding up—Committee of inspection—Foreign creditor—Power of court to order fresh meetings of creditors and contributories—Companies Act*, 1862 (25 & 26 *Vict. c* 89), *s.* 91—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9, 23, 24.—If it is shown that there is reason to believe that the committee of inspection of a company in liquidation is not constituted in accordance with the wishes of the majority of the creditors, the court may order the liquidator to summon a fresh meeting of creditors in order to determine whether any alterations should be made in the constitution of the

committee.—RADFORD & BRIGHT, RE, *Ch.D. Wright, J.*, 270; [1901] 1 Ch. 272; 70 L. J. Ch. 78.

32. *Winding up — Committee of inspection — Creditors unrepresented—Resummoning first meetings —Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 91—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 6, 9.—In the winding up of a company by the court, the court has power to order the first meetings of the creditors and contributories to be resummoned, and it may limit the purposes of the meetings to the selection of persons to be appointed as members of the committee of inspection.

Where the creditor of a company for a large amount was unrepresented on the committee of inspection, and at a meeting of the creditors, summoned by the direction of the court, a resolution was passed that it was desirable that the creditor should be represented on the committee, but a majority of the creditors at the meeting expressed the opinion that it was undesirable that any member of the present committee should retire, the court directed the first meetings to be resummoned to determine whether a committee should be appointed and who should be the members of it.—RADFORD & BRIGHT (LIMITED) (No. 2), RE, *Ch.D. Wright, J.*; [1901] 1 Ch. 735; 70 L. J. Ch. 352; 84 L. T. 151.

33. *Winding up—Contract—Fully-paid shares—Omission to file contract—Costs—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26).—Where after a winding up has commenced relief has been granted to a shareholder under the Companies Act, 1898, the terms (if any) imposed as a consideration of obtaining relief are in the discretion of the court.

Where the payment of the liquidation costs is made a condition of obtaining relief, there is no general rule as to whether the costs ought to be as between solicitor and client, or party and party; but in determining this the court will take into consideration the assistance given to the liquidator by the applicant and the reasonableness of opposing the application.—FARMERS UNITED, RE, STEPHENSON'S CASE, *Ch.D. Wright, J.*; [1900] 2 Ch. 442; 69 L. J. Ch. 684; 63 L. T. 406.

34. *Winding up—Contributory—Action begun by company—Discontinuance by liquidator—Originating summons—Same cause of action—Costs of action—Stay of proceedings—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 101.—Where a company commenced an action against a shareholder for calls, but afterwards went into voluntary liquidation, and the liquidator discontinued the action, and then took out a summons against the shareholder for a balance order, the shareholder is not entitled to a stay of proceedings on the summons till his taxed costs of the discontinued action have been paid, but is entitled to set off these costs against any sum which the liquidator may recover against him under the summons.—UNITED SERVICE ASSOCIATION, RE, YOUNG, EX PARTE, *Ch.D. Wright, J.*, 216; [1901] 1 Ch. 97; 70 L. J. Ch. 15; 84 L. T. 145.

35. *Winding up — Contributory — Application for shares—Withdrawal before allotment.*—By a reconstruction or amalgamation agreement the C. Co. and its liquidators agreed to transfer its goodwill and assets to the M. Co., part of the consideration for the transfer being that every member of the C. Co. should, in respect of each share therein held by him, "be entitled as of right to claim an allotment" of either a debenture bond, or two ordinary shares of £5 each in the M. Co. credited with £1 per share paid up, and the agreement provided that the M. Co. should, within a month from the date of the agreement, allot and issue the bonds and shares claimed, subject to this, that it should not be bound to allot shares to any one to whom under its articles it could have objected as a transferee of shares. The agreement further provided that a claim must be made within twenty-one days from the date thereof by sending in to the M. Co. or to the liquidators of the C. Co. a signed claim in writing, and that the liquidators should within seven days from that date give notice in writing to each member of the C. Co. stating the number of bonds or shares which he was entitled to claim as of right, with proper forms of claim. The liquidators duly gave notice to W., a shareholder in the C. Co., who within the twenty-one days signed a document, addressed to the directors of the M. Co., claiming an allotment of ten ordinary shares with £1 per share paid up, and agreeing to accept the same and to pay the further moneys payable thereon when called upon. Before any acceptance of the offer or the allotment of the shares subsequently made, W. wrote to the M. Co. withdrawing his application. In the subsequent winding-up of the M. Co. the liquidator of that company sought to have W. retained on the list of contributories in respect of the ten shares.

Held, that the document sent to W. was an application which could be withdrawn by him before acceptance, and not an acceptance of a prior offer by the M. Co., and that he was not liable as a contributory.—METROPOLITAN FIRE INSURANCE CO., RE, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 671; 83 L. T. 403.

36. *Winding up—Landlord and tenant—Restraining distress—Bill of exchange for rent—Debentures—Receiver—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 87, 138, 163.—H. granted a lease to X. which was purchased by a company, but no assignment of it was taken. The company, however, entered into occupation of the demised premises, and gave H. bills of exchange for rent overdue, which bills were dishonoured. After the dishonour the company passed an extraordinary resolution for voluntary winding-up, and then the landlord distrained for the rent on the company's chattels. These, however, were subject to a floating security contained in debentures covering all the company's assets, which were insufficient in value to satisfy the debenture debt. No receiver had been appointed. The liquidators having moved to restrain the landlord from proceeding with the distress,

Held, (1) that, but for the existence of the debentures, and notwithstanding *Ex parte Clemence*, 23 Ch. D. 154 (which the court declined to follow), the landlord would have been restrained, as he had a right to prove in the winding up; but (2) that, as the assets were covered by the debentures and were insufficient to satisfy the debenture debt, the liquidator had no right to intervene, following on this point *Ex parte Purssell*, 34 Ch. D. 646, and that the non-appointment of a receiver made no difference.—HARPUR'S CYCLE FITTINGS CO., RE, *Ch.D. Wright, J.*; [1900] 2 Ch. 731; 83 L. T. 407.

37. *Winding up — Liquidator — Appointment — Court's power to appoint additional liquidator in voluntary winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 138, 141.—Sections 138 and 141 of the Companies Act, 1862, enable the court having jurisdiction to wind up companies to appoint a liquidator in a voluntary winding up, not only where there is no liquidator acting or in the place of a liquidator who is by the court removed from

his office, but also in any other case where due cause is shown for appointing a liquidator—*e.g.*, when an additional liquidator is required—and the appointment may be made on the application of the existing liquidator.—SUNLIGHT INCANDESCENT GAS LAMP CO., RE, *Ch.D. Wright, J.*; [1900] 2 Ch. 728; 83 L. T. 406.

38. *Winding up—Liquidator—Appointment of—Order by court for winding up—Jurisdiction of court to appoint permanent liquidator—Companies Act*, 1862 (25 & 26 *Vict. c.* 89) *s.* 92—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *ss.* 4, 6.—The court, on making an order for the compulsory winding up of a company, has no jurisdiction to appoint a permanent liquidator other than the official receiver for the district.

By section 4 of the Companies (Winding-up) Act, 1890, the official receiver becomes, by virtue of his office, provisional liquidator; and, under section 6, he has to summon a meeting of the creditors of the company, and, until they have been thus consulted as to the appointment of the liquidator, the court has no power to appoint a permanent liquidator.—REID (JOHN), RE. *Q.B.D.*, 15; [1900] 2 Q. B. 634; 69 L. J. Q. B. 736; 83 L. T. 196.

39. *Winding up — Liquidator — Remuneration—Charges for letters.*—A company which was being wound up under a compulsory winding-up order was liable for the costs and expenses of the voluntary winding up of other companies, the undertakings of which it had purchased.

In assessing the amount payable as remuneration to the voluntary liquidator,

Held, (1) that the court would not sanction an alleged practice of accountants to charge for all letters written, irrespective of their character, as having taken half an hour of the principal's time (charged for at a certain rate) in the preparation; (2) that there was nothing to bind the court to apply the scale adopted by the Chancery judges and sanctioned by the Lord Chancellor in 1868, which only applied to official liquidators; and (3) that each case as to the remuneration of a voluntary liquidator must be considered with regard to its own particular circumstances. — AMALGAMATED SYNDICATES (LIMITED), RE, *Ch.D. Wright, J.*; [1901] 2 Ch. 181; 84 L. T. 864.

40. *Winding up — Petition—Evidence—Companies (Winding-up) Rules*, 1900, *rr.* 36, 176, 177.—The statutory affidavit in support of a petition to wind up a company must be made by the petitioner, or one of the petitioners, and the power to make it cannot be delegated to a subordinate.—CHARTERED STORES AND TRADING CO., RE, *Ch.D. Wright, J.*, 75; [1900] 2 Ch. 870; 69 L. J. Q. B. 861; 83 L. T. 674.

41. *Winding up — Petition—Future debt—Debenture stock — Trust deed — Breach of covenant — Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 79, 80, 82.—A debenture-holder whose security is not presently redeemable, and the interest of which is not in arrear, cannot petition for the winding up of the company, as he is not yet a creditor.

In re Australian Joint Stock Bank, 41 SOLICITORS' JOURNAL 469, [1897] W. N., p. 48, distinguished.—MELBOURNE BREWERY, RE, *Ch.D. Wright, J.*, 250; [1901] 1 Ch. 453; 70 L. J. Ch. 198; 84 L. T. 228.

42. *Winding up—Reconstruction—Special resolution—Notice of—Invalidity.*—Notice was given of an extraordinary meeting of shareholders in a company for the purpose of considering and, if thought fit, passing resolutions for a voluntary winding up with the appointment of a liquidator at a fixed remuneration for the purpose of reconstruction in accordance with the terms of a draft agreement. At the meeting the only resolution put was for voluntary winding up with the appointment of a liquidator.

Held, on the petition of a creditor for a compulsory winding up, that a compulsory winding up order must be made, as the resolution put to the meeting and passed was invalid, not being in accordance with the terms of the notice.—TEEDE & BISHOP, RE, *Ch.D. Cozens-Hardy, J.*; 70 L. J. Ch. 409; 84 L. T. 561.

43. *Winding up—Requisition to directors—Notice of meeting by secretary without authority—Effect on validity of resolution to wind up voluntarily——Companies Act*, 1900, *s.* 13, *sub-sections* 1, 3, 5.—Where a requisition under section 13 of the Companies Act, 1900, has been sent in to the directors calling upon them to summon a meeting of the company, the notice of the meeting, if given within the period of twenty-one days mentioned in the Act, can only be given by the authority of the directors at a meeting of the board, consequently a notice given within such period by the secretary of the company without the authority of the board of directors is invalid, and the proceedings of the meeting held in pursuance of such notice are of no effect.

Quære, whether the requisitionists could, after the expiration of the twenty-one days, call a meeting by notices signed by the secretary.—STATE OF WYOMING SYNDICATE, RE, *Ch.D. Wright, J.*, 650; 84 L. T. 868.

44. *Winding up—Secured creditor—Garnishee order—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 45 — Section 45 of the Bankruptcy Act, 1883, restricting the rights of creditors under attachment of debts is not made applicable by section 10 of the Judicature Act, 1875, to the winding up of insolvent companies, and therefore it is still the law, as recognized in *In re Stanhope Silkstone Collieries Co*, 11 Ch. D. 160, that a judgment creditor who has obtained a garnishee order *nisi* to attach a debt owing by a company to his debtor, and has served the order on the company before the commencement of its winding up, is a secured creditor and entitled to the debt as against the liquidator.—NATIONAL UNITED INVESTMENT CORPORATION, RE, *Ch.D. Wright, J.*; [1901] 1 Ch. 950; 70 L. J. Ch. 461; 84 L. T. 766.

45. *Winding up—Surety—Fraudulent preference—"Creditor"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.—A surety being a person who can prove in respect of his contingent liability is a creditor within the meaning of section 48 of the Bankruptcy Act, 1883, and consequently a transaction which, if between a company and one of its ordinary creditors, would, under section 164 of the Companies Act, 1862, and section 48 of the Bankruptcy Act, 1883, be void as a fraudulent preference, is also void for the same reason when between the company and its surety.—BLACKPOOL MOTOR CAR CO., RE, HAMILTON *v.* BLACKPOOL MOTOR CAR CO., *Ch.D. Buckley, J.*, 124; [1901] 1 Ch. 77; 70 L. J. Ch. 61.

46. *Winding up—Voluntary winding up—Shareholder's petition for compulsory order—Effect of voluntary winding up.*—A petition for a compulsory winding-up order was presented by a fully-paid shareholder who was supported by a considerable

number of the other shareholders. Resolutions for voluntary winding up had been passed with a view to a reconstruction, which had, however, proved abortive at the time of the hearing of the petition. There were also matters which appeared to require investigation.

Held, that a compulsory winding-up order must be made, and that, in arriving at that conclusion, the fact that the voluntary winding up was not an ordinary one, but was resolved upon with the view to a specific object which had failed, was a reason for strongly influencing the court. — GUTTA PERCHA CORPORATION, RE, *Ch D. Cozens-Hardy, J.*; [1900] 2 Ch. 665; 83 L. T. 401.

See also Bankruptcy, 10, 19; Building Society, 1; Mortgage, 2; Partnership, 4; Practice, 8, 25; Solicitor, 1.

CONFLICT of LAWS:—

1. *Domicil—Personal property—Settlement—Power of appointment—Will.*—On the marriage of an Englishwoman with a domiciled Frenchman, English personal property was settled in English form with English trustees on such trusts as the intended wife should by will appoint, and subject thereto for her separate use.

Held, that the settlement was governed by English law, and that, subject to the payment of separate debts of the wife, the settled property passed under the will of the wife notwithstanding limitations imposed by French law on testamentary disposition.—MEGRET, RE, TWEEDIE *v.* MAUNDER, *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 547; 70 L. J. Ch. 451; 84 L. T. 192.

2. *Marriage settlement.* — A marriage was solemnized in Scotland in 1857 between B., a gentleman domiciled in Mauritius, and K., a domiciled Scotchwoman. Before the marriage a settlement was made in Scotch form of the money brought into settlement by the wife, and another settlement was made in English form of the property settled by the husband. Each settlement contained a provision that the law of Mauritius should not apply so far as it was or might be at variance or inconsistent with the provisions, clauses, and agreements contained in the settlements. In the English settlement there was a limitation on the death of the husband and remarriage of the wife to the persons who would have been entitled to the husband's estate if he had died without issue and unmarried under the English Statutes of Distribution. The husband, by the law of Scotland, had a testamentary power to revoke this limitation if that law applied.

Held, that the law of Scotland applied.—MUSPRATT-WILLIAMS *v.* HOWE, *Ch.D. Cozens-Hardy, J.*; 84 L. T. 191.

CONTEMPT:

1. *Company—Winding up—Creditor's petition—Fraudulent circular—Resolution to wind up voluntarily—Attempt to mislead the court.*—Where, after a creditor's petition for the compulsory winding up of a company has been presented, a circular is issued at the instigation of the directors by a shareholder asking for proxies to be used by him in order to obtain an investigation into the conduct of the directors, and such proxies are intended to be, and are in fact, used in support of the directors and a resolution for voluntary winding up, those responsible for the circular and such action are guilty of a contempt of court, in that they have attempted to mislead the court by representing that a voluntary winding up is already in existence, with the view of inducing the court not to make an order for compulsory winding up.—PARSONAGE, RE, *Ch.D. Wright, J.*, 700; 84 L. T. 866.

2. *Company—Winding up—Liquidator—Application to remove circularizing shareholders.*—In a voluntary winding up a shareholder took out a summons on behalf of himself and the other shareholders of the company asking for the removal of the voluntary liquidator from office, and in support filed an affidavit stating what he alleged to be the facts justifying the application. Before the summons came on for hearing he issued a circular to the other shareholders, in substance repeating what he had stated in the affidavit, and asking the shareholders to support his application. The liquidator then served notice of motion for an injunction to restrain the issuing of the circular or any other like document on the ground that it was a contempt of court.

Held, that the circular could not in any way interfere with or prejudice the due trial of the matter, and was not a contempt of court, and that the liquidator's application must be dismissed.

Semble, that *Coats* v. *Chadwick*, [1894] 1 Ch. 347, so far as it decided that the plaintiff had been guilty of contempt, and *In re Crown Bank*, [1890] 44 Ch. D. 649, were not rightly decided.—NEW GOLD COAST EXPLORATION CO., RE, *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 860; 70 L. J. Ch. 355.

CONTRACT:—

1. *Assignment*—Chose in action.—A., who was the owner of a patent for the construction of a machine, supplied and erected a machine for the respondent. Afterwards he assigned the patent to the appellant company "together with the benefit of all contracts and concessions." The company, with the consent of A., sued the respondent for the price of the machine supplied to him.

Held, that the action was not maintainable.—INTERNATIONAL FIBRE SYNDICATE *v.* DAWSON, *H.L.*; 84 L. T. 803.

2. *Breach—Remedy—Conduct determining contract—Damages.*—To enable one of two parties to a contract to treat the contract as at an end there must either be an express repudiation of the contract by the other party thereto or such a failure of performance going to the root of the contract as to justify the conclusion that the other party no longer intends to be bound by the contract.

Where the main part of a contract has been performed and little remains to be done under it, failure to perform that little does not justify the other party to the contract in treating it as at an end, but the proper remedy is in damages.—RHYMNEY RAILWAY CO. *v.* BRECON, &c., RAILWAY CO, *C.A.*, 116; 83 L. T. 111.

3. *Building contract — Architect — Certificate — Liability for negligence in making certificate—Position of arbitrator—Duty to exercise impartial judgment.*—A building contract provided that the builder should be paid on the certificates of the architect who was employed by the building owner to superintend the work and measure it up when completed, and that the final certificate should be conclusive evidence that the builder was entitled to receive payment of the final balance. The contract contained a clause providing that, in case any dispute under the contract should arise between the building owner, or the architect on his behalf, and the builder, such dispute should be referred to the arbitration of a person other than the architect.

Held, by A. L. Smith, M.R., and Collins, L.J. (Romer, L.J., dissenting), that the architect occupied the position of an arbitrator in making certificates, and therefore that the building owner could not maintain an action against the architect

for negligence in making his final certificate.—CHAMBERS v. GOLDTHORPE; RESTELL v. NYE, *C.A.*, 401; [1901] 1 Q. B. 624; 70 L. J. K. B. 482; 84 L. T. 444.

4. *Conditional promise to consider a proposal favourably—Construction—Appeal from Canada.*—Held, reversing the judgment of the courts below, that a written promise by the appellants that if satisfied with the respondent as a customer they would favourably consider any application by him to renew a subsisting contract between them on its expiration does not impose a legal obligation to grant it.—MONTREAL GAS CO. v. VASEY, *P.C.*; [1900] A. C. 595; 69 L. J. P. C. 134; 83 L. T. 233.

5 *Contract to erect houses—Breach—Specific performance.*—The defendant covenanted to erect certain houses on a piece of land sold to him for that purpose by the mayor and corporation of W., who sought to have houses erected on this site in order to increase the rateable value of that part of the town.

In an action to enforce specific performance of the covenant to build, with an alternative claim for damages for the non-performance of the covenant, the special jury assessed the damages at £50; and the learned judge entered judgment for the plaintiffs for specific performance.

Held, that, this being a case in which the loss arising to the plaintiffs from the land remaining vacant could not be estimated in damages, specific performance of the covenant to build had rightly been granted.

Per Romer, L.J.—As a general rule the court will not grant specific performance of a building contract; but there is an exception to that rule where it is established (1) that the building work to be done is defined; (2) the plaintiff has a substantial interest in having the contract specifically performed which cannot be adequately compensated by damages; and (3) the defendant has, by reason of the contract, obtained possession of the land on which the building is to be erected.—WOLVERHAMPTON (MAYOR) v. EMMONS, *C.A.*, 553; [1901] 1 K. B. 515; 70 L. J. K. B. 429; 84 L. T. 407.

6. *Contract to make and deliver chattel by certain date—Buyer to provide ship to receive—Concurrent obligations—Delay in making chattel—Obligation of buyer to provide ship.*—The plaintiffs agreed to construct and deliver, f. o. b. at the port of London, for the defendants a steam launch by a fixed date. The launch was not in fact ready to be delivered until three months after the agreed date, but the defendants did not during that time notify to the plaintiffs that there was any vessel at the port of London on board of which they required the launch to be delivered.

Held (affirming the judgment of Bucknill, J.), that, as the defendants were not ready and willing to take delivery before the plaintiffs were ready and willing to deliver, the defendants were not entitled to deduct from the price the agreed damages for delay in delivery.—FORREST v. ARAMAYO, *C.A.*; 83 L. T. 335.

7. *Illegality—City of London Corporation—Interest of member—City of London Sewers Act*, 1848, *s.* 42 —*City of London Sewers Act*, 1851, *ss.* 53, 57.—The fact that a commissioner of sewers or an alderman or common councilman of the City of London is interested or concerned in a contract made by the Commissioners of Sewers with a company, by reason of his being a shareholder in such company, is sufficient to render the contract null and void.—CITY OF LONDON ELECTRIC LIGHTING CO. v. CITY OF LONDON CORPORATION, *C.A.*, 306; [1901] 1 Ch. 602; 70 L. J. Ch. 334; 84 L. T. 170.

8. *Illegality—Statutory confirmation—Vendor and purchaser—Agreement to give "first refusal" of land —Purchaser with notice—Injunction.*—Where an agreement is confirmed by Act of Parliament, the effect is to give it statutory validity, so that no question as to remoteness or uncertainty can arise.

Where a contract so confirmed stipulates that B. shall have the first refusal of A.'s land, A. cannot sell the land without first informing B. of the actual cash price offered by an intending purchaser, and offering it to B. at that price.

Such a stipulation does not create an interest in the land, but it involves a negative contract not to part with the land to any other person without giving that first refusal, and can be enforced, not only against the vendor, but against an intending purchaser with notice.

Decision of Farwell, J., ([1900] 2 Ch. 352), affirmed.—MANCHESTER SHIP CANAL CO. v. MANCHESTER RACECOURSE CO., *C.A.*, 418; [1901] 2 Ch. 37; 70 L. J. Ch. 468; 84 L. T. 436.

9. *Implied negative stipulation—Injunction—Undue preference—Electric Lighting Act*, 1882 (45 & 46 *Vict. c.* 59), *ss.* 19, 20.—Where a contract, although affirmative in form, is negative in substance, the court will, notwithstanding the absence of a negative stipulation, imply one, and grant an injunction accordingly, upon the principle of *Lumley* v. *Wagner*, 1 De G. M. & G. 604.

A customer of an electric lighting company agreed "to take the whole of the electric energy required for the premises" for five years. He did not bind himself to take any quantity at all. There was no express negative stipulation.

Held, that the court would imply a negative stipulation, and grant an injunction against his taking electric energy from anyone else.

An electric lighting company were empowered under their provisional orders (duly confirmed) to supply a district with electric energy. They agreed to supply a customer for five years at 4½d. a unit upon his taking the whole of his supply from them. They were supplying another customer for two years at 4d., but he was a large consumer, and took his supply in the daytime, which was an advantage to the company.

Held, that the supply to this customer was not an undue preference, and that, consequently, the contract with the first-named consumer was not wanting in consideration.

Held, also, that the contract was authorized by sections 19 and 20 of the Electric Lighting Act, 1882, and the provisional orders of the company.—METROPOLITAN ELECTRIC SUPPLY CO. v. GINDER, *Ch. D. Byrne, J.*, 508; 84 L. T. 818.

10. *Infant—Illegitimate child—Contract to relieve mother for ever of liability—Validity.*—By a contract made between the plaintiff and the defendants, in consideration that the plaintiff, who was the mother of an illegitimate child, would place and allow the child to remain in the defendants' possession, the defendants promised to maintain and bring up the child as though she were the defendants' child, and for ever to relieve the plaintiff from all liability and responsibility in connection with the bringing up of the child. The child was placed in the defendants' possession and maintained by them for some months, when they refused to maintain her any longer. In an action by the plaintiff to recover damages for breach of contract,

Held, that the contract was one which the law

would not enforce.—HUMPHRYS *v.* POLLAK, *C.A.*, 612; [1901] 2 K. B. 385; 70 L. J. K. B. 752.

11. *Interest — Tradesman's account — Notification that interest would be charged—Implied agreement by customer to pay interest.*—During a period of ten years a tradesman had delivered to a customer, since deceased, a yearly account in which it was stated that interest would be charged on all sums due for more than three years. The customer never objected to the charge, and had from time to time made payments on account generally.

Held, that there was an implied agreement to pay interest.—ANGLESEY (MARQUIS), RE, WILLMOT *v.* GARDNER, *C.A.*, 708.

12. "*Liquidated damages*"—*Word* "*penalty*" *used in contract—Amount recoverable.*—By a contract for electric lighting installation it was provided that the work should be "completed in all respects on or before the 26th of November, 1898, subject to a penalty of £15 per day, and the plant by the 10th of December, subject to a penalty of £3 per day for every day the work remains unfinished to the satisfaction of the authorities or engineers."

Held, that, although the word "penalties" was used, the amounts incurred owing to the default of the contractor were in fact "liquidated damages." —WHITE *v.* ARTHUR, *K.B.D.*; 84 L. T. 594.

13. *Personal contract—Agreement with a partnership—Death of one member of partnership—Liability of surviving partners—*"*Unforeseen calamity*"*—Sale under power in mortgage.*—The plaintiffs, music-hall artistes, entered into a contract with the A. Co., which was then a partnership of three persons, to perform on two separate occasions at their hall. The plaintiffs had no knowledge of the fact that the A. Co. was a partnership consisting of three persons. The contract contained a clause that, in the event of any "unforeseen calamity" by which the business might be stopped, all engagements were to terminate. Before the time fixed for the first performance one of the partners in the firm died, but the plaintiffs performed in accordance with their contract, and were paid by the defendants for their services. After the first performance, and before the time fixed for the second performance, the hall was sold by a mortgagee under a power of sale in the mortgage, and the second performance was not carried out.

Held, that, the contract being one which had no reference to the personal character and conduct of the partner who had died, the surviving partners were liable for a breach of it, and that the sale of the hall under the power of sale was not an "unforeseen calamity" within the contract, and that the plaintiffs were entitled to recover.—PHILLIPS *v.* ALHAMBRA PALACE CO., *Q.B.D.*, 223; [1901] 1 Q. B. 59; 70 L. J. Q. B. 26; 83 L. T. 431.

14. *Principal and agent—Undisclosed principal—Ratification.*—A contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

The decision of the Court of Appeal, [1900] 1 Q. B. 629, reversed.—KEIGHLEY *v.* DURANT, *H.L.*; [1901] A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777.

15. *Principal and agent—Vendor and purchaser agreement—Construction of contract—Appeal from Canada—Quebec.*—In an action by the appellant for a declaration that he was entitled as purchaser to a conveyance from the respondent of the property in suit,

Held, on consideration of all its terms and of the surrounding circumstances, that the agreement sued upon was not a vendor and purchaser agreement, but an agency agreement; that the appellant never came under any personal liability, present or future, to purchase, the arrangement contemplated being on behalf of third parties who might thereafter be accepted by the respondent.—LIVINGSTONE *v.* ROSS, *P.C.*; [1901] A. C. 327.

16. *Restraint of trade—Contract not to retail goods supplied by the plaintiff below a fixed price.*—A contract entered into with a manufacturer not to retail his goods below a fixed price is not a contract in restraint of trade.—ELLIMAN *v.* CARRINGTON, *Ch.D. Kekewich, J.*, 532; [1901] 2 Ch. 275; 70 L. J. Ch. 577; 84 L. T. 858.

See also Company, 6, 7, 10, 22, 33; Election Law, 2; Frauds Statutes, 1; Infant, 2; Married Woman, 11; Master and Servant, 1.

CONVEYANCING ACTS.—See Bankruptcy, 14; Easement, 1, 7; Landlord and Tenant, 11; Married Woman, 8; Mortgage, 6, 9, 10; Power 1; Trustee, 1.

COPYHOLD:—

1. *Special custom—Only one joint tenant admitted —Admittance of one not admittance of all—Wills Act* (1 *Vict. c.* 26), *s.* 3.—A special custom of a manor by which one only of several joint tenants of copyholds can be admitted and only one fine is payable on such admittance is a special circumstance which excludes the general rule that the admittance of one joint tenant operates as the admittance of all; and, in case of a devise to joint tenants, such custom is not bad as restraining the power given to testators, by section 3 of the Wills Act, to devise their copyholds without stint.—HOWARD *v.* GWYNN, *K.B.D.*; 84 L. T. 505.

2. *Waste of manor—Custom to kill rabbits—Right of copyholders—Reasonableness—Lease by lord for training horses—Liability for damage to commoner's rights.*—A custom or customary bye-law, whereby the commoners of a manor might take or destroy rabbits or game on the waste, is not necessarily void for unreasonableness.

Semble, that a custom for any person, not merely any copyholder, to kill rabbits on a manor without molestation would be on the face of it unreasonable.

The lord of the manor by deed leased the right to train and gallop horses on the waste of the manor.

Held, that the lord would not be liable for damage done to the rights of common of pasturage of the copyholders by the lessee, unless it was proved that the lessee caused the damage as the lord's agent or with his licence.

Semble, a licence to train and gallop horses does not of necessity involve injury to the right of pasturage.—COOTE *v.* FORD, *Q.B.D.*; 83 L. T. 482.

COPYRIGHT:—

1. *Infringement—Portions of one book printed by different printers —* "*Cause to be printed*" *— Sanctioning publication—Partnership—5 & 6 Vict. c.* 45, *s.* 15.—A. agreed with B., in consideration of receiving a percentage of profits, to allow B. the use of A.'s name in the publication of a book containing shipping information. The whole was to be printed by A.'s workmen. The title-page, containing the statement "Printed by A.," and the first eighty-one pages of the book and certain advertisements, were printed by A., but at B.'s

request the remainder of the book was subsequently printed elsewhere. The portion printed elsewhere contained matter pirated from the plaintiffs' copyright. The book was published and sold by B. A. was ignorant of the piracy till notified of the same by the plaintiffs.

Held, that there was no partnership between A. and B., and that A. had not caused the printing of the pirated portion of the book within the meaning of the statute; but, that, inasmuch as A. had not altered the statement "Printed by A." to suit the facts, A. was not entitled to costs.—KELLY'S DIRECTORIES *v.* GAVIN, *Ch.D Byrne, J.*, 313; [1901] 1 Ch. 374; 70 L. J. Ch. 237; 84 L. T. 581.

2. *Penalties — Number of offences — "Sum not exceeding £10"—Minimum sum—25 & 26 Vict. c. 68, s. 6.*—The copyright in certain pictures was infringed by the distribution of over a million copies. Upon a summons to fix the amount of the penalties payable under 25 & 26 Vict. c. 68, s. 6, which fixes the penalty for each offence at a "sum not exceeding £10."

Held, that each copy constituted a separate offence, but that the court was not bound to fix a penalty for each offence but could give an aggregate sum for all, even though that sum if divided by the number of offences would give for each offence a fraction of a farthing.

Decision of Kekewich, J. (48 W. R. 682), reversed.—HILDESHEIMER *v.* FAULKNER, *C.A.*, 708.

3. *Report of speech—"Author"—Newspaper—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 16, 18.—Under the Copyright Act, 1842, the reporter of a public speech has copyright in his report, for he is "author" of such within the meaning of the Act.

Decision of the Court of Appeal (48 W. R. 218, [1899] 2 Ch. 749) (Lord Robertson dissenting) reversed.—WALTER *v.* LANE, *H.L.*, 95; [1900] A. C. 539; 69 L. J. Ch. 699; 83 L. T. 289.

4. *School edition of Shakespeare—Colourable imitation—Common sources of knowledge—Injunction, when granted.*—An author dealing with a subject already treated by another is at liberty (1) to use all common sources of information, (2) to use the work of that other as a guide to those common sources, and (3) to use that other's work to test the completeness of his own.

Where there has been no extensive copying, and no extraction of the vital part of the plaintiff's work, the court will not grant an injunction.

Jarrold v. *Houlston*, 3 K. & J. 708, 6 W. R. Ch. Dig. 19, and *Pike* v. *Nicholas*, 18 W. R. 321, L. R. 5 Ch. App. 251, considered.—MOFFATT *v.* GILL, *Ch.D. Kekewich, J.*, 438; 84 L. T. 452.

CORPORATION:—

Corporation sole—Endowment—Rector—Wrongful investment—Statute 13 *Eliz. c.* 10.—In pursuance of the private Act 31 Geo. 2, c. 2, a sum of money was vested in the rector of a parish as corporation sole. In 1881 a rector of the parish invested part of the money in the purchase of land, which was conveyed to him, "his heirs and assigns," with a declaration in bar of dower. The deed was not enrolled in Chancery, and there was only one attesting witness, and no licence in mortmain was obtained. Part of the property thus conveyed was sold by the rector, and the rest, on resigning the living, he conveyed as beneficial owner by deed to H. (his successor) in fee simple in consideration of five shillings as purchase-money. Shortly afterwards H. sold the property by auction, and defendant B. was the purchaser.

Held, that though personal property cannot usually be vested in a corporation sole, the statute 31 Geo. 2, c. 2, made this case an exception, and therefore that the rector as corporation sole could receive and give a good discharge for the money vested in him.

Held, that, on the sale by H. to B., as the purchase-money was received by H., it came into the proper hands, and that the defendant B. was not answerable.—POWER *v.* BANKS, *Ch.D. Cozens-Hardy, J.*, 679.

See also Election Law, 1, 2; Justices, 2.

COSTS—See Arbitration, 3; Bankruptcy, 20-25; Company, 34; Divorce, 7-10; Lands Clauses Acts, 3, 7; Married Woman, 3, 12; Mortgage, 2; Practice, 5-17, 20, 24; Solicitor, 1-4; Vendor and Purchaser, 5.

COUNTY COURT:—

1. *Admiralty—Jurisdiction of county court and Trimming Board Committee—Coal Trimmers' Union.*—Where a committee of a Coal Trimmers' Union held that a certain vessel was, according to their bye-laws, a "self-trimmer," the effect of which was to bind her to a certain tariff rate of the board's,

Held, by the county court (and affirmed by the Divisional Court), that the question was one of law, and was within the jurisdiction of the county court and not of the Trimmers' Union.—"SWINDON," THE, *P.D. & Ad.D.*, 634.

2. *Appeal — Costs — Security.*—The High Court will order security for costs to be given of an appeal from a county court where it appears that the appellant has disposed of his goods for the purpose of avoiding payment of the respondent's costs.—MOORE *v.* PINWICK, *K.B.D.*; 70 L. J. K. B. 471.

3. *Jurisdiction—Foreclosure action in county court—Amount originally advanced over £500—Amount actually due when action brought under £500—Transfer to Chancery Division of High Court—Retransfer to county court—County Court Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 67 (3), 68.—On a motion for an order retransferring to the county court of Durham an action commenced in that court for payment of the amount due on a mortgage of freehold property and in default foreclosure and possession of the property, it appeared that, although the mortgage debt of £575 had by various payments been reduced to £461 before action brought, the county court judge was of opinion that, as the amount of the advance had exceeded £500 the matter was beyond the jurisdiction of the county court, and ordered the action to be transferred to the Chancery Division of the High Court of Justice.

Held, that by virtue of section 67 (3) and section 68 of the County Courts Act, 1888, the action might be re-transferred to the county court of Durham.—SHIELDS, &c., BUILDING SOCIETY *v.* RICHARDS, *Ch.D. Cozens-Hardy, J.*; 84 L. T. 587.

4. *Practice—Costs—Taxation—Ship—Admiralty—Payment into court—Acceptance—Amount less than £2.*—In an admiralty action in a county court where money is paid into court unconditionally by the defendant, and accepted by the plaintiff in satisfaction, the plaintiff is entitled to his costs under ord. 39*b*, r. 50*a*, of the County Court Rules, and to have them taxed under column B of the County Court Scale, under rule 80 of the same order, unless the county court judge otherwise orders, even where the amount so recovered is less than £2.—"SKUDENARES," THE, *P.D. & Ad.D.*; 70 L. J. P. 64.

5. *Practice—Garnishee summons—Attachment of debt — Attachment of part of a debt — Balance in hands of garnishee — County Court Rules, ord. 26a, r. 3; Form 156a.*—A garnishee summons issued by a county court attaches the whole of the moneys owing or accruing due from the garnishee to the judgment debtor, and an assignment by the judgment debtor of the balance of such moneys over and above the amount of the judgment debt is therefore invalid.

Rogers v. *Whiteley*, [1892] A. C. 118, followed.—YATES *v.* TERRY, *Q.B.D*, 112; [1901] 1 Q. B. 102; 70 L. J. Q. B. 24; 83 L. T. 415.

6. *Practice—Judgment summons—Judgment debtor outside the district of the county court—Leave to issue judgment summons—Affidavit—County Court Rules, 1889, ord. 25, r. 14a; Appendix, Form 52a.*—Where a judgment debtor does not dwell or carry on business, and is not employed, within the district of the county court in which the judgment was obtained, the affidavit, on the application under ord. 25, r. 14a, of the County Court Rules, 1889, for leave to issue a judgment summons against the debtor, must contain all the material averments set out in Form 52a in the appendix to the rules.

Therefore, where the affidavit only stated that the debtor lived in a certain house, apparently of the yearly value of £60, and that he carried on the business of a builder, and did not state any facts showing that the business was profitable or that he had other means to pay a substantial part of the debt, and did not say whether he was married, and, if so, whether he had any children,

Held, that the affidavit did not comply with the requirements of the form, and that the county court judge had no jurisdiction to give leave to issue the judgment summons.—MCINTOSH *v.* SIMPKINS, *C.A.*, 241; [1901] 1 Q. B. 487; 70 L. J. Q. B. 268; 84 L. T. 21.

7. *Practice—Jurisdiction to remit action—Claim on writ for over £100—Abandonment of excess—Jurisdiction of county court judge to proceed with trial—Prohibition—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65.*—In an action commenced in the High Court in which the claim is for more than £100, but which claim is reduced to £100 by abandonment of the excess over £100 after action brought, there is no jurisdiction under section 65 of the County Courts Act, 1888, to remit the action for trial in the county court except by consent of the parties.

Where, however, the plaintiff has reduced the claim to £100 by abandonment of the excess and the master at chambers has made an order remitting the action, and the defendant has failed to appeal against such order, the county court judge has jurisdiction to try the action though the order should not have been made, and the High Court under such circumstances will not subsequently grant a prohibition.—DIERKEN *v.* PHILPOT, *K.B.D.*, 703; [1901] 2 K. B. 380; 70 L. J. K. B. 675.

8. *Practice—New trial, application for—Jurisdiction—Power to enter judgment—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 93.*—A county court judge has no jurisdiction, on an application for a new trial of an action tried in the county court, to enter judgment for the applicant.—ROBINSON *v.* FAWCETT & FIRTH, *K.B.D.*; [1901] 2 K. B. 325; 70 L. J. K. B. 639; 84 L. T. 629.

9. *Practice—Notice of statutory defence—Gaming Act, 1892 (55 Vict. c. 9), s. 1—County Court Rules, 1899, ord. 10, rr. 10, 18a.*—The Gaming Act, 1892, created a statutory defence, of which it is necessary for the defendant to give notice under the County Court Rules, 1889, ord. 10, r. 18a.—WILLIS *v.* LOVICK, *K.B.D.*, 540; [1901] 2 K. B. 195; 70 L. J. K. B. 656; 84 L. T. 713.

10. *Practice — Prohibition — Judgment debtor outside district—Affidavit on application for judgment summons—Waiver—County Court Rules, 1889, ord. 25a, r. 14, App. Form 52a.*—The requirements of ord. 25, r. 14a, of the County Court Rules, 1889, as to the form of an affidavit on an application for leave to issue a judgment summons against a debtor who does not dwell or carry on business and is not employed within the district of the court in which the judgment was obtained, cannot be waived by the debtor.—ALDERTON *v.* PALLISER, *C.A.*, 706.

11. *Prohibition — Jurisdiction — Commitment — Judgment against firm in High Court of Justice—Judgment summons against alleged partner in county court—County Court Rules, ord. 25, rr. 14b, 17—Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.*—The affidavit which the plaintiff is required to file under ord. 25, r. 14b, of the County Court Rules must set out the sources of information and grounds of belief on which the plaintiff alleges the defendant is a partner in the firm against which he has recovered judgment, or there is no jurisdiction in the county court judge to try the case.

Where a plaintiff has recovered judgment against a firm in the High Court, he can enforce such judgment against a partner by a judgment summons in the county court, and on the trial of such judgment summons the county court judge, if satisfied that the defendant is a partner in the firm, and that he has had means since the date of the judgment against the firm, may forthwith commit the defendant to prison.—LUMLEY *v.* OSBORNE, *K.B.D.*, 374; [1901] 1 Q. B. 532; 70 L. J. K. B. 416; 84 L. T. 461.

12. *Prohibition—Telephone company—Delegation of powers by Postmaster-General—Consent from local authority — Arbitration — Jurisdiction — Telegraph Act, 1863 (26 & 27 Vict. c. 112—Telegraph Act, 1868 (31 & 32 Vict. c. 112)—Telegraph Act, 1878 (41 & 42 Vict. c. 76)—Telegraph Act, 1892 (55 & 56 Vict. c 59).*—Under the Telegraph Acts the Postmaster-General delegated certain powers to the National Telephone Co. The company thereupon entered into an agreement with the mayor, &c., of Tunbridge Wells for the exercise of certain powers within their district.

By that agreement, with the exception of certain work mentioned in the schedule, it was provided that the company should not exercise any of the powers conferred on the Postmaster-General by the Telegraph Acts, 1863 and 1878, in respect of which the consent of the corporation was required without obtaining a further consent in writing from the corporation.

It was further provided that if any dispute or difference arose concerning the premises or the rights and liabilities of the parties, such dispute or difference should be referred to arbitration.

Upon the corporation refusing their consent to some further works beyond those mentioned in the schedule, the National Telephone Co. applied to the county court judge as arbitrator under sections 3 and 4 of the Telegraph Act, 1878.

Held, that the county court judge had no jurisdiction, as the company, being only the delegates of powers from the Postmaster-General, could not proceed under sections 3 and 4 of the Telegraph Act, 1878, but only under the arbitration clause in

their agreement. Prohibition therefore granted. —TUNBRIDGE WELLS (MAYOR) *v.* NATIONAL TELEPHONE CO., *Q.B.D.*; 83 L. T. 525.

See also Married Woman, 3; Practice, 6, 10.

CRIMINAL LAW:—

1. *Evidence—Admissibility—Course of conduct—Acquittal on previous indictment—Admission of evidence given on previous trial.*—A person was charged with obtaining money by falsely pretending that certain cheques drawn by him would be honoured. He was indicted on two separate indictments in respect of separate transactions of this kind, all occurring within the space of a fortnight. He was acquitted on the first indictment, and was afterwards tried on the second indictment. Evidence which had been given on the trial of the first indictment was given again on the trial of the second indictment, such evidence being relevant on both indictments.

Held, by Lord Russell of Killowen, L.C.J., and Mathew, Grantham, Wright, Darling, and Channell, JJ. (Bruce and Ridley, JJ., dissenting), that the evidence was admissible on the second trial.—REG. *v.* OLLIS, *C.C.R.*, 76; [1900] 2 Q. B. 758; 69 L. J. Q. B. 918; 83 L. T. 251.

2. *False pretences—Friendly society—Member in arrears with subscription — Arrears paid up by prisoner—He places member's name on sick list—Applies sick pay to satisfy debt—Person to whom false pretence made.*—It was the duty of the prisoner, who was an officer of a society, to return the names of members entitled to sick pay. The prisoner wrongfully entered on the list a member's name, which he gave to the secretary, and in due course received an order from the treasurer to pay the member the sum named. When the prisoner received the money he applied it in payment of a debt due from the member to himself. Upon an indictment charging the prisoner with obtaining the money from the treasurer by falsely pretending to him that the member was entitled to sick pay,

Held, dismissing the appeal, that there was evidence upon which the jury might find that the false pretence was made by the prisoner to the treasurer.—REX *v.* TAYLOR, *C.C.R.*, 671.

3. *Larceny—Advertising reward for return of stolen property—No questions to be asked—"Any property whatsoever"—Dog—Larceny Act,* 1861 (24 & 25 *Vict. c.* 96), *s.* 102.—Section 102 of the Larceny Act, 1861, which makes it an offence to publish an advertisement offering a reward for the return of stolen property and stating that no questions will be asked, applies to the case of a stolen dog.—MIRAMS *v.* OUR DOGS PUBLISHING CO., *C.A.*, 626.

4. *Larceny—Fraudulent appropriation by agent—Larceny Act,* 1861 (24 & 25 *Vict. c.* 96), *s.* 75.—The prisoner, a conjuror and thought-reader, received from the prosecutrix a cheque for the specific purpose of paying a deposit upon an application on behalf of the prosecutrix for shares in a certain railway company, the cheque to be returned to the prosecutrix in the event of the shares not being obtainable. The prisoner made no application for the shares, but cashed the cheque and misappropriated the proceeds.

Held, that the words "or other agent" in section 75 applied only to persons whose occupation was similar to those enumerated in the section, and did not include any ordinary agent who might from time to time be intrusted with chattels or valuable securities, and that the facts disclosed no offence within the meaning of the section.

Reg. v. *Portugal*, 16 Q. B. D. 487, approved and followed.—REG. *v.* KANE, *C.C.R.*; [1901] 1 Q. B. 472; 70 L. J. Q. B. 143; 84 L. T. 240.

5. *Obtaining goods by false pretences—Parting with possession—Goods loaded on prisoner's van before false pretence—Cheque for balance dishonoured.*—The prisoner agreed to purchase a quantity of old iron from the prosecutor, and paid a deposit of ten shillings. The next day he came with a cart and man to fetch the iron away, and said, "I will pay you the remainder of the money when I have loaded the iron." The iron having been placed in the the cart, the prisoner returned to prosecutor's house and gave him a cheque for the balance, which was subsequently dishonoured.

Held, that there was evidence upon which the jury might find that the goods were obtained by false pretence, as the prosecutor did not intend to part with the goods until after he had received the cheque.—REX *v.* COSNETT, *C.C.R.*, 633; 84 L. T. 800.

6. *Practice—Sentence of hard labour—Common law forgery—"Any cheat or fraud punishable at common law"—Criminal Procedure Act,* 1851 (14 & 15 *Vict. c.* 100), *s.* 29.—H. was tried and convicted for the common law misdemeanour of forging and uttering writing with intent to defraud. An order had been made in a county court that he should render an account of the money he had collected and received from one Cobb, which he had fraudulently misappropriated. He delivered papers in which the donors had entered their names and the amounts they had handed him, and he so altered these entries as to make it appear that smaller amounts had been given.

It was not alleged that Cobb had been defrauded or prejudiced, except so far as it appeared that he had been deprived by the prisoner's conduct of the evidence to support his claim. The question reserved was whether there was power to pass a sentence of imprisonment with hard labour.

The Court (Lord Alverstone, L.C.J., and Mathew, Lawrance, Bruce, and Ridley, JJ.) held that, as the indictment charged only a common law forgery, without alleging that anyone was thereby defrauded, the case did not come within the Criminal Procedure Act, 1851, s. 29, by which persons convicted of "any cheat or fraud punishable at common law" may be sentenced to hard labour.—REX *v.* HAMILTON, *C.C.R.*, 575; [1901] 2 K. B. 740; 70 L. J. K. B. 480; 84 L. T. 332.

See also Gaming, 2.

DEED:—

Construction—"Or" read "and"—Gift to a class—Absence of words of division—Substantial gift.—A settlement contained a trust "for all and every the child and children or grandchild of Julia Gibson, the wife of John Gibson, party hereto living at the death of the survivor of" H. C. and M. his wife.

Held that the word "or" must be construed literally.

Held, also, that the fact that the document to be construed was a deed and not a will made no difference.

Held, also, that the children of Julia Gibson who were living at the death of the survivor of H. C. and M. his wife alone took under the trust, to the exclusion of all the grandchildren notwithstanding that the parents of some of the grandchildren were then dead.—COLEY'S TRUSTS, RE, GIBSON *v.* GIBSON, *Ch.D. Byrne J.*, 165; [1901] 1 Ch. 40; 70 L. J. Ch. 153; 83 L. T. 671.

DIVORCE :—

1. *Nullity of marriage—Impotence—Power to vary settlements—Property settled—Matrimonial Causes Act*, 1859 (22 & 23 *Vict c.* 61), *s.* 5—*Matrimonial Causes Act*, 1878 (41 & 42 *Vict. c.* 19), *s.* 3.—The powers of the court under section 5 of the Matrimonial Causes Act, 1859, and section 3 of the Act of 1878, can be exercised in the case of a decree of nullity of marriage on the ground of impotence, and are not confined to cases where there are or might have been children.

By a marriage settlement the husband, in consideration of the intended marriage, covenanted with the trustees that, if the marriage should take place, he would, during the joint lives of himself and his wife, pay to the trustees £200 a year upon trust for his wife. Further, in consideration of the intended marriage, and in exercise of a power of appointment vested in him, he appointed to the trustees a term of 1,000 years in certain hereditaments to secure the payment of a rent-charge to his wife, the term and the rent-charge to commence as from his death. Further, in consideration of the intended marriage, and in exercise of a power of appointment vested in him, he appointed to the trustees a term of 1 200 years in certain hereditaments, to commence from the solemnization of the intended marriage, upon trust to raise the sum of £20,000 upon certain trusts for himself and the issue of the marriage; but no part of the £20,000 was to be raised during his lifetime, except with his consent in writing. No such consent was ever given.

On a petition by the wife for a variation of the settlement, after a decree of nullity of marriage on the ground of the impotence of the husband,

Held, that the court had power. under section 5 of the Matrimonial Causes Act, 1859, to deal with the annuity of £200; but that it had not power to deal with the term of 1,000 years and the rent-charge, because the term and rent-charge were not to commence till the death of the husband; neither had it power to deal with the sum of £20,000, because the husband had not given his consent to the raising of any part of that sum —DORMER *v.* WARD, *C.A.*, 149; [1900] P. 20; 83 L. T. 556.

2. *Nullity—Non-consummation — Impotence presumed.*—From the fact of non-consummation of a marriage after a reasonable period or cohabitation, during which one of the parties was always willing and anxious and repeatedly urged that the marriage should be consummated, the court may draw the inference that something more than seemingly mere wilful refusal must have animated the other party, who has in fact persistently refused to consummate the marriage, and has also refused to obey the usual order to attend for medical inspection. In such a case the court may properly assume the existence of some latent impediment amounting to incapacity.

The principle laid down by the court in *F.* v. *P.* (*falsely called F.*), 75 L. T. 192, in the case of a female respondent, followed and extended to the case of a male respondent.—B. *v.* B., *P.D. & Ad.D.*; [1901] P. 39; 70 L. J. P. 4.

3. *Peer—Title of honour—Right of wife who has divorced husband to continue to use his title—Subsequent re-marriage to commoner.—Injunction.*—The former wife of a peer, who has divorced her husband, has no legal right to continue to use his title.

If, however, she continue to do so, that fact alone does not constitute an *injuria* cognizable at law; and the court, accordingly, will not restrain her from so doing by injunction.

The existence of any social usage in the matter might be material in any proceeding where malice was part of the cause of action, but it is otherwise irrelevant.

Decision of Gorell Barnes, J. (48 W. R. 463, [1900] P. 118). reversed.—COWLEY *v.* COWLEY, *C.A.*, 19; [1900] P. 305; 69 L. J. P. 121; 83 L. T. 218.

4. *Practice—Affidavit in verification of petition—Proposed petitioner for judicial separation an inmate of an asylum—Refusal by Commissioners in Lunacy to authorize access by solicitor and commissioner for oaths — Motion — Order forthwith.* — A married woman, confined in an asylum, gave instructions to her solicitor to institute proceedings against her husband for judicial separation, and the solicitor attended with a commissioner for oaths, in order to obtain from the proposed petitioner the necessary affidavit in verification of the petition, which had been approved and signed by her previously.

The superintendent of the asylum, acting upon printed instructions purporting to be signed by the secretary, and addressed from the Office of the Commissioners in Lunacy, refused to allow the solicitor and commissioner for oaths to see the proposed petitioner, and, upon application being made by the solicitor to the Commissioners in Lunacy, they upheld the refusal of the superintendent.

The court, upon motion, and upon affidavit proving notice, made an order, the Commissioners in Lunacy having notice and not opposing, that the commissioners should forthwith authorize the superintendent of the asylum to permit the solicitor and commissioner for oaths to have access to the proposed petitioner. — BEECHAM, EX PARTE, *P.D. & Ad.D.*; [1901] P. 65; 70 L. J. P. 20; 84 L. T. 63.

5. *Practice—Agreement for separation—Petition for alimony* pendente lite—*Matrimonial Causes Act.* 1857 (20 & 21 *Vict. c.* 85), *s.* 35—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 4.—Where an action has been brought for a dissolution of a marriage, the inquiry as to alimony on a petition for alimony *pendente lite* ought to proceed in the usual way, notwithstanding that the parties have entered into a separation agreement providing for an allowance to be paid by the husband to the wife. —BARRY *v.* BARRY, *C.A.*, 370; [1901] P. 87; 70 L. J. P. 17; 84 L. T. 33.

6. *Practice—Alimony—Death of co-respondent after suit begun—Motion to strike out his name.*—Where a co-respondent named in a petition dies after the commencement of the proceedings, the right form of application to be made by the petitioner is to strike his name out of the suit. — WALPOLE *v.* WALPOLE, *P.D. & Ad.D.*; [1901] P. 86; 70 L. J. P. 23; 84 L. T. 63.

7. *Practice — Consolidated suits — Costs — Co-respondent—Appeal—Final or interlocutory order—Leave to appeal—Jurisdiction—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85). *s.* 34—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.—Where a husband and wife present cross-suits. the wife's being in fact the first on the file, and an order for consolidation is made, followed by verdict and decree in the husband's favour,

Held, on the authority of *The City of Manchester*, 5 P. D. 221, and *Marsden* v. *Lancashire and Yorkshire Railway Co.*, 7 Q. B. D. 641, that the order was final, not interlocutory, and that the leave of the court was not required.

Held, also, that section 34 of the Act of 1857 only gave jurisdiction to order a co-respondent to pay

the costs of the proceedings upon a petition presented by the husband, and that the consolidation order did not make the proceedings in the wife's suit part of the proceedings in the husband's suit. The order had no effect analogous to the consolidation of common law actions; it was merely made for the convenience of trying the two petitions together. Section 5 of the Supreme Court of Judicature Act, 1890, had been relied on as giving jurisdiction to order the co-respondent to pay these costs. But the generality of the words of that section must have some limitation, and they could not authorize the court to order a person to pay the costs of proceedings to which he was not a party.—FORBES-SMITH *v.* FORBES-SMITH, *C.A.*, [1901] P. 258; 70 L. J. P. 61; 84 L. T. 789.

8. *Practice—Costs—Security for—Motion for new trial—Divorce petition—Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1—*R. S. C., ord.* 58, *r.* 15.—The Court of Appeal will not order security to be given for the costs of a motion for a new trial of a divorce petition, it not having been the practice to require security to be given in such a case before the Supreme Court of Judicature Act, 1890.

Hecksher v. *Crosley*. [1891] 1 Q. B. 224, followed.—RICKABY *v.* RICKABY, *C.A.*; [1901] P. 134; 70 L. J. P. 24; 84 L. T. 182.

9. *Practice—Costs—Wife's costs—Husband's petition—No security for wife's costs—Disagreement of jury—Entering verdict—Wife's costs of abortive trial—Practice—Discretion of judge*—A husband filed a petition for divorce, alleging adultery by his wife with a co-respondent. The wife filed a cross-petition for judicial separation, alleging adultery and cruelty on the part of the husband, to which he pleaded condonation. At the trial the jury disagreed as to the wife's adultery, and as to condonation by her, but signified, without returning a formal verdict, that they were prepared to find both adultery and cruelty on the part of the husband. The judge at the trial declined to enter any verdict, and on an application by the wife for her costs of the abortive trial, refused to make any order at that stage in the proceedings.

Held, that the refusal at that stage was a matter for the discretion of the judge, with which the Court of Appeal would not interfere.

Decision of Jeune, P. (*ante*, p. 672), affirmed.—WAUDBY *v.* WAUDBY, *C.A.*; 84 L. T. 829.

10. *Practice—Costs—Wife's costs—Jury discharged without giving a verdict.*—It is the usual practice of the Divorce Court to allow to an unsuccessful wife her costs up to the limit of the amount paid into court or secured, with the addition of such sum as may be added *de die in diem* at the trial; but if a wife brings her case to a hearing without having previously taxed them against her husband, and is unsuccessful, the husband is not liable.—WAUDBY *v.* WAUDBY, *P.D. & Ad.D.*, 672.

11. *Practice—Damages—Verdict for larger amount than that claimed.*—Where in an undefended case damages are assessed at a higher figure than that claimed in the petition, a summons must be taken out by the petitioner (if he desire to amend his claim) asking for leave to amend and re-serve the petition.

The summons should be served upon the co-respondent, who, although not represented at the trial, will be entitled to be heard in opposition to the application.—BECKETT *v.* BECKETT, *P.D. & Ad.D.*; [1901] P. 85; 70 L. J. P. 17; 84 L. T. 272.

12. *Practice—Husband's petition—Wife not appearing—Husband formerly convicted of desertion—Separation and allowance under Summary Jurisdiction (Married Women) Act*, 1895—*Subsequent adultery of wife—Discretional bar—Decree.*—Where a husband, who presents a petition for a dissolution of his marriage, has been previously convicted of desertion under the Summary Jurisdiction (Married Women) Act, 1895, the court will exercise its discretion as to granting a decree dissolving his marriage. The mere fact of conviction will not be sufficient to establish a bar. The whole circumstances of the case will be considered, and if the court is of opinion that the petitioner acted upon reasonable grounds, he will not be deprived of the relief prayed for.—LLOYD *v.* LLOYD, *P.D. & Ad.D.*; 84 L. T. 726.

13. *Practice—Married woman—Computation of income—Voluntary allowance—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).—In estimating the respective incomes of a husband and wife upon a matter arising under the Summary Jurisdiction (Married Women) Act, 1895, a voluntary allowance is to be taken into account.—NOTT *v.* NOTT, *P.D. & Ad.D.*; [1901] P. 241; 84 L. T. 573.

14. *Practice—Restitution of conjugal rights—Demand and petition—Service out of the jurisdiction—Domiciled Englishman—Deed of separation—Practice.*—The service of a demand and petition for restitution of conjugal rights by a wife upon her husband, effected out of the jurisdiction, is good if the husband is a domiciled Englishman.

The court, if the husband fails to appear, will take no notice of any agreement for separation by which the parties have undertaken not to molest or trouble each other.—HARDIE *v.* HARDIE, *P.D. & Ad.D.*; 84 L. T. 64.

15. *Practice—Restitution of conjugal rights—Service out of the jurisdiction—Decree.*—A citation and petition in a suit for restitution of conjugal rights, as well as the previous letter of demand required by the rules, may now be served out of the jurisdiction; and where a decree is granted, the decree may likewise be served out of the jurisdiction.

In any further proceedings arising out of a non-compliance with the decree, the petitioner must satisfy the court that the respondent has been served therewith at a place from which he could reasonably have returned to his wife within the period named in the decree.—BATEMAN *v.* BATEMAN, *P.D. & Ad.D.*; [1901] P. 136; 70 L. J. P. 29; 84 L. T. 331.

16. *Practice—Service of petition—Substituted service—Co-respondent resident abroad.*—The co-respondent in a divorce suit was resident in a sanatorium in Switzerland, and the principal of the sanatorium refused to serve him with the citation or petition, or to allow him to be served therewith; the Procureur-General of the Canton stated that service must be effected through a diplomatic source, but the Foreign Office refused to act in the matter except under an order of the court. It was shown on affidavit that the mother and uncle of the co-respondent resided in Switzerland, and that the petitioner was acquainted with their addresses.

The court made an order for service of the citation and the petition on the co-respondent by means of registered letters addressed to his mother and uncle.—STUMPEL *v.* STUMPEL, *P.D. & Ad.D.*; 70 L. J. P. 6.

17. *Practice—Substituted service of citations and petition—Respondent and co-respondent resident in Lisbon—Portuguese law—Letters of request refused—Service by registered letters.*—Where, upon a citation and petition for dissolution of marriage, it appeared

that the respondent and co-respondent were known to be residing at certain addresses in Portugal, the court, after letters of request had been applied for and refused, dispensed with personal service, and ordered substituted service to be effected by registered letters.—WRAY *v.* WRAY, *P.D. & Ad.D.*; [1901] P. 132; 70 L. J. P. 32; 84 L. T. 64.

18. *Practice—Wife's petition—Queen's Proctor's intervention—Wife forced by husband to earn money by prostitution—Separation—Habitual adultery subsequent to separation—Husband's former misconduct conducive to such adultery—Matrimonial Causes Act,* 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Discretion of court—Decree made absolute.*—Upon an intervention by the Queen's Proctor after the petitioner had obtained a decree *nisi* for the dissolution of her marriage on the ground of the adultery and cruelty of her husband, it appeared that he had by his threats and ill-treatment forced her to prostitute herself for his pecuniary benefit, and that she, after she had left him on account of his continued ill-treatment, resorted to other acts of prostitution to supplement her insufficient means of livelihood, and also cohabited for a period of three years with a certain man as his wife.

Held, that all her subsequent acts were the outcome of the husband's conduct, and that she was entitled to have the decree which she had obtained made absolute; the three years' cohabitation and some other facts, very material to be considered by the court and such as ought not to have been withheld at the hearing of the petition, being insufficient to bar the wife's claim to have her marriage dissolved on the grounds of her husband's adultery and cruelty, though amply sufficient to warrant and justify the intervention of the Queen's Proctor.

Symons v. *Symons*, [1897] P. 167, discussed.—BURDON *v.* BURDON, *P.D. & Ad.D.*; [1901] P. 52.

19. "*Unreasonable delay*"—*Respondent's insanity.*—The hope or expectation operating in the mind of a husband that he may be released from the matrimonial tie by the death of his wife, who after committing adultery has become insane, may be accepted as a valid excuse of what would otherwise be "unreasonable delay" in taking proceedings for the dissolution of the marriage.—JOHNSON *v.* JOHNSON, *P.D. & Ad.D.*; [1901] P. 193; 70 L. J. P. 44; 84 L. T. 725.

20. *Variation of settlements—Absolute assignment by husband to wife—Divorce Act,* 1859 (22 & 23 *Vict. c* 61), *s.* 5.—A husband executed a deed by which he assigned to a trustee a leasehold house and some furniture upon trust to assign the same at once to the wife absolutely, and the trustee assigned the same accordingly. The wife afterwards obtained a decree of nullity of marriage.

Held, that the assignment was not a settlement within section 5 of the Divorce Act, 1859, and that the court had no jurisdiction to vary its provisions.—HUBBARD *v.* HUBBARD, *C.A.*; [1901] P. 157; 70 L. J. P. 34; 84 L. T. 441.

21. *Variation of settlements—Next-of-kin—Petition for order of reconveyance of settled property.*—The petitioner on his marriage with respondent settled property on trust to pay the income to himself until he should alienate his interest therein or until some event should occur whereby the income should become payable to someone other than himself, or until his death, whichever should first happen; with remainder to the respondent for life or widowhood; and (there being no children of the marriage) there was an ultimate trust in favour of the next-of-kin of the petitioner, which, however, was only to take effect after the death of the respondent if she should have married again and again become a widow. In 1899, the petitioner gave an undertaking in the Chancery Division that he would apply forthwith to vary the settlement so as to vest the remainder of the property in himself absolutely and that he would in any event give a charge over all his interest under the settlement. After the decree absolute, the petitioner contracted a second marriage, and at present if he were to die the persons entitled to share in his estate under the Statute of Distributions would be the second wife, the mother, and a nephew and neice of the petitioner, the last two being also beneficially interested in the mortgage of his interest in the settled property.

Upon motion to confirm the registrar's report upon the petition to vary the settlement and to order the reconveyance of the settled property to the petitioner absolutely,

Held, distinguishing *Meredyth* v. *Meredyth and Leigh*, [1895] P. 92, and *Wynne* v. *Wynne*, 78 L. T. 796, that this would be going too far, and that the right order to make was simply to extinguish the respondent's interests in the settlement, so that, subject to the engagement given by the petitioner in the Chancery Division, the petitioner's resulting life interest in the settled property would become operative.—WALPOLE *v.* WALPOLE (No. 2), *P.D. & Ad.D.*; [1901] P. 196; 70 L. J. P. 49; 84 L. T. 727.

22 *Variation of settlement—Settlement on wife with restraint on anticipation—Dissolution of marriage—Remarriage of wife.*—On their marriage both husband and wife brought property into settlement. The wife's property was settled on her for life, with a restraint on anticipation. The wife obtained a decree dissolving her marriage, and remarried. She then presented a petition for variation of the marriage settlement. The registrar recommended that the property brought into settlement by husband and wife should be given back to them freed from all trusts.

Held, that the report ought to be confirmed, and that the restraint on anticipation did not, even after the petitioner's remarriage, affect the power of the court to make the suggested variation.—MERTON *v.* MERTON, *P.D. & Ad.D.*; 83 L. T. 223.

See also Married Woman, 4-6.

DOG.—See Animal, 1.

DOMICIL:—

Prolonged residence abroad—Declared intention to return home—Inference from acts.—If the acts of a person reasonably indicate that he intends to make his home for an indefinite period in a foreign country, the fact that he declares from time to time his intention ultimately to return to his native country will not be sufficient to prevent his acquiring a domicil of choice in the foreign country.—ATTORNEY-GENERAL *v.* WINANS, *Q.B.D.*; 83 L. T. 634.

See also Administration, 4; Lunacy, 3.

EASEMENT:—

1. *Light—Derogation from grant—Plots sold for building—Plan showing building line—Conveyancing Act,* 1881 (44 & 45 *Vict. c.* 41), *s.* 6.—Where a landowner contracts to grant a lease of a vacant piece of land when a house of a specified character is built thereon, and accordingly a house is built and a lease of the house and land is granted, the doctrine that a grantor cannot derogate from his own grant must be applied, not to the vacant piece

of land, but to the land with the house on it according to the contract, which must be taken for this purpose to have been fulfilled.

If land forms part of a building estate, and the contract is entered into by reference to a plan in which the estate is marked out in building plots, with a building line marked on the plan so as to extend through all the plots, including the land which is the subject of the contract, the application of the doctrine is not thereby limited or restricted, and, in the absence of further evidence of the existence of a building scheme or of any reservation of right to the grantor, the purchaser from him of an adjoining plot will be restrained from building on his land so as to interfere with the access of light to the house as theretofore enjoyed.

Broomfield v. *Williams*. [1897] 1 Ch. 602, applied. —POLLARD *v.* GARE, *Ch.D. Kekewich, J.*; [1901] 1 Ch. 834; 70 L. J. Ch. 404; 84 L. T. 352.

2. *Light—Right to extraordinary use of light—Sufficient for ordinary business purposes.*—A prescriptive right to light is limited to a sufficient quantity for ordinary business purposes. Where the light has been interfered with, but not so as to make it insufficient for ordinary business purposes, the plaintiff has no cause of action.—HOME AND COLONIAL STORES *v.* COLLS, *Ch.D. Joyce, J.*; 83 L. T. 759.

3. *Right of way—Annual payment—Uninterrupted enjoyment for over forty years—Parol licence—Lost grant—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 5.—Where an easement is claimed under the Prescription Act, s. 2, a payment within the period of forty years may so negative the enjoyment "as of right" as to prevent the claim being established.

Where a licence to use a way was given by parol more than forty years before action brought, and such licence was subject to a small annual payment,

Held (Rigby, L.J., dissenting), on the facts, that the proper inference was that each payment was made for permission to use the way for the preceding year, and that the way had not therefore been enjoyed as of right within the meaning of the Prescription Act.

Held, also, that no lost grant could be inferred.

Decision of Cozens-Hardy, J. (48 W. R. 469), reversed.—GARDNER *v.* HODGSON'S KINGSTON BREWERY CO., *C.A.*, 421; [1901] 2 Ch. 198; 70 L. J. Ch. 504; 84 L. T. 373.

4. *Right of way—Private right of way—Prescription Act* (2 & 3 *Will.* 4, *c.* 71), *ss.* 2, 3, 4—*Unity of possession of alleged dominant and servient tenements by lessee.*—Unity of possession of the dominant and servient tenements in the person of a lessee for years during the twenty years next before action brought is sufficient to bar a claim to a right of way under the Prescription Act.

Onley v. *Gardiner*, 4 M. & W. 496, and *Battishill* v. *Reed*, 4 W. R. 603, 18 C. B. 696, followed.—DAMPER *v.* BASSETT, *Ch.D. Joyce, J.*, 536; [1901] 2 Ch. 350; 70 L. J. Ch. 657; 84 L. T. 682.

5. *Right of way—Undefined—No user—Unlimited claim—Action dismissed.*—In 1862 the Corporation of the City of London, in pursuance of powers conferred on them by the Metropolitan Meat and Poultry Act, 1860 (23 & 24 Vict. c. cxciii.), entered into an agreement with the plaintiff and defendant companies by which the companies agreed to construct a railway station for goods traffic only beneath the site of S. Market.

In 1878 the corporation, with the privity of the defendant company, leased to the plaintiff company the northern part of the land on which the railway station had been built for 100 years, together with a right of way from time to time and at all times over the southern part of the land (which was leased by the corporation to the defendant company) through a circular road. The way was not definitely described, and it was never in fact used by the plaintiff company.

The station was now substantially in the same state as it was in 1878.

The plaintiff company brought this action to enforce their right of way.

Held, that, until the plaintiff company used the demised premises as a goods station in accordance with the provisions of the Act of 1860, their right of way did not arise; and that the claim to the right of way was so undefined and unlimited that it could not be maintained.—METROPOLITAN RAILWAY CO. *v.* GREAT WESTERN RAILWAY CO., *C.A.*; 84 L. T. 333.

6. *Support—Right to support of dock sides by rods fastened in adjoining owner's land—Enjoyment* claim.—In this case it was held that there was no implied reservation in favour of the vendors when the wharf was conveyed to the plaintiffs in 1877, but that a right had been acquired, either under the Prescription Act, or under the common law doctrine of a lost grant, unless it could be held that the easement had been enjoyed not openly but *clam*—namely, that the easement had not come to the knowledge of the plaintiffs, and was not of such a nature that their attention ought reasonably to have been drawn to it. In the present case there had been nothing surreptitious, no active concealment, but on the other hand there had been no open and visible enjoyment of the easement claimed. This special and unusual support, by means of iron ties beneath the surface of the plaintiffs' land, was not such as could be claimed merely by twenty years' enjoyment without the knowledge of the plaintiffs, and the defendants were not entitled to retain any of the rods, ties, or supports in or under the plaintiffs' land for the purpose of upholding or supporting the defendants' dry dock, and were not entitled to interfere with the removal by the plaintiffs of all or any of such rods, ties, or supports.—UNION LIGHTERAGE CO. *v.* LONDON GRAVING DOCK CO., *Ch D. Cozens-Hardy, J.*; [1901] 2 Ch. 300; 70 L. J. Ch. 558; 84 L. T. 527.

7. *Watercourse—Pond—Uninterrupted flow—Right to water cattle — Prescription—"Temporary"—"Precarious"—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 6.—Of two properties which were in one ownership for fifty years prior to 1886, a farm property was conveyed to the plaintiff in 1886 and a mill property to the defendant at a subsequent date. An ancient pond, filled from a brook by an artificial watercourse, and habitually used by cattle, was on the defendant's property, but for fifty-five years abutted on the plaintiff's property, whence his cattle drank from it.

In an action by the plaintiff claiming that the watercourse was a continuous easement necessary and convenient for the use of his property; that he had a right to compel the defendant to keep the pond full with a constant and undiminished supply, or at least a right to water his cattle at the pond whenever there was water therein; and that, in the absence of express words in his deed of conveyance, these rights passed under section 6 of the Conveyancing Act, 1881,

Held, that, in such a case all the circumstances must be considered (*Birmingham Banking Co.* v. *Ross*, 36 W. R. 914, 38 Ch. D. 295); that there was

no easement here which could pass, nor one by way of prescription by reason of the nature of the works; and that the artificial watercourse having been made for one property only, and no leakage by trampling of cattle in the pond having been intended by the vendors of the property, it was not to be inferred from the particular facts of the user that there was a grant of water which conferred either any right to compel such a continuance of the flow as, apart from the rights of lower riparian proprietors, would impose a serious burden on the defendant, or any right to an easement of such a "precarious" character as an easement to water cattle at the pond when and as often as it might be full, such an easement being unknown to the law, and therefore incapable of passing under the general words of section 6 of the Conveyancing Act, 1881.

Hanna v. *Pollock*, [1898] 2 Ir. Rep. 532, [1900] 2 Ir. Rep. 664, and *McEvoy* v. *Great Northern Railway Co.*, [1900] 2 Ir. Rep. 325, discussed.

Watts v. *Kelson*, 19 W. R. 338, L. R. 6 Ch. App. 166, distinguished.—BURROWS *v.* LANG, *Ch.D. Farwell, J.*, 564; 70 L. J. Ch. 607; 84 L. T. 623.

See also Highway, 3; Settled Land, 8.

ECCLESIASTICAL LAW:—

1. *Churchwarden—Admission—Visitation of bishop—Inhibition to archdeacon—Jurisdiction of archdeacon.*—Where the bishop, during his visitation, inhibits the archdeacon from admitting churchwardens, the bishop is the only person entitled to admit, and a *mandamus* to admit a churchwarden during the period covered by the inhibition will not lie to the archdeacon.

Rex v. *Simpson*, 1 Stra. 609, explained.

Judgment of the Divisional Court (*ante*, p. 170, [1901] 1 Q. B. 66) reversed.—REG. *v.* SOWTER, *C.A.*, 338; [1901] 1 Q. B. 396; 70 L. J. Ch. 322; 84 L. T. 36.

2. *Churchwarden—Election of parishioners' churchwarden—Right of minister to vote as ratepayer—Canon* 89—*Sturges Bourne's Act*, 1818 (58 *Geo.* 3, *c.* 69), *s.* 3.—The minister of a parish has no right to vote in his capacity as a ratepayer in the election of the parishioners' churchwarden.

Judgment of Wills and Channell, JJ. (*ante*, p. 399, [1901] 1 Q. B. 573), affirmed.—REX *v.* SALISBURY (BISHOP), *C.A.*, 529; [1901] 2 K. B. 225; 70 L. J. K. B. 593; 84 L. T. 553.

3. *Clergy—Discipline—Brawling—Conviction by justices—Clergy Discipline Act*, 1892 (55 & 56 *Vict. c.* 32), *s.* 2—*Ecclesiastical Courts Jurisdiction Act*, 1860 (23 & 24 *Vict. c.* 32), *s.* 2.—The consistory court of the diocese in which a clergyman holds preferment has jurisdiction under section 2 of the Clergy Discipline Act, 1892, to try and sentence him under that Act, in case he is convicted by a temporal court of having committed an act constituting an offence against ecclesiastical law, not being a question of doctrine or ritual, notwithstanding that the offence he is charged with is not an offence against morality.—GIRT *v.* FILLINGHAM, *St. Alban's Consist. Ct.*; [1901] P. 176.

4. *Faculty—Architectural adornment not shown to be probably open to abuse—Jurisdiction—Chancel screen with crucifix and figures of the Virgin Mary and St. John—Admission of fresh evidence on appeal—Retention of cause.*—A chancel screen, to the upper portion of the tracery of which is attached over the entrance archway the figure of Our Lord upon the Cross, and on one side of the archway the figure of the Virgin Mary, and on the other side the figure of St. John, is not, either from its character, nature, or position, in itself unlawful in churches or chapels of the Church of England, and may be authorized by faculty, provided the ordinary is of opinion in his discretion that it is not probable that it will be abused for superstitious purposes.

The mere suggestion that the figures on the screen may cause offence is not a sufficient reason for the ordinary refusing in his discretion to grant the faculty.

The vicar and churchwardens of a parish church in the diocese of London and the chapel-wardens of a chapel of ease in the parish petitioned for a faculty to authorize the erection in the chapel of a chancel screen of oak with the figure of our Lord on the Cross upon the centre of it, and the figure of the Virgin Mary on one side, and of St. John on the other; the figures not to surmount the screen, but to be attached to the upper portion of the tracery, the central figure immediately over the entrance archway, and the other two figures, one on the right and one on the left, at a somewhat less elevation, upon pedestals affixed to the woodwork. The grant of the faculty was unopposed, and no evidence was given as to whether the figures on the screen would or would not be likely to be abused by superstitious reverence. The Chancellor of the Diocese of London refused to grant a faculty for the figures on the proposed screen, being of opinion that the erection of a chancel screen with the figures as proposed was illegal in itself under the ruling of the Arches Court and the Privy Council in *Clifton* v. *Ridsdale*, 1 P. D. 316, 2 P. D. 276. The petitioners appealed to the Arches Court.

The Dean of Arches at the hearing of the appeal admitted fresh evidence as to the mode in which the services in the chapel were conducted, and finding that there was nothing in them to lead the court to suppose that the proposed screen and figures were likely to be treated otherwise than as architectural decoration, allowed the appeal, retained the cause, and ordered the faculty as prayed to issue from the registry of the Arches Court.—ST. ANSELM'S, PINNER, RE, *London Consist. Ct.*; [1901] P. 202.

5. *Faculty—Communion table in side chapel—Proviso inserted in faculty.*—A faculty was granted on the application of the rector of a parish for the erection and use of a second communion table in a side chapel of the parish church, though both the churchwardens of the parish and the parish vestry expressed opinions averse to the grant, but the court directed that a proviso should be inserted in the faculty reserving to the court, on being satisfied that ornaments other than those sanctioned by the present or any future faculty had been introduced into the chapel or unlawful services performed there, to order the removal of the second communion table from the chapel.—ST. ANNE'S, LIMEHOUSE (RECTOR) *v.* PARISHIONERS OF SAME, *London Consist. Ct.*; [1901] P. 73.

6. *Faculty—Jurisdiction—Grant of faculty for use as public street of portion of consecrated cemetery or churchyard closed for burials, and setting back of cemetery or churchyard wall—Retention of cause.*—The ordinary has jurisdiction to grant a faculty authorising a portion of a consecrated cemetery or churchyard, closed for burials by Order in Council, to be used for widening a public street. Any faculty granted for this purpose should contain exact particulars of the measurements of the portion of the cemetery or churchyard proposed to be used for the widening.

The rector and churchwardens of a parish church

in the diocese of Exeter, and the corporation of a borough in which a consecrated cemetery forming an addition to the parish churchyard was situate, petitioned the ordinary for a faculty to authorize a strip of the cemetery being used for widening an adjoining public street, and the boundary wall of the cemetery being set back so as to form the boundary wall between the remaining portion of the cemetery and the widened street. It appeared that the street proposed to be widened was only sixteen feet wide, and too narrow for the traffic along it, and that the proposed widening would be not only for the general convenience and safety of the public, but particularly of the rector and his parishioners, to the former of whom and the churchwardens moreover, by way of consideration, a sum of money was intended to be paid by the corporation. It also appeared that the strip of cemetery proposed to be thrown into the street had been closed for interments under an Order in Council, and that the proposed alteration of the width of the street had been unanimously approved by the parish vestry. The Chancellor of the Diocese of Exeter refused to issue citation, being of opinion that he had no jurisdiction to grant the faculty prayed for. The petitioners appealed to the Arches Court of Canterbury. The Dean of Arches allowed the appeal, retained the cause, and, the allegations in the petition having been verified by affidavit, decreed a faculty to issue in accordance with the prayer of the petitioners.—RECTOR, &c., OF BIDEFORD, EX PARTE, *Arches Ct. of Canterbury*; [1900] P. 314.

7. *Faculty—New ecclesiastical parish—Right of non-resident ratepayer to promote faculty suit—Lord Blandford's Act* (19 & 20 *Vict. c.* 104), *s.* 15—*Consecration—Criminal suit against churchwarden—Illegal ornaments.*—The tenant of a house within the limits of an ecclesiastical district formed into a separate parish with a new parish church under Lord Blandford's Act, who has his name on the rate-book of the civil parish out of which the separate parish has been formed, and pays the civil parochial rates levied on him, has a sufficient interest to promote a faculty suit for the removal of illegal ornaments set up in the new parish church, notwithstanding that he does not reside in the ecclesiastical district and has become tenant of the house for the sole purpose of qualifying as a parishioner and ratepayer.

A bishop cannot by a sentence of consecration legalize the retention in a parish church of an ornament which is forbidden by law to be there.

The following ornaments and things were ordered by the ordinary to be removed from a parish church as illegal:—

I. ORNAMENTS AND THINGS IN THE CHURCH AT THE TIME OF ITS CONSECRATION.

I. The fourteen Stations of the Cross. II. Three Confessional Boxes. III. A large Crucifix fixed near the pulpit. IV. A Tabernacle on the Communion Table in the chancel before which a lamp was kept burning.

II. ORNAMENTS AND THINGS INTRODUCED INTO THE CHURCH SINCE ITS CONSECRATION.

I. A piece of furniture applicable for receiving Confessions. II. Two Water Stoups for holding Holy Water. III. A Tabernacle on the Communion Table in the side chapel of the church used for the Reservation of the Sacrament. IV. Images representing (1) the Good Shepherd, on a pedestal at the west end of the church, with candles on each side and a lighted lamp in front; (2) the Virgin Mary, on a pedestal standing against the chancel screen with candles on each side, vases of flowers, and a lighted blue lamp before it with canopy, crown, and star over it; (3) the Sacred Heart and St. Joseph, on either side of the Communion Table in the side chapel of the church. V. Several Crucifixes, one over the Communion Table in the chancel, another on the chancel screen, and another with a crown over it over the Holy Table in the side chapel of the church.

The patent appointing the Chancellor of the Diocese of Chichester confers on him jurisdiction to proceed in the absence of the bishop of the diocese from the Consistory Court of Chichester in all ecclesiastical suits, the decision of which is known by law or custom of the realm to belong to the Ecclesiastical Courts, and finally to decide and determine them without breach of the laws and statutes of the kingdom, "nevertheless first consulting us" [the bishop of the diocese] "and our successors, and having our consent, in case either party earnestly craves our judgment."

The opponents in a cause of faculty instituted in the Consistory Court of Chichester for the removal of certain ornaments out of a parish church alleged in their answer that before any decision or final determination of the cause, the bishop of the diocese should be first consulted and his consent had, and earnestly craved his judgment in the premises, and complained and supplicated that the said bishop should examine and determine the cause in his own proper person in the consistory court of the diocese. The petitioner in his reply submitted that the consent of the bishop prayed for in the answer was not necessary to the hearing and determination of the cause, and supplicated that the said cause might be examined and determined by the chancellor of the diocese. Subsequently the hearing of the cause took place in the Consistory Court of Chichester.

The chancellor of the diocese heard the cause sitting alone, the bishop not being present, and determined it, delivering judgment without consulting the bishop, and decreeing a faculty to issue for the removal of the illegal ornaments referred to in the petition, holding that the validity of the reservation in his patent in favour of the bishop was a matter for the determination of the temporal courts; it being within the province of these courts alone to decide whether a custom for the bishop to exercise the right reserved to him by the patent was valid in law.

Semble, the custom in question—*i.e.*, a custom for the bishop to veto a judgment come to after the hearing of a suit by the chancellor, would be unreasonable and bad in law and not a legal custom, as no trace of its exercise could be found in recent times or since the Reformation.

Observations as to the institution of criminal suits against churchwardens for the purpose of obtaining the removal of illegal church ornaments.—DAVEY *v.* HINDE, *Chichester Consist. Ct.*; [1901] P. 95.

8. *Faculty—Removal of remains from consecrated to unconsecrated ground subject to grant of licence from Secretary of State, Faculty for — Jurisdiction — Evidence—Discretion—The Burial Act*, 1857 (20 & 21 *Vict c.* 81), *s.* 25—4 & 5 *Will.* 4, *c. lxxv.*—The 25th section of the Burial Act, 1857, provides that, except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary, it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of her Majesty's Secretaries of State.

The superior of St. Edmund's College—one of the Roman Catholic theological colleges in England—applied to the court for a faculty to authorize the removal of the remains of a former superior of the college from their place of interment in a vault in the churchyard of a parish church in the diocese of London to a vault under the chapel of the college wherein three of the predecessors of the petitioner and the deceased lay buried. It appeared that the owner of the vault from which it was proposed to remove the remains of the deceased could not be discovered, but that the incumbent of the parish church in whom the freehold of the churchyard was vested and the next-of-kin of the deceased consented to the proposed removal. No evidence was given that the vault under the college chapel had ever been consecrated.

The court in its discretion granted the faculty; but, being of opinion that the vault under the college chapel was not a consecrated place of burial within the meaning of the above section, directed that the faculty should issue upon condition that it was not to be acted upon until a licence approving the place of reinterment had been obtained from a Secretary of State.

The removal of remains from unconsecrated places of burial being by the above section placed under the control of a Secretary of State, the court cannot now, as it would have done before the passing of the Burial Act, 1857, refuse to exercise whatever jurisdiction it might possess to grant a faculty for the removal of remains to unconsecrated ground on account of the objection that the remains when removed would not be sufficiently protected from disturbance.—TALBOT, RE, *London Consist. Ct.*; [1901] P. 1.

9. *Prohibition—Consistory court—Patent of commissary and vicar-general—Reservation to bishop of certain causes—Questions of procedure not affecting jurisdiction.*—By letters patent appointing a chancellor for a diocese, the bishop gave him power to determine certain causes, "Nevertheless first consulting us and our successors, and having our consent in case either party earnestly crave our judgment." A suit was promoted for the removal of certain ornaments from a church in the diocese, and the respondents in their reply asked that the bishop should be first consulted and his consent had, and earnestly craved his judgment. The chancellor heard the suit and pronounced an order, in which it did not appear that he had first consulted the bishop or had his consent. On an application for a writ of prohibition,

Held, that there was not such a defect of jurisdiction apparent on the record as would justify the issue of the writ, but that if there was any defect it was in the procedure of the court, and was the proper subject of appeal.—REX *v* TRISTRAM, *K.B.D.*; [1901] 2 K. B 141; 70 L. J. K. B. 565; 84 L. T. 473.

EDUCATION:—

Elementary school—School board—Science and art schools or classes—Provision out of rates—Day schools—Evening continuation schools—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *ss.* 3, 5, 7, 8, 53, 54, 74—*Elementary Education Act*, 1873 (36 & 37 *Vict. c.* 86), *s.* 13—*Education Code* (1890) *Act*, 1890 (53 & 54 *Vict. c.* 22), *s.* 1.—It is not within the power of a school board to pay out of the rate levied under the Elementary Education Acts the expenses of maintaining in their day schools or evening continuation schools science and art schools or classes registered under the Science and Art Department.

Judgment of Wills and Kennedy, JJ. (*ante*, p. 252, [1901] 1 Q. B. 322), affirmed.—REG. *v.* COCKERTON, *C.A.*, 433; [1901] 1 Q. B. 726; 70 L. J. K. B. 441; 84 L. T. 488.

ELECTION LAW:—

1. *Municipal election—Election of mayor—Vote of councillor subsequently disqualified—Validity of such vote—Vote of chairman—Casting vote—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *ss.* 10, 15 (3), 42, 61 (4), 102.—At a municipal election N., a councillor, voted, whose election as a councillor was then about to be challenged on the ground that he had an interest in a contract with the council.

T., the retiring mayor and chairman of the meeting, who had himself voted, said if N.'s vote was disallowed there would be an equal number of votes for each of the two candidates for the position of mayor, and he should therefore give a provisional casting vote for the respondent.

On the hearing of the petition N. was held disqualified from acting as a member of the town council, and the question was then raised for the decision of the High Court, (1) whether, on the authority of *Nell* v. *Longbottom*, [1894] 1 Q. B. 767, his vote given for the election of the mayor was valid; (2) whether the chairman at a meeting of the council for electing a mayor may give a casting vote to take effect in case the votes turn out to be equal, owing to one of the votes being disallowed.

Held, (1) that as N. had been found to be disqualified to act as a councillor, his vote was bad and ought to be disallowed; (2) that under the Municipal Corporations Act T., the outgoing mayor, would have been entitled to give an original vote, and that there was nothing in the Provisional Order of 1900 to take away that right; (2) that T. had a right, under the circumstances, to give a casting vote, as the number of lawful (*i.e.*, valid) votes—N.'s not being a lawful vote—were equal, and therefore both the original and casting vote of T. were good and the respondent entitled to claim the seat.—BLAND *v* BUCHANAN, *K.B D.*, 601; [1901] 2 K. B. 75; 70 L J. K. B. 466; 84 L. T. 390.

2. *Municipal corporation—Town council—Disqualification—Contract with council—Release by committee—Ratification by council—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 12, *sub-section* 1 (c).—The respondent, in answer to an advertisement, sent in a tender offering to supply to a city council certain goods at specified prices for the period of twelve months certain. This tender was accepted, and the respondent supplied goods from time to time. Shortly before the completion of the twelve months the respondent, wishing to stand as a candidate at the forthcoming election of councillors, applied to a committee of the council to be released from his contract. The committee resolved, subject to approval by the council, to release the respondent as from that date. He was then nominated, and after his nomination the council ratified the resolution of the committee. A petition was presented against him, alleging that his election was void on the ground that, at the date of his nomination, he had an interest in a contract with the council.

Held, that the advertisement, tender, and acceptance constituted a contract in which the respondent had an interest, and that the ratification of the committee's resolution by the council after the nomination of the respondent did not relate back to the date of the resolution because the interests of persons other than the parties to the contract might be affected; and therefore the respondent having an interest in a contract with

the council at the date of his nomination, was disqualified and his election void.—GLOUCESTER ELECTION PETITION, RE, NEWTH *v.* FORD, *K.B.D.*, 345; [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354.

3. *Parliament — Registration — Right of freeholders of Haverfordwest to vote for borough of Pembroke—Reform Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *s.* 2, *Schedule E—Redistribution of Seats Act*, 1885 (48 & 49 *Vict. c.* 23), *ss.* 2, 7, 11, *Schedules I. and V.*—By the Redistribution of Seats Act, 1885, a new parliamentary borough of P. and H. was created, consisting of the parliamentary borough of P. and the places comprised in the area of the parliamentary borough of H., and by the same Act the borough of H., which was a county of itself, ceased to return any member.

Held, that the freeholders of the old borough of H., who had had as such a right to vote for that borough, had no right as freeholders to vote for the new borough of P. and H.—JAMES *v.* IVEMEY, *Q.B.D.*; [1901] 1 Q. B. 193; 70 L. J. Q. B. 326; 83 L. T. 587.

EMPLOYER.—See Master and Servant, 1-22, 26, 27.

EXECUTOR:—

1. *Administration—Right of retainer—Marriage settlement—Covenant to pay money after decease of testator—Insolvent estate—Right of trustee to sue.*—The executor of an insolvent estate, being also tenant for life of a sum covenanted to be paid by the testator's executors or administrators in his marriage settlement, cannot retain such sum out of testator's assets where there are trustees of the settlement who have the legal right to sue for the said sum so covenanted to be paid.

In re Dunning, Hatherley v. *Dunning*, 33 W. R. 760, 54 L. J. Ch. 900, followed.

Loomes v. *Stotherd*, 1 Sim. & S. 458, discussed.—HAYWARD, RE, TWEEDIE *v.* HAYWARD, *Ch.D. Byrne, J.*, 296; [1901] 1 Ch. 221; 70 L. J. Ch. 155; 84 L. T. 256.

2. *Administration—Trust for sale and conversion—Appropriation—Leaseholds—Reversionary interest in stock—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 4.—The power of executors and trustees holding residuary estate upon trust for sale and conversion to appropriate unconverted parts of the personal estate in respect of legacies and shares of residue extends to all personal estate, including chattels real and reversionary interests in stock in a company; and this power has not been taken away or modified by the Land Transfer Act, 1897.

Semble, that this power of appropriation extended—previously to the said Act, and still extends—to real estate, where there is a trust for sale and conversion.

Semble, that, where there is no trust for sale and conversion, the executors had, and have, the same power over the whole personal estate.

Section 4 of the Land Transfer Act, 1897, applies to all the residuary estate, whether personal or real.—BEVERLEY, RE, WATSON *v.* WATSON, *Ch.D. Buckley, J.*, 343; [1901] 1 Ch. 681; 70 L. J. Ch. 295; 84 L. T. 297.

See also Administration, 2; Building Society, 2; Trustee, 3.

EXTRADITION:—

Extradition treaty with Germany—"Apprehension"—"Sufficient evidence for the extradition" within two months from apprehension—Subsequent investigation of other charges—Jurisdiction to review decision of magistrate—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 8.—B. was arrested in this country under the extradition treaty with Germany, charged with obtaining money by false pretences from one Wallesch, and evidence was given upon that charge, and B. was remanded from time to time. After the expiration of two months from his arrest, B. was committed for extradition on this charge. He was, however, detained pending the investigation of thirty other charges against him, and he was also committed on those charges.

Held, that there was, in fact, upon the depositions before the expiration of the two months from the date of B.'s arrest, sufficient evidence for his committal on the first charge under the treaty.

Semble, the committal of B. on the subsequent charges was regular.—BLUHM, EX PARTE, REX *v.* HOLLOWAY (GOVERNOR OF), *K.B.D.*, 464; [1901] 1 Q. B. 764; 70 L. J. K. B. 472.

FACTOR:—

Agreement for sale of goods—Hire purchase agreement—"Person having agreed to buy goods"—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 9.—By an agreement one Whitting agreed with the defendant to hire goods of the value of £ , "and to pay her the sum of £1 on signing this agreement and the balance in instalments of £1 per month until the full amount of the aforesaid value be paid," when the goods were to become the property of Whitting.

The agreement contained a clause: "But in default being made in payment of such sums of £1 per month," Whitting agreed "to give up all claims to the said goods, and to deliver the same free from damage or injury beyond fair wear and tear" to the defendant or to her agents on demand.

Held that Whitting was a person who had "agreed to buy goods" under section 9 of the Factors Act, 1899.—WYLDE *v.* LEGGE, *K.B.D.*; 84 L. T. 121.

FACTORY ACTS:—

1. *Definition—Beer bottling works—Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 93 (3)—Premises were used by the respondents for the purpose of washing bottles and bottling beer. Before the bottles were filled, which was done by manual labour alone, they were washed by manual labour with the aid of mechanical power.

Held, that the premises were not a factory within the definition of the term in section 93 (3) of the Factory and Workshop Act, 1878.—LAW *v.* GRAHAM, *K.B.D.*, 622; [1901] 2 K. B. 327; 70 L. J. K. B. 608; 84 L. T. 599.

2. *Making and finishing of bricks—Girl under age of sixteen—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 38, *Sched.* 1.—Bricks after being baked were taken to dipping sheds, and after being placed in a preparing solution were dipped in glaze and scraped and knifed. They were then stacked, and ultimately baked with a view to setting the glaze. They were then polished, and stacked until wanted for sale.

Held, that this constituted the "finishing of bricks" within the Act.—SQUIRE *v.* STANLEY, *K.B.D.*; 84 L. T. 535.

3. *Public health—Sanitary conveniences—Default in relation to water-closet—Failure of sanitary authority to take proceedings—Proceedings by factory inspector—Evidence—Jurisdiction of justices—Appeal to quarter sessions—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 38—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *ss* 7, 22—*Factory and Workshop Acts*, 1878 (41 *Vict. c.* 16), *s.* 4; 1891 (54 & 55 *Vict. c.* 75), *s.* 2; 1895 (58 & 59 *Vict. c.* 37),

ss. 3, 35.—Where a factory inspector, acting under section 4 of the Factory and Workshop Act, 1878, section 2 of the Factory and Workshop Act, 1891, section 3 of the Factory and Workshop Act, 1895, and section 22 of the Public Health Acts Amendment Act, 1890, has given notice to the owner or occupier of a factory (in a district in which the last-mentioned section is in force) requiring him to make such alterations or additions in the factory as may be required to give sufficient sanitary accommodation, and the owner or occupier neglects or refuses to comply with the notice, the justices by whom a complaint of such neglect or refusal is heard have no jurisdiction to adjudicate upon the sufficiency of the accommodation existing in the factory.

So held by Lord Alverstone, L.C.J., and Grantham, Bruce, and Darling, JJ. (Phillimore, J., dissenting).

Semble, the notice must specify the alterations or additions required.

Per Lord Alverstone, L.C.J., and Bruce and Darling, JJ.—An appeal to quarter sessions from the requirement of the factory inspector lies under section 7 of the Public Health Acts Amendment Act, 1890.—TRACEY *v.* PRETTY, *Q.B.D.*, 282; [1901] 1 Q. B. 444; 70 L. J. Q. B. 234; 83 L. T. 767.

4. *Ventilation—"Dust generated and inhaled by the workers to an injurious extent"—Direction by factory inspector requiring a fan to be provided—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 36.—By section 36 of the Factory and Workshop Act, 1878, it is provided that where in a factory any process is carried on by which dust is generated and inhaled by the workers to an injurious extent, an inspector of factories may direct a fan or other mechanical means of a proper construction for the prevention of such inhalation to be provided.

Held, that, in ascertaining whether dust was generated or inhaled to an injurious extent, it is not necessary to prove that the health of any of the workers was actually injured; it is sufficient if the inhalation of the dust has a tendency to injure health.—HOARE *v.* RITCHIE, *Q.B.D.*, 351; [1901] 1 Q. B. 434; 70 L. J. Q. B. 279; 84 L. T. 54.

5. *Workshop—Shop used for process of "adapting for sale"—Factory and Workshop Act*, 1878 (41 *Vict. c.* 16), *s.* 93.—A shop was used during the daytime for the selling by retail of bonbons and sweetmeats, and after the ordinary shop hours for the purpose of packing such goods in b xes ornamented and tied with ribbons, so as to make them attractive to purchasers.

Held, on these facts, that such packing was an "adapting for sale" of an article within section 93 of the Factory and Workshop Act, 1878, and that the premises were a "workshop" within the meaning of that section.—FULLERS *v.* SQUIRE, *K.B.D.*, 683; [1901] 2 K. B. 209; 70 L. J. K. B. 689.

See also Master and Servant, 13, 14, 16.

FINANCE ACTS. — See Inland Revenue, 1-11; Practice, 29.

FINES and RECOVERIES ACT. — See Settlement, 2, 8.

FISHERY:—

1. *Fishery district—Reservoir within the geographical boundary of a fishery district—Jurisdiction of Board of Trade—Taking trout or char from reservoir—Freshwater Fisheries Act*, 1878 (41 & 42 *Vict. c.* 39), *s.* 6—*Salmon and Freshwater Fisheries Act*, 1886 (49 & 50 *Vict. c.* 39), *s.* 3.—Neither section 6 of the Freshwater Fisheries Act, 1878, nor section 3 of the Salmon and Freshwater Fisheries Act, 1886, give power to the Board of Trade to include an artificial water reservoir frequented by trout and char in a fishing district.—STEAD *v.* NICHOLAS, *K.B.D.*, 522; [1901] 2 K. B. 163; 70 L. J. K. B. 653.

2. *Several fishery—Crown grant—Grant of weirs* (gurgites)—*Construction of parcels—Grant valid to extent of Crown rights—Right of way appurtenant to several fishery—Acts upon bed of river treated as trespass and not as acts of ownership.*—The right to a several fishery in part of a river claimed under a grant from the Crown which purported to give the fishing in that part and a further part is not disproved by showing that the Crown could not have granted the fishery in the further part of the river.

The grant of a fishery in certain waters may confer a several fishery without the use of the word "several." The grant of a weir (*gurges*) is a grant of the soil, not merely of the place where the weir stands, but in the absence of anything appearing to the contrary of the soil over which the river runs and upon which there is the right to construct weirs for the purpose of taking fish.

A right of way along the banks of a non-tidal river for the purpose of fishing may be appendant or appurtenant to a right of several fishery in the river. The *dictum* of Lord Coke (Co. Litt. 121*b*) that an incorporeal hereditament cannot be appendant or appurtenant to an incorporeal hereditament not followed. The true test is whether the principal and adjunct so agree in nature and quality as to be capable of union without incongruity.—HANBURY *v.* JENKINS, *Ch.D. Buckley, J.*, 615.

3. *Ship—Oyster beds—Property in oysters—Sea Fisheries Act*, 1868 (31 & 32 *Vict. c.* 45), *ss.* 51, 53—*Jurisdiction—Action* in rem—"*Damage done by any ship*"—*Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *ss.* 7, 35.—The plaintiffs, owners of oyster-beds at the mouth of a navigable river, brought an action *in rem* against the defendants, as owners of a vessel, for so negligently navigating her as to ground on the property of the plaintiffs, and thereby do damage to their oysters and oyster-beds.

Held, that the damage was "done by a ship" within the meaning of section 7 of the Admiralty Court Act, 1861, and therefore the action would lie. Secondly, that as the damage was not done by grounding in the ordinary course of navigation, or without notice of the existence of the oyster-beds, the defendants were liable for the negligence of those in charge of their vessel; and, thirdly, that as the plaintiffs had property in the soil, and by section 51 of the Sea Fisheries Act, 1868, in the oysters, they were entitled to enforce their claim for damage not only in respect of the disturbance of the beds, but also in respect of the destruction of the oysters.—"SWIFT," THE, *P.D. & Ad.D.*; [1901] P. 168; 70 L. J. P. 47.

FIXTURES:—

Tenant for life and remainderman—Tapestry.—Trade fixtures and articles affixed to the freehold for purposes of ornamentation are exceptions to the rule, "*Quicquid plantatur solo, solo cedit*," equally in the case of a landlord and tenant and in the case of a tenant for life and remainderman.

Where tapestry had been affixed by a tenant for life to the walls of a mansion-house, it was held that the affixing was only for the better enjoyment of the tapestry, and not for the purpose of increasing the value of the freehold. Consequently, the legal personal representatives of the tenant for life were entitled to the tapestry as against the remainderman.

D'Eyncourt v. *Gregory*, 15 W. R. 186, L. R. 3 Eq. 382, and *Norton* v. *Dashwood*, 44 W. R. 680, [1896] 2 Ch. 497, commented on.—DE FALBE, RE, WARD v. TAYLOR, *C.A.*, 455; [1901] 1 Ch. 523; 70 L. J. Ch. 286; 84 L. T. 273.

See also Landlord and Tenant, 3; Mortgage, 3.

FOOD and DRUGS.—See Adulteration.

FRAUDS, STATUTES of:—

1. *Contract—For a year from day following—An agreement not to be performed within a year—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—A hiring agreement for a year from the day after that upon which the agreement is made is an agreement "not to be performed within the space of one year from the making thereof" within section 4 of the Statute of Frauds, and therefore it cannot be enforced unless there is a note or memorandum in writing of it signed by the party to be charged.—DOLLAR v. PARKINGTON, *K.B.D.*; 84 L. T. 470.

2. *False representation—Representation as to credit of another person—Company—Signature by agent—Statute of Frauds Amendment Act*, 1828 (9 *Geo.* 4, *c.* 14), *s.* 6.—A limited company incorporated under the Companies Acts comes within section 6 of 9 Geo. 4, c. 14, and is therefore not liable for a false representation signed by an agent of the company as to the credit of another person.—HIRST v. WEST RIDING UNION BANKING CO., *C.A.*, 715.

3. *Marriage settlement—Mistake—Parol evidence—Non-execution of power—Rectification—29 Car.* 2, *c.* 3, *s.* 4.—In an action for the rectification of a marriage settlement, parol evidence of a mistake made in drawing up the settlement was offered.

Held, that the Statute of Frauds was no valid defence, as such an action was not one seeking "to charge any person upon any agreement made upon consideration of marriage" within section 4 of the statute.—JOHNSON v. BRAGGE, *Ch.D. Cozens-Hardy, J.*, 198; [1901] 1 Ch. 28; 70 L. J. Ch. 41; 83 L. T. 621.

4. *Specific performance—Alternative offers—Verbal acceptance—Agreement for yearly tenancy.*—Specific performance will be decreed of a verbal and written acceptance of one of two alternatives contained in a duly signed offer, if the offer accepted can be identified, and of an agreement to let on a yearly tenancy.—LEVER v. KOFFLER, *Ch.D. Byrne, J.*, 506; [1901] 1 Ch. 543; 70 L. J. Ch. 395; 84 L. T. 584.

See also Landlord and Tenant, 12.

FRIENDLY SOCIETY:—

1. *Industrial insurance companies—Transfer of members—Notice to society whence a member is sought to be transferred—Collecting Societies and Industrial Insurance Companies Act*, 1896 (59 & 60 *Vict. c.* 26), *s.* 4 (2).—It is provided by section 4 (2) of the Collecting Societies and Industrial Insurance Companies Act, 1896, that, where a member of, or person insured with, a collecting society or industrial assurance company is sought to be transferred to any other such society or company, the society to which the member or person is sought to be transferred shall, within seven days of his application for admission to that society or company, give notice thereof in writing to the society or company from which he is sought to be transferred, and by section 14 (1) (*c*), failure to give such notice is made an offence under the Act.

A person insured with an industrial assurance company applied, through an agent, for admission to a collecting society. At the time of the application he was still insured in the company.

Held, that he was a person who was sought to be transferred to the society, and that the society, having failed to give the notices required by section 4 (2) of the above-mentioned Act, was guilty of an offence under section 14 (1) (*c*).—PEARL ASSURANCE CO. v. SCOTTISH LEGAL LIFE ASSURANCE SOCIETY, *K.B D.*, 493; [1901] 1 Q. B. 528; 70 L. J. K. B. 360; 84 L. T. 153.

2. *Life policy—Assignment—Mortgage by deposit.*—Policies of life insurance issued by a friendly society constituted under the Friendly Societies Acts, 1875-1896, are not assignable otherwise than by nomination according to the provisions of those Acts. Consequently, the mere deposit of a policy to secure a loan, unaccompanied by the nomination of the lender or his nominee, will not create a valid charge on the policy moneys.—REDMAN, RE, WARTOR v. REDMAN, *Ch.D. Kekewich, J.*; 70 L. J. Ch. 669.

GAME:—

"*Entering or being, in the daytime, upon any land in search or pursuit of game*"—*Game Act*, 1831 (1 & 2 *Will.* 4, *c.* 32), *s* 30.—By section 30 of the Game Act, 1831, it is unlawful for any person to trespass by entering or being, in the daytime, upon any land in search or pursuit of game.

The appellant, having been convicted under this section, on appeal contended that the conviction was bad, because he went upon the land for the purpose of raising a question of right, and no evidence was offered that he had gone upon the land with intent to search for or kill game at the time.

Held (dismissing the appeal), that the justices were right in convicting, and that the words "search" and "pursuit" in the section could not be limited to searching and pursuing with an intent to kill at the time.—STIFF v. BILLINGTON, *K.B.D.*, 486; 84 L. T 467.

GAMING:—

1. *Betting—Advertisement of house kept for purpose of receiving money in connection with betting—Betting House Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 7—*Betting House Act*, 1874 (37 *Vict. c.* 15), *s.* 3.—By an agreement entered into by the plaintiff and the defendants the defendants agreed to print and publish a certain paper on the plaintiff's behalf every week on certain terms and conditions, one of which was that they were only to be called on to fulfil the contract if the said newspaper contained matter which was neither libellous nor illegal. The plaintiff called upon the defendants to print and publish for circulation in England with the said newspaper and as part of it an advertisement relating to a "coupon competition"—that is to say, of a promise by the plaintiff to pay a sum of money to such persons as should correctly guess the result of a certain horse-race then shortly about to be run, and should write their guesses upon certain forms, called "coupons," which were issued with each number of the newspaper, and should return the coupons so filled up to the plaintiff's office in Holland, together with the sum of one penny in respect of each guess made. The defendants refused to print the advertisement, contending that the publication was illegal and constituted an offence against the Betting Acts, 1853 (section 7) and 1874 (section 3). The plaintiff thereupon brought an action to recover damages from the defendants for breach of contract.

Held, that the publication of the said advertisement did not constitute an offence under section 7 of the Betting House Act, 1853, or section 3 of the

Betting House Act, 1874, as the advertisement did not relate to a house to which persons physically resorted for the purpose of betting.—STODDART *v.* ARGUS PRINTING CO., *K.B.D.*, 666; [1901] 2 K. B. 470; 70 L. J. K. B. 711.

2. *Betting—Criminal law—Keeping an office for receiving money in consideration of promise to pay on the event of a horse-race—"Coupon competition"—Betting Act*, 1853 (16 & 17 *Vict. c.* 119), *s.* 1.—The defendant was the proprietor of a newspaper published at her office, and sold for one penny, each number of which contained advertisements of a "coupon competition" and a number of forms or coupons to be cut out and used by intending competitors and sent to the defendant's office. Each competitor inserted in one or more coupons the names of horses which he thought likely to win or obtain places in a specified race or races, and a large money prize was paid by the defendant, after the races had been run, to the competitors whose guesses were correct. One coupon could be filled up and sent in free of charge by any purchaser of the newspaper; with each other coupon a penny stamp had to be sent to the defendant's office. Large sums were received by the defendant in this way.

The defendant was convicted upon an indictment under section 1 of the Betting Act, 1853, charging her with having kept an office for the purpose of receiving money as the consideration for a promise to pay money on an event or contingency of or relating to a horse-race.

Held, that whether or not the transaction amounted to betting the defendant had committed an offence under the section and was rightly convicted.—REG. *v.* STODDART, *C.C.R.*, 173; [1901] 1 Q. B. 177; 70 L. J. Q. B. 189; 83 L. T. 538.

3. *Betting—Money paid in respect of gaming contract—Money advanced as partnership capital for purpose of betting—Gaming Act*, 1892 (55 & 56 *Vict. c.* 9), *s.* 1.—V. advanced £500 for the purpose of working a scheme invented by the defendant for making money by backing horses. The working of the scheme was left to the defendant, who undertook to be responsible for half the amount advanced. Profits were to be divided between V. and the defendant. The whole sum having been lost, the defendant gave V. promissory notes for £250. An action on the notes was brought by the trustee in V.'s bankruptcy. At the trial the judge found that the sum of £500 was in the nature of partnership capital.

Held, that the sum advanced by V. was money paid "in respect of" a gaming contract, and that, therefore, by reason of the Gaming Act, 1892, the action was not maintainable.

Tatam v. *Reeve*, 41 W. R. 174, [1893] 1 Q. B 44, approved. — SAFFERY *v.* MAYER, *C.A.*, 54; [1901] 1 Q. B. 11; 70 L. J. Q. B. 145; 83 L. T. 304.

4. *Betting—Principal and agent—Bets lost but unpaid by agent—"Any sum of money paid."*—The words "any sum of money paid" in section 1 of the Gaming Act, 1892, are not confined to money actually paid, but apply also to money to be paid; and a betting agent who has lost, but not paid, bets made on behalf of his principal cannot maintain an action against his principal to recover his unpaid losses or to indemnify him against his liability to pay them. — LEVY *v.* WARBURTON, *K.B.D.*; 70 L. J. K. B. 708.

See also Bankruptcy, 3.

GAS.—See Nuisance, 1.

HACKNEY CARRIAGE.—See Local Government, 6.

HIGHWAY:—

1. *Dangerous locality—Removal of protecting fence—Misfeasance—Liability of highway authority—Local government.*—A fence had been formerly erected, by the then existing highway authority, to protect the public using a highway which was dangerous, owing to its liability to be flooded by a stream that ran by the side of the road. The stream was diverted, but the ditch where the former bed of the stream had been was still liable to be filled in time of flood, and the water then flowed over the road. After the fence had been in existence for a number of years, the defendants, adopting the report of their surveyor that the fence was in bad repair, that it was no longer necessary, and that all that was required was the erection of a short length at each end, ordered that the work should be done. The fence was removed, and three weeks later and before any new fence had been put up the road was flooded. A man driving along the road drove into the ditch and was drowned. In an action by his administratrix to recover damages for his death, the jury found that the removal of the fence under the circumstances, and in the way in which it had been done, was inconsistent with reasonable regard for the safety of persons using the road. Judgment was given for the plaintiff. On appeal,

Held, that the defendants were liable.—WHYLER *v.* BINGHAM RURAL COUNCIL, *C.A.*; [1901] 1 Q. B. 45; 70 L. J. Q. B. 207; 83 L. T. 652.

2. *Dedication to public use—Obstructions—Embayments—User by public—Cleaning and repairing by highway authority—Evidence of dedication—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 69.—A building erected in 1869 upon land leased from the corporation of L., who were the owners of the freehold, was built with recessed windows or embayments on the ground floor and the main wall of the building on either side projected beyond the embayments, and overhung them above the windows, the embayments being some eleven inches deep. In 1899 the tenant of the house reconstructed these windows so as to cause them to project three inches beyond the main wall, and so as to fill up the embayments. During the period from 1869 till the reconstruction in 1899, the paving of the embayments was not distinguishable or marked off from the paving of the footway, and had been cleaned and repaired by the corporation, as the highway authority, at the same time as the paving of the footway, and the public were in the habit without any objection by any lessee of entering upon and passing in and out of the embayments, the windows of which were used for the exhibition of shop goods.

Upon an information against the tenant for causing an obstruction in the street by building so as to fill up the embayments,

Held, that neither the user by the public nor the fact that the paving of the embayments was not marked off from the paving of the footway, and was cleaned and repaired by the corporation as highway authority was any evidence of the dedication of the embayments to the public use as part of the highway, and that therefore no obstruction had been committed.—PIGGOTT *v.* GOLDSTRAW, *Q.B.D.*; 84 L. T. 94.

3. *"Drain"—Pouring water from highway on to adjoining land—Easement—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *s.* 67.—A pipe whereby rain-water from the surface of a highway is poured on adjoining land is not a "drain" such as is contemplated by section 67 of the Highway Act, 1835.

A right of way over a highway is not a dominant tenement to which an easement to pour rain-water through a pipe from the highway on to adjoining land can be attached. — ATTORNEY-GENERAL *v.* COPELAND, *K.B.D.*, 489; [1901] 2 K. B. 101; 70 L. J. K. B. 512; 84 L. T. 562.

4. *Land alongside road—Evidence of user—Presumption.*—An uninclosed strip of land, of varying breadth, adjoined a highway for the space of 300 yards. The road authorities had made no use of it, but the owner of the adjoining land had, as far as living memory went, exercised acts of ownership over it.

Held, that there was no presumption of dedication of the strip to the public; and even if there had been any such presumption, it was rebutted by the surrounding circumstances and by the evidence. —BELMORE *v.* KENT COUNTY COUNCIL, *Ch.D. Cozens-Hardy, J.*, 459; [1901] 1 Ch. 873; 70 L. J. Ch. 501; 84 L. T. 523.

5. *Light locomotive—Excessive speed of driving on highway—"Having regard to the traffic on the highway"—Motor tricycle—Light Locomotives on Highways Order*, 1896, *art.* 4 (1).—Article 4 (1) of the Light Locomotives on Highways Order, 1896, provides that a person driving or in charge of a light locomotive when used on a highway shall "not drive the light locomotive at any speed greater than is reasonable and proper, having regard to the traffic on the highway."

Held, that, in order to constitute an offence under this section, it is not necessary to prove that any vehicle or person was interrupted, interfered with, incommoded, or affected by the speed at which the accused was driving the light locomotive.—SMITH *v.* BOON, *K.B.D.*, 480; 84 L. T. 593.

6. *New or substituted highway—Formalities required by Highway Act*, 1835—*Presumption of compliance with, after lapse of time—Highway Act*, 1835 (5 & 6 *Will.* 4, *c.* 50), *ss.* 23, 84, 85.—Upon the hearing by a court of summary jurisdiction, under section 8 of the Private Street Works Act, 1892, of objections to the proposals of an urban sanitary authority as to works to be executed by them under the Act, on the ground that the street was a highway repairable by the inhabitants at large, it appeared that in 1842, pursuant to a resolution of the vestry, a new road was substituted for an older public highway repairable by the inhabitants at large; the old highway was then closed, and from that date the new road had been used by the public as a highway. Upon one occasion the new road had been repaired by the surveyor for the parish, though it was uncertain whether in so doing he had acted in his capacity of surveyor. No evidence was given that the formalities required by section 23 of the Highway Act, 1835, in the case of new highways, or by sections 84 and 85 in the case of substituted highways, had been complied with.

Held, that there was evidence upon which the justices might properly find that the new road was a highway repairable by the inhabitants at large, and that the formalities required by the Highway Act, 1835, might after the lapse of time be presumed to have been complied with.—LEIGH URBAN COUNCIL *v.* KING, *K.B.D.*; [1901] 1 K. B. 747; 70 L. J. K. B. 313; 83 L. T. 777.

7. *Obstruction—Indictment—Practice—Verdict of acquittal — Motion to stay entry of judgment—Misdirection.*—Where a verdict of not guilty has been returned upon an indictment for an obstruction to a highway, the court will not order the entry of judgment to be stayed, on the ground of a misdirection of the judge before whom the indictment was tried, for the purpose of giving an opportunity for the question to be raised again upon a fresh indictment.

Rex v. *Inhabitants of Wandsworth*, 1 B. & Ald. 63, considered.—REX *v.* NORTH-EASTERN RAILWAY CO., *K.B.D.*, 524; 70 L. J. K. B. 548; 84 L. T. 502.

8. *Repairs—Extraordinary traffic—Person "by or in consequence of whose order" traffic has been conducted—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-section* 1 (c).—The defendants, on the 2nd of March, 1898, entered into a contract with a firm of contractors to carry out for them certain building operations. On the 16th of March, 1898, they entered into another building contract with another firm. The site of both buildings was in the plaintiffs' district, and the works involved the carriage of exceptionally heavy traffic along certain roads within the plaintiffs' highway district, and they were put to extraordinary expenses in repairing them. The work under the first contract was completed on the 5th of April, 1899, and under the second contract on the 23rd of September, 1899. The writ in this action was issued on the 22nd of December, 1899.

Held, that the defendants were persons "by or in consequence of whose order" the traffic was conducted within the meaning of section 12 of the Locomotives Act, 1898, and were liable for the extraordinary expenses incurred by the plaintiffs in repairing the roads, but that the proceedings to recover the amount in respect of the damage caused in carrying out the first contract were too late, having been commenced more than six months after the completion of that contract.—EPSOM DISTRICT COUNCIL *v.* LONDON COUNTY COUNCIL, *Q.B.D.*, 302; [1900] 2 Q. B. 751; 83 L. T. 284.

9. *Tramway crossing — Nuisance — Sanction of authority—Evidence—Injunction.*—The soil of roads is vested in a highway authority simply to the extent necessary for the purpose of preserving and maintaining and using them as roads. A highway authority has no general power to break up a road; so that

Permission given by a highway authority for a tramway to cross a highway is of no effect when in the opinion of the court the crossing is a nuisance.

Semble, otherwise, if no nuisance is proved.

The principles upon which the court proceeds to discover whether or not a nuisance has been committed on a highway explained.

Where the relators join the Attorney-General as co-plaintiffs they are entitled on proof of special damage to an injunction in their own right, although they could not have succeeded if the Attorney-General had not.—ATTORNEY-GENERAL *v.* BARKER, *Ch.D. Farwell, J.*; 83 L. T. 345.

See also Local Government, 7; Metropolis, 7; Nuisance, 2.

INCLOSURE:—

Private road—Pasturage—Ownership of soil—User in excess of award—Prescription—Presumption of lost grant.—By an award made under an Inclosure Act of 1812 it was provided that all the grass and herbage which should from time to time grow upon all the private roads therein set out should belong to and be the property of the surveyor of the highways for the time being, to be by him let annually for the depasturing of sound and healthy sheep, but of no other cattle or stock whatever, at the best rent or rents that could reasonably be obtained for the same.

Plaintiff was the occupier of a farm, allotted under the award, on one side of a private road. Since 1846 the pasturage of this private road, along with other roads, had been let out annually pursuant to directions given at public vestry meetings, and with conditions (contrary to the restriction of the award) providing a varying limit as to the number of cattle or horses which might be grazed upon this road. Plaintiff was party to many such lettings. On a claim by him for an injunction restraining the rural district council (the successors of the surveyor of highways) from so letting or using the road,

Held, that, there having been an open and regular and unchallanged dealing with the herbage of the road in a manner and to an extent not authorized by the award, and which was apparently to the advantage of the owners and occupiers of the allotted lands, a lawful origin must be presumed from the long usage, based on a lost grant from the owner of the soil.

Held, that, having regard to the Inclosure Act, the soil of the road became vested in the owners of the adjoining allotments, subject to a right of way and to the right of herbage.

Poole v. *Huskinson*. 11 M. & W. 827, and *Haigh* v. *West*, [1893] 2 Q. B. 19, 41 W. R. Dig. 87, referred to.—NEAVESON *v.* PETERBOROUGH DISTRICT COUNCIL. *Ch.D. Cozens-Hardy, J.*, 154; [1901] 1 Ch. 22; 70 L. J. Ch. 35; 83 L. T. 496.

INCOME TAX ACTS.—See Inland Revenue, 12-15.

INDUSTRIAL SOCIETY:—

1. *Winding up—Recovery of debts from members—Lien on shares—"Set off"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 164—*Industrial and Provident Societies Act*. 1893 (56 & 57 *Vict. c.* 39), *s.* 23—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 154.—By section 23, sub-section 1, of the Industrial and Provident Societies Act, 1893, it is provided that "all moneys payable by a member of a registered society shall be a debt due from such member to the society . . . ." and by sub-section 2 "a registered society shall have a lien on the shares of any member for any debt due to it by him, and may set off any sum credited to the member thereon in or towards the payment of such debt." An industrial society, as long as it is carrying on business, may *bonâ fide* avail itself of the provisions of the above sub-section 2, notwithstanding that the society is at the time in financial difficulties and is wound up within three months of such time.—GWAWR-Y-GWEITHYR INDUSTRIAL SOCIETY, RE, DOVEY *v.* MORGAN, *K.B.D*, 655; [1901] 2 K. B. 477; 70 L. J. K. B. 614; 84 L. T. 824.

See also Friendly Society, 1.

INFANT:—

1. *Accumulation—Maintenance—Mansion-house—Subscription to charities.*—Where a testator directs payment of an annual sum for the maintenance and education of a tenant for life, or in tail, and directs accumulation of the residue for his benefit if he shall attain full age, and, in the event of his death, on specified trusts,

The court has jurisdiction to allow the expenditure of a larger annual sum if, on the true construction of the will, there is a paramount intention which authorizes it.—WALKER, RE, WALKER *v.* DUNCOMBE, *Ch.D. Farwell. J.*, 394; [1901] 1 Ch. 879; 70 L. J. Ch. 417; 84 L. T. 193.

2. *Contract—Necessaries.*—In the case of an infant who was entitled to an income of between £7 and £8 a week, during his minority, such things as (*a*) cartridges, (*b*) champagne, and (*c*) jewellery presented to a lady to whom the infant was engaged without the consent of his guardian, but who did not become his bride, will not be allowed as necessaries.—HEWLINGS *v.* GRAHAM, *Ch.D. Joyce, J.*; 70 L. J. Ch. 568; 84 L. T. 497.

3. *Mortgage—Mortgagee in possession—Right to recover possession—Infants' Relief Act*, 1874 (37 & 38 *Vict. c.* 62)—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *ss.* 21, 38.—A mortgagor is not entitled to recover possession of land which has been taken by the mortgagee without repaying the advance, even though the mortgage was made by the mortgagor while an infant.—THURSTAN *v.* NOTTINGHAM BUILDING SOCIETY, *Ch.D. Joyce, J.*, 56; [1901] 1 Ch. 88; 83 L. T. 424.

INJUNCTION.—See Divorce, 3; Highway, 9; Nuisance, 3; Practice, 22, 23; Trade Name, 2, 3; Trade Union, 1.

INLAND REVENUE:—

1. *Corporation duty—Real property—"Annual value, income, or profits"—Inland Revenue Act*, 1885 (48 & 49 *Vict. c.* 51), *s.* 11.—The Surrey County Cricket Club, an unincorporated body of persons, was possessed of real and personal property, the real property consisting of a building and land held under a lease for years, and used by them for the purposes of a cricket club. Their receipts included money paid as gate-money and other payments received from persons admitted to view the cricket matches played on the ground. The club was carried on at a profit.

Held, that the gate-money and other payments received from the public were not "annual value, income, or profits of the property" within section 11 of the Inland Revenue Act, 1885; that the annual value of the real property should be arrived at in the same way as upon an assessment of annual value made for the purposes of the property tax under Schedule A of the Income Tax Act, 1842, and that the club were entitled to include the estimated cost of repairs as a permissible deduction from that annual value.—SURREY COUNTY CRICKET CLUB, RE, *K.B.D.*; [1901] 2 K. B. 400.

2. *Estate duty—Interest in expectancy—Sale or mortgage—Value of property passing on death of tenant for life—Deduction—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 21, *sub-section* 3.—The petitioner, being then a tenant in tail in remainder, by indenture executed before the date of the Finance Act, 1894, created, for good consideration, an annuity or clear yearly rent-charge, charged upon and to issue out of the settled property, with power to enforce payment by entry, distress, and sale. On the death of the tenant for life in 1896, the petitioner claimed (1) to deduct from the value of the property passing to him on the death the capitalized value of the annuity, on the ground that it represented the sale of an interest in expectancy, on which, by section 21, sub-section 3, of the Finance Act, 1894, no estate duty was payable; or (2), in the alternative, if the transaction was not a sale, but a mortgage, that, under the same section, estate duty was only payable on the value of the equity of redemption.

Held, that the transaction was not a sale, but a mortgage; and that estate duty was payable by the petitioner on the whole value of the settled property without any deduction in respect of the value of the annuity.—VERNON, RE, *Q.B.D.*, 192; [1901] 1 Q. B. 297; 70 L. J. Q. B. 202; 83 L. T. 535.

3. *Estate duty—Policy of life insurance—Settled*

property—Finance Act, 1894 (57 & 58 *Vict. c.* 50), *ss.* 1, 2, 3.—A. was tenant for life of certain estates, and B., his son, was tenant in tail in remainder. A. had effected several mortgages on his life interest to secure payment of certain debts, and he had also effected several policies on his life by way of further security. A family arrangement was entered into, under which B. concurred in the execution of a disentailing deed, and a further deed of resettlement was executed by A., B., and certain trustees. Under the said arrangement a sum of money was raised by way of mortgage on the estates to pay off A.'s incumbrances, and the aforesaid policies were assigned to the said trustees, who were to receive all moneys (if any) which should, during the life of A., become payable under any of the policies and apply the same towards the discharge of the mortgages, and A. undertook, out of the income of his life estate, to pay the premiums on the policies and the interest on the mortgage. The residue of the income was to be paid, as to two-thirds to A., and as to one-third to B. On the death of A. in 1898, the trustees received all the moneys due under the policies and paid the same to B.

Held, that, on A.'s death, B. was liable under the Finance Act, 1894, to pay estate duty on the policy moneys, they being an "interest purchased or provided by the deceased" within the meaning of section 2, sub-section 1 (*d*).—ATTORNEY-GENERAL *v.* HAWKINS, *Q.B.D.*, 320; [1901] 1 Q. B. 235; 70 L. J. Q. B. 195.

4. *Estate duty—property passing on death—Devise by father to son—Death of son in lifetime of father—Payment of estate duty in respect of death of father—Liability to further estate duty in respect of death of son—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 33—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (1) (a).—A father by his will devised freehold property to his son, who died in the lifetime of the father, leaving a daughter who was living at the death of the father. By virtue of section 33 of the Wills Act, 1837, the devise did not lapse, but took effect as if the son had survived the father. The son had by his will devised his residuary estate to trustees. Estate duty was duly paid on the devised freehold property as being property which passed on the death of the father.

Held, that estate duty was also payable on the devised freehold property as being property which passed on the death of the son.

Judgment of Darling and Channell, JJ. (48 W. R. 205, [1901] 1 Q. B. 372), affirmed.—SCOTT, RE, *C.A.*, 178; [1901] 1 Q. B. 228; 70 L. J. Q. B. 66; 83 L. T. 613.

5. *Estate duty—Settled property—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2 (a), *and* 5, *sub-section* 2.—A wife on her marriage settled certain funds, whereby a life interest was given to her husband followed by a life interest to herself, with an absolute reversion to herself. She predeceased her husband, and estate duty was paid on the principal value of her settled property.

Held, that by section 5, sub-section 2, of the Finance Act, 1894, upon the husband's death estate duty was not again payable on the settled funds.

Semble, that no estate duty was payable in respect of the husband's life interest.

Judgment of Rigby, L.J., in *Attorney-General* v. *Dodington*, 45 W. R. 657, [1897] 2 Q. B. 373, approved.

Decision of the Court of Appeal in Ireland, [1900] 2 Ir. R. 400, affirmed.—INLAND REVENUE COMMISSIONERS *v.* PRIESTLEY, *H.L.*, 657; [1901] A. C. 208; 70 L. J. P. C. 41; 84 L. T. 700.

6. *Estate duty—Succession duty—Property situate abroad—Disposition by foreigner domiciled abroad—Gift to English company on trust for foreign beneficiaries—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2—*Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 16, 44.—A foreigner domiciled abroad, by a deed made in the English language and in English form, but executed abroad, gave to the defendants, an English company registered under the Companies Acts, and having its registered office in London, certain stocks, shares, and securities on the terms that the defendants would, during the life of the donor, permit him to receive the income thereof, and after his death would apply the said stocks, shares, and securities for the benefit of Russian Jews generally, and principally for the promotion of their emigration and settlement in North and South America and other countries, which was the object for which the company had been formed. The stocks, shares, and securities were duly transferred by direction of the donor to the account of the defendants. The defendants, under their articles of association, carried on business in Paris, but the annual general and other meetings were held in London. The defendants paid the income of the property to the donor during his life. At the date of his death the greater part of the property was situate abroad, and only a small portion in England.

Held, that, the deed being an English deed enforceable by the English courts, all the property comprised therein was property to which section 2 of the Succession Duty Act, 1853, applied; and that the defendants were therefore liable to pay estate duty and succession duty thereon.

Judgment of Ridley and Darling, JJ. (*ante*, p. 59, [1900] 2 Q. B. 556), affirmed.—ATTORNEY-GENERAL *v.* JEWISH COLONIZATION ASSOCIATION, *C.A.*, 230; [1901] 1 Q. B. 123; 70 L. J. Q. B. 101; 83 L. T. 561.

7. *Estate duty—Settlement estate duty—Incidence—Will—Contingent legacies and annuities—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 5, 7, 9, 14, 22—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 14.—A testator by his will gave certain contingent legacies and annuities, and directed that they should be primarily charged upon and payable out of his personal estate, but, if this was insufficient, he charged his real estate in aid, but not in exoneration, of the personal estate; and, after devising his real estate in strict settlement he declared that, if his residuary personal estate should be insufficient for payment of funeral and testamentary expenses, debts, legacies, and annuities, the trustees might raise the deficiency by mortgage of the real estate, but so that the annuities should be paid out of rents and profits and not by raising a capital sum to provide for the same, and he charged the residuary personalty with the payment of the legacies and annuities, and directed that the ultimate residue of the personalty was to be invested and was to follow the limitations of the real estate. The executors had paid estate duty and settlement estate duty in respect of the contingent legacies and annuities, but there was a probability that the personalty would be insufficient to pay the funeral and testamentary expenses, debts, legacies, and annuities.

Held, that the contingent legacies were to be treated as settled, and that the settlement estate duty must be borne by the legatees, as in *In re Maryon-Wilson*, 48 W. R. 338, [1900] 1 Ch. 565; and that, as to the annuities, the decision in *Attorney-General* v. *Owen*, [1899] 2 Q. B. 253, 47 W. R Dig. 73, applied to personalty, and therefore

the annuitants must bear the proper proportion of the settlement estate duty, in accordance with the rule established in *In re Parker-Jervis, Salt* v. *Locker*, 47 W. R. 147, [1898] 2 Ch. 643.—ST. ALBANS (DUKE), RE, LODER *v.* ST. ALBANS, *Ch.D. Stirling, J.*, 74; [1900] 2 Ch. 873; 69 L. J. Ch. 863.

8. *Estate duty—Trust property—Income to children subject to annuity to widow—Division on widow's death—Testator died before* 1894—*Time when property passed—Finance Act*, 1894 (57 & 58 *Vict. c* 30), *s.* 10. —A testator, who died in 1892, by his will gave his real and personal estate to trustees on trust to invest, and out of the income of the invested fund to pay an annuity to his wife and to pay the residue of the income of the said trust fund during his widow's life to his eight children; and after his widow's death, if the trust fund exceeded £9,600, to pay eight-ninths of such excess to his eight children in equal shares, and the remaining one-ninth of such excess to the children of a ninth child who had predeceased him. The testator's widow died in 1900.

Held, that the testator's estate (save one-ninth of the excess above £9 600), subject to the widow's annuity, passed to his children upon his death, and that estate duty was consequently not payable on the death of the testator's widow.—TOWNSEND, RE, *K B.D.*, 600; [1901] 2 K. B. 331; 70 L. J. K. B. 764; 84 L. T. 714.

9. *Estate duty—Will—Appointed fund—Residue.*—The estate duty on a fund appointed by a will made in execution of a testamentary power of appointment, must be borne by the appointed fund and not by the residue.—MADDOCK, RE, *Ch.D. Kekewich, J.*; 70 L. J. Ch. 660.

10. *Estate duty—Will—Exercise of general power of appointment—Appointed fund—General residue —Property "passing to executor as such"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 9, *sub-section* 1.—Apart from any special direction by the testator a fund appointed by the testator under a general power of appointment is not property that passes to the testator's executor as such, and consequently the fund appointed and not the general residue must bear the estate duty payable in respect of such fund.

In re Treasure, 48 W. R. 696. [1900] 2 Ch. 648, and *In re Maddock*, (1901) W. N. 118, followed.

In re Moore. ante, p. 373, [1901] 1 Ch 691, not followed.—POWER, RE, ACWORTH *v.* STONE, *Ch.D. Byrne, J.*, 678.

11. *Estate duty—Will—Incidence of estate duty as between an appointed fund and residuary estate—Property passing to the executor as such—Finance Act*, 1894, *ss.* 6 (2), 9 (1).—A fund appointed by will pursuant to a general power of appointment is property which passes to the executor as such within the meaning of the Finance Act, 1894, so that, apart from a direction to the contrary in the will, the estate duty payable in respect of the fund is payable out of the general residuary estate of the deceased rather than out of the appointed fund.

In re Treasure, 48 W. R. 696. [1900] 2 Ch. 648, not followed.—MOORE *v.* MOORE. *Ch.D. Buckley, J.*, 373; [1901] 1 Ch. 691; 70 L. J. Ch. 321.

12. *Income tax — Company — Profits or gains— Interest from foreign investments—Receipt in the United Kingdom—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100), *Schedule D, Fourth Case—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—An insurance society carried on their business in the United Kingdom, and, by means of local agents or managers, in foreign countries. The business was entire and indivisible, and was managed by a board of directors in London. The society possessed funds invested in foreign countries in which they did no business. The interest on these investments was either reinvested in those countries, remitted directly to other foreign countries for investment, or remitted to London. They also possessed funds invested in foreign countries in which they carried on business. The interest on these investments was either reinvested in those countries, applied in establishment and other charges in those countries, remitted direct to other foreign countries for investment or for the general purposes of the society, or remitted to London. Yearly accounts were prepared in which all the interest on investments in foreign countries was included, and out of the profits shown by the accounts a dividend was paid yearly to the shareholders. The surplus funds of the society divisible as profits were ascertained by actuarial valuation once in three years, and all the interest on investments in foreign countries was included in the triennial account.

Held, that all the interest on foreign investments was received in the United Kingdom within the meaning of the fourth case of section 100 of 5 & 6 Vict. c. 35, and was liable to income tax under Schedule D.—GRESHAM LIFE ASSURANCE SOCIETY *v.* BISHOP, *C.A.*; [1901] 1 Q. B. 153; 70 L. J. Q. B. 298; 83 L. T. 654.

13. *Income tax—Deductions—"Call of licences"— Necessary annual trade expense—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Schedule D.*—Expenses incurred by brewers in applying for new and additional licences for houses owned and leased by them, including payments made to owners of public-houses for the surrender of licences in order to enable the brewers to obtain a new licence, cannot be deducted from the profits made by the brewers and assessable to income tax under Schedule D of the Income Tax Act. 1853.—SOUTHWELL *v.* SAVILL, *K.B.D.*, 682; [1901] 2 K. B. 349; 70 L. J. K. B. 815.

14. *Income tax—Deduction of tax from interest or annuities—"Payable out of profits or gains brought into charge to such tax"—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-section* 3.—The London County Council raised money on loan by the creation and issue of Metropolitan Consolidated Stock, which with the dividends and sinking fund were charged on the lands, rents, and property of the council, and in addition the stockholders had the security of the rates. In the year 1897-8 the council claimed exemption from income tax on rents received by them and on interest on advances by them to other public bodies, as having been paid out "of profits or gains already brought into charge."

Held, that section 24, sub-section 3, of the Customs and Inland Revenue Act, 1888, entitled them to do so, for the income tax assessed under the various schedules is one tax, and not a collection of taxes essentially distinct.

Decision of Court of Appeal (48 W. R. 294, [1900] 1 Q. B. 192) reversed.—LONDON COUNTY COUNCIL *v.* ATTORNEY-GENERAL, *H.L.*, 686; [1901] A C. 26; 70 L. J. Q. B. 77; 83 L. T. 605.

15. *Income tax—Profits accruing by reason of office —Voluntary grants by charitable fund.*—A clergyman is not assessable to income tax in respect of grants made to him as a beneficed incumbent by the council of a charitable fund for providing adequate remuneration for beneficed clergy, which council

reserves to itself the entire control over the apportionment of grants and the right to consider whether any such grant should be made; for such grants do not accrue to the clergyman by reason of his office within the meaning of section 146 of the Income Tax Act, 1842, Schedule E, although the holding of the office is a condition of his receiving the payment.—HERBERT *v.* MCQUADE, *K.B.D.*; 70 L. J. K. B. 725; 84 L. T. 661.

16. *Inhabited house duty—Assessment—"Full and just yearly rent"—Poor rate—Licensed house—Competition of brewers—"Tied" houses*—43 *Geo.* 3, *c.* 161, *s.* 10—48 *Geo.* 3, *c.* 55. *Sched. B, r.* 8—*House Tax Act*, 1851 (14 & 15 *Vict. c.* 36), *ss.* 1, 2.—In assessing premises, situated outside the metropolitan area, for inhabited house duty, regard need not be had to the poor rate assessments where such assessments are not based upon the full rental value of the premises.

In assessing a public-house for inhabited house duty, a covenant entered into by the tenant to deal exclusively with his landlords, who were a firm of brewers, for exciseable and other articles, and covenants by the tenant to pay additional rent in any year in which he should deal for those articles with persons other than the landlords, and also in any year in which his indebtedness to the landlords should exceed a certain sum, should be taken into consideration.—WALKER *v.* BRISLEY, GRINTER *v.* FLEMING, *Q.B.D.*, 23; [1900] 2 Q. B. 735; 69 L. J. Q. B. 875; 83 L. T. 347.

17. *Inhabited house duty — Blocks of shops—Buildings used partly as shops and partly for residence of staff—House Tax Acts*, 1808 (48 *Geo.* 3, *c.* 55), *Schedule B, r.* 3, *and* 1851 (14 & 15 *Vict. c.* 36).—The appellants appealed against an assessment made upon certain blocks of buildings used by them partly as shops and partly for the residence for their staff.

Held, dismissing the appeal, that the blocks of premises were assessable to the Inhabited House Duty as a whole because the business part of the premises communicated with the residential part, and the fact that the communication was closed at night by iron doors made no difference.—MAPLE *v.* WILSON, *K.B.D.*, 670.

18. *Legacy duty—Heirlooms—Person chargeable—Absolute interest—Legacy Duty Act*, 1796 (36 *Geo.* 3, *c.* 52), *s.* 14.—A testator directed that certain chattels should be considered as heirlooms and enjoyed by the person or persons for the time being beneficially entitled to a certain mansion-house under the limitations of settlements whereby the mansion-house and certain estates were settled upon A. for life, with remainder to the eldest son of B. (who predeceased the testator) in tail male. A. and C. (B.'s eldest son) resettled the mansion-house and estates on A. for life, with remainder to C. for life, with remainders over, and assigned the chattels to the trustees of the resettlement in trust to allow them to devolve as heirlooms with the mansion-house and estates.

Held, that legacy duty became payable upon the death of A. in respect of the chattels, with the payment of which the trustees of the resettlement were chargeable, being persons having "an absolute interest therein" within the meaning of section 14 of the Legacy Duty Act, 1796.—ATTORNEY-GENERAL *v.* BRUCE, *K.B.D.*, 519; [1901] 2 K. B. 391; 70 L. J. K. B. 767.

19. *Stamp duty—Conveyance on sale—Sale of right not before in existence—Railway company—Statutory right to prevent working of minerals under railway—Payment of compensation to mine-owner—Receipt and undertaking to leave minerals unworked—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 78—*Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 60.—The owners of coal lying under a railway, having been required by the railway company, under section 78 of the Railways Clauses Act, 1845, to leave the coal unworked, and having received compensation therefor, signed a document acknowledging the receipt of the compensation money, and undertaking to leave the coal unworked and to do all things necessary for vesting the same in the railway company.

Held, that the company was not chargeable with *ad valorem* stamp duty under section 60 of the Stamp Act, 1891, as the transaction between the parties was not a sale of a "right not before in existence."

Judgment of Darling and Phillimore, JJ. (48 W. R. 170, [1899] 2 Q. B. 652), affirmed.—GREAT NORTHERN RAILWAY CO. *v.* INLAND REVENUE COMMISSIONERS, *C.A.*, 261; [1901] 1 K. B. 416; 70 L. J. K. B. 336; 84 L. T. 183.

20. *Stamp duty—Family arrangement—Conveyance on sale—Consideration—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57.—By two deeds made between B. and H. (who was the heir to B.'s unsettled estates), after reciting that H. had undertaken the payment of a mortgage on the estates and that B. was indebted to H. in certain sums, it was witnessed that in pursuance of a family arrangement B. conveyed his unsettled estates to H. subject to the mortgages, and also certain specified chattels; but power was reserved to B. and H. to cancel, alter, or make void the family arrangement at any time.

Held, that the deeds were liable to *ad valorem* duty as being conveyances on sale.—BRISTOL (MARQUIS) *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.* 718; [1901] 2 K. B. 336; 70 L. J. K. B. 759; 84 L. T. 659.

21. *Stamp duty—Goodwill—Agreement executed in England—Sale of foreign business—"Property situate locally out of the United Kingdom"—Stamp Act*. 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.—For the purposes of the Stamp Act, 1891, an agreement for sale executed in this country by the purchasers is made in England.

The goodwill of a business situated and carried on abroad is "property locally situate out of the United Kingdom," and an agreement executed in England for the sale of such goodwill is excepted from duty under section 59, sub-section 1, of the Stamp Act, 1891.

Decision of Court of Appeal, [1900] 1 Q. B. 310, 48 W. R. Dig. 77 (Earl of Halsbury, L.C., dissenting), affirmed.—INLAND REVENUE COMMISSIONERS *v.* MULLER, *H.L.*, 603; [1901] A. C. 217; 70 L. J. K. B. 677; 84 L. T. 729.

22. *Stamp duty—Lease of tramways—Rent—Additional payments—Covenants "relating to the matter of the lease"—Assessability—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 77, *sub-section* 2; *Schedule*, "*Lease or Tack*," "*Bond or Covenant*."—The corporation of a borough in whom certain tramways were vested, under section 19 of the Tramways Act, 1870, and in consideration of the yearly rent and other payments reserved, demised to the appellants as lessees the right of user of the tramways for the conveyance of passengers for the term of twenty-one years, subject to the power of determination by the corporation in certain events.

The amount of rent payable, being 6½ per cent. on the cost of purchase, was to be £3,250 per annum; and the lessees were to pay, as from the

date of the certificate of the Board of Trade authorizing electric traction, £100 per annum per mile in lieu of repairing the roads, with the proviso that the sum so paid should not be less than £900 per annum; and the corporation were to repair and maintain the roads. A further uncertain sum was reserved as rent in certain contingencies. The lessees were to purchase from the corporation all their electrical energy, and were to pay the corporation, as from the date of the commencement of electric traction, for the electrical energy supplied at a certain specified rate, with the proviso that the sum so paid should not be less than £4,000 per annum. There was also a provision that the rent and the minimum sum of £900 per annum, but not the minimum sum of £4,000 per annum, might be recovered by distress and entry.

The commissioners having assessed the lease to *ad valorem* stamp duty under "Lease or Tack," No. (3) in the Schedule to the Stamp Act. 1891, on the rent of £3,250 plus £900; to a fixed duty of 10s. in respect of the rent which was uncertain; and to *ad valorem* duty on the minimum sum of £4,000 a year under "Bond, Covenant," &c., in the schedule; and there being no dispute as to the *ad valorem* duty on the rent of £3,250 per annum and the fixed duty of 10s.,

Held, that these minimum sums of £900 and £4,000 per annum were not assessable to *ad valorem* stamp duty under "Bond, Covenant, or Instrument," No. (1) in the schedule.

Held, also (Phillimore, J., dissenting), that these minimum sums of £900 and £4,000 per annum were not rent and were not assessable to stamp duty as rent under "Lease or Tack." sub-head (3), but that the covenants to pay the same were "covenants relating to the matter of the lease" within section 77 (2) of the Act, and were therefore exempt from further duty.—BRITISH ELECTRIC TRACTION CO. *v.* INLAND REVENUE COMMISSIONERS, *C.A.*; 84 L. T. 84.

23. *Stamp duty—"Marketable security"—Bond of foreign company—"Issue" in United Kingdom—"Offered for subscription" in United Kingdom—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-section* 1 (b) (i.) (ii.).—A scheme for the re-oganisation of an American railway company was prepared, by which it was proposed that an executive committee should be formed in America to carry out the scheme, that a new company should be formed in America to take over the undertaking of the old company, and that the new company should issue new bonds in order to take up the bonds of the old company and provide further capital for the new company.

The English holders of bonds of the old company were invited by circular to accept the scheme and to deposit their bonds with named depositaries in London, in exchange for which they would subsequently receive bonds of the proposed new company.

The scheme was carried out. The new company executed and delivered to the appointed trustee in America the stipulated number of new bearer bonds, which were duly certified by the trustee and then handed to the executive committee.

The executive committee had full power to deal with any of the new bonds, by sale, pledge, or otherwise, for the purposes of the scheme and for the uses of the new company, in its discretion and without accountability to the new company.

The new bonds in question were forwarded by the executive committee to the depositaries in London, by whom they were handed to the persons who had deposited bonds of the old company.

Held, that the new bonds given to the holders of old bonds in England were neither "issued" nor "offered for subscription" in England within the meaning of section 82, sub-section 1 (*b*) (i.) (ii.) of the Stamp Act, 1891.—BROWN *v.* INLAND REVENUE COMMISSIONERS, *C.A.*; 84 L. T. 71.

24. *Stamp duty—"Marketable security"—"Instrument to bearer . . . by means of which stock" is transferred—Finance Act.* 1899 (62 & 63 *Vict. c.* 9), *ss.* 4 (1) (2), 6.—A certificate for 4 per cent. debenture stock of a foreign railway certified that the appellant was the owner of a certain amount of such stock, and there was indorsed on such certificate a form of transfer signed by the appellant, the name of the transferee being left in blank. It was admitted that such certificates with the transfer in blank therein were by usage treated as sufficient for the purpose of effecting the sale in the stock markets of the United Kingdom of the stock referred to therein; but such stock was really transferable only in the books of the railway company upon production of such certificate. The debenture stock was share capital of the railway company, enabling the holder to vote at the election of directors, but it was secured or preferred under a trust deed which enabled the holders of the debenture stock, if the interest on their stock was not duly paid, to take the management of the railway out of the hands of the directors and vest it in a finance committee elected by themselves.

Held, that the certificate as indorsed was a marketable security within section 4 (1) of the Finance Act. 1899.—NOAKES *v.* INLAND REVENUE COMMISSIONERS, *Q.B.D.*; 83 L. T. 714.

25. *Stamp duty—"Property," interest in—Sale of benefit of contract—Agreement with regard to land situate out of United Kingdom—Property not situate out of the United Kingdom—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-section* 1.—By a contract dated the 25th of January. 1899, a foreigner resident in Roumania undertook to transfer to F. or his nominees a certain quantity of land, suitable for the erection of a sugar factory, to be situated in a certain locality in Roumania, but the exact situation of which was to be selected by F. or his nominees; he further undertook to procure a certain quantity of land in the same locality, and to cultivate thereon in a certain manner beetroot, which he was to supply for the purposes of the sugar factory at fixed prices.

By an agreement under seal dated the 14th of April, 1899, made in England, the benefit of the contract of the 25th of January, 1899, was sold to an English company.

Held, that the benefit of the contract of the 25th of January, 1899, was "property" within the meaning of section 59, sub-section 1, of the Stamp Act, 1891, and that it was not within the exception therein contained as being "property locally situate out of the United Kingdom"; and that an *ad valorem* duty was therefore payable on the agreement of the 14th of April, 1889.—DANUBIAN SUGAR FACTORIES (LIMITED) *v.* INLAND REVENUE COMMISSIONERS., *C.A.*; [1901] 1 Q. B. 245; 70 L. J. Q. B. 211; 84 L. T. 101.

26. *Stamp duty—Railway company—Increase of nominal share capital—Conversion of stock—Stamp Act,* 1891 (54 & 55 *Vict. c.* 39), *s.* 113.—The Midland Railway Co., in pursuance of a special Act, converted certain rent-charge stock and certain preference stock into stock of an increased nominal amount chargeable with interest at a correspondingly lower rate, and converted their ordinary stock into preferred and deferred ordinary stock, the

nominal amount of both the preferred and deferred stock being the same as the nominal amount of the original ordinary stock.

Held, that the increase in the nominal amount of the stock of the company was an "increase of the amount of nominal share capital" within the meaning of section 113 of the Stamp Act, 1891.

Judgment of Ridley and Darling, JJ. (*ante*, p. 138, [1900] 2 Q. B. 353), affirmed.—ATTORNEY-GENERAL *v.* MIDLAND RAILWAY CO., *C.A.*, 243; [1901] 1 Q. B. 220; 70 L. J. Q. B. 254; 84 L. T. 15.

27. *Stamp duty—Settlement—Instrument of appointment—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 6, *sub-sections* 1, 2; *First Schedule*, "*Settlement*"—*Exemption.*—By a deed of settlement dated the 26th of June, 1895, the settlor granted to trustees certain funds, and by a deed dated the 12th of December, 1896, certain other funds, upon trust for his five children, but so nevertheless that the share of each child should be held by the trustees upon trust to pay the income thereof to such child during his or her life, and after his or her death upon trust for such one or more of the others as such child should by will appoint, and in default of appointment for the other children in equal shares. It was further provided in the deed that the trustees should have power, on or subsequent to the marriage of any of the children, to revoke the trusts of the settlement and to declare, as they thought fit, new trusts by way of resettlement for the benefit of such child, or any wife or husband of such child, or such child's children or remoter issue, or the next-of-kin of such child, but not in favour of any other person or persons, and to transfer the funds to the trustees of such resettlement. These deeds were stamped with *ad valorem* duty as settlements.

By two deeds both dated the 10th of April, 1899, the trustees of the settlements of the 26th of June, 1895, and the 12th of December, 1896, revoked the trusts of those settlements so far as they concerned the share of C. E. H. R., one of the children, who was then about to be married, and declared that such share should, from and after the solemnization of the intended marriage, be held upon trust to pay the income thereof to C. E. H. R. during his life, and after his decease to transfer such share to the trustees of the marriage settlement of C. E. H. R., to be held by them upon the trusts declared in the marriage settlement. Each of these deeds were stamped with a duty of ten shillings.

By the marriage settlement, a deed of even date with the two last-mentioned deeds, it was provided that after the death of C. E. H. R. the trustees of the settlement should stand possessed of his share of the funds comprised in the settlements of the 26th of June, 1895, and the 12th of December, 1896, upon the trusts of the settlement, which were, as regards the husband's fund, to pay the income to the intended wife during her life, and after her death upon trust for the children or remoter issue of the intended marriage as the intending husband and wife jointly, or the survivor of them, should appoint, and in default of appointment in trust for the children in equal shares.

Held, that the marriage settlement was not as regards the share of C. E. H. R. in the funds comprised in the settlements of the 26th of June, 1895, and the 12th of December, 1896, exempt from the payment of settlement duty, either under the exemption under the heading "Settlement" in the schedule to the Stamp Act, 1891, or under section 106, sub-sections 1 or 2, of the Act.—HAMILTON-RUSSELL *v.* INLAND REVENUE COMMISSIONERS, *K.B.D.*, 569; [1901] 2 K. B. 342; 70 L. J. K. B. 715; 84 L. T. 716.

INSURANCE:—

1. *Bullion—Seizure by government of assured's country—Subsequent declaration of war—Insurance of property of enemy.*—Gold bullion, the property of a company registered and carrying on business in the Transvaal, was insured at Lloyd's during transit from the Transvaal to the United Kingdom by a policy which covered the usual risks of capture and detention. The gold, while in transit, was seized on the 2nd of October by the order of the Transvaal Government. At that date negotiations were proceeding between this country and the Transvaal which might result in war. On the 9th of October the Transvaal Government addressed an ultimatum to the British Government and declared war on the 11th of October. In an action on the policy, it having been agreed that the case was to be dealt with as if the war was over,

Held, by A. L. Smith, M.R., and Romer, L.J., Vaughan Williams, L.J., dissenting, that it was not contrary to public policy to allow the contract of insurance to be enforced, and that the underwriters were liable.

Judgment of Mathew, J. (48 W. R. 619, [1900] 2 Q. B. 339), affirmed.—DRIEFONTEIN CONSOLIDATED MINES *v.* JANSON, *C.A.*, 660; [1901] 2 K. B. 419.

2. *Life—Life assurance company—Grant of annuities in connection with tea dealing business—Life Assurance Companies Act*, 1870 (33 & 34 *Vict. c.* 61), *ss.* 2, 3.—N. & Co., tea dealers, in order to promote the sale of their tea, offered to every woman who should have become a widow since Christmas, 1897, and who since that date should have purchased not less than a specified quantity of tea per week for the last five consecutive weeks previously to her becoming a widow, a pension payable as long as she remained a widow, and they offered a similar pension to every woman who became a widow previously to Christmas, 1897, or previously to her commencing to purchase N. & Co.'s tea, provided she should have purchased a specified quantity of tea per week for ten years. Cards were issued to women who desired to qualify for a pension at a charge of 1d. The holder of a card entered the purchases of tea made by her, and the entries were checked from time to time by N. & Co.'s manager. Records of the purchases were also kept in N. & Co.'s books. By a trust deed N. & Co. undertook to pay to trustees a proportion of their profits for the purpose of forming a fund for the payment of this pension.

Held, upon these facts, that justices were justified in finding that N. & Co. carried on the business of "granting annuities upon human life," and were a life assurance company within the meaning of the Life Assurance Companies Act, 1870.—NELSON *v.* BOARD OF TRADE, *K.B.D.*, 590; 84 L. T. 565.

3. *Marine—"Actual collision with another vessel"—Fouling anchor in bed of river attached to ship—Liability of insurance corporation under policy.*—An insurance of a tug against damage arising from actual collision with another vessel, wharf, mooring, pier, or similar structure,"

Held to cover damage caused to the tug by striking upon an anchor in the bed of the river attached by a length of chain to a vessel.—MARGETTS *v.* OCEAN ACCIDENT CORPORATION, *K.B.D.*, 669; 70 L. J. K. B. 762.

4. *Marine—"Advances"—Security of freight—Freight payable* pro rata—*Insurance against total loss only—Construction of policy.*—The master of an Italian ship at Pensacola obtained from the plaintiffs an advance for disbursements, giving as

security a document by which he promised to pay £760 ten days after the arrival of the ship at Southampton, and pledged the ship and her freight. The plaintiffs effected an insurance with the defendants upon "advances valued £775" from Pensacola to Southampton, and expressed to be "free of all average." The ship was lost at the Azores but the cargo was saved, and by Italian law, subject to which the contract of affreightment was made, £790 freight *pro rata* was paid.

Held, that as there had not been a total loss of the freight, and therefore not a total loss of the charge on freight, the plaintiffs could not recover on the policy.—PRICE *v.* MARITIME INSURANCE CO., *C.A.*, 645; [1901] 2 K. B. 412; 70 L. J. K. B. 780.

5. *Marine—General average—Ship and cargo belonging to same owner—Sacrifice of mast—Liability of underwriters on cargo.*—In the case of an action on a policy of marine insurance on the cargo of a ship to recover a general average loss incurred by the cutting away of the mainmast under circumstances constituting a general average sacrifice, the fact that the vessel and the cargo both belonged to the plaintiffs is no defence to the action.

The Brigella, [1898] P. 189, 41 W. R. Dig. 92, dissented from.—MONTGOMERIE *v.* INDEMNITY MUTUAL MARINE INSURANCE CO., *Q.B.D.*, 221; [1901] 1 Q. B. 147; 70 L. J. Q. B. 45; 84 L. T. 57.

6. *Marine—Ship—Valued policy—Salvage and general average contribution—Real value of ship—Liability of underwriters.*—A ship was insured by a policy for £33,000, and was valued in the policy at £33,000. During the currency of the policy salvage services were rendered and general average expenses were incurred. For the purpose of the salvage award, and in making up an average statement, the value of the ship was taken to be £40,000.

Held, that the underwriters on the policy were only liable to pay to the owners 33-40ths of the amount due from the ship for salvage and general average.—BALMORAL STEAMSHIP CO. *v.* MARTEN, *Q.B.D.*, 137; [1900] 2 Q. B. 748; 83 L. T. 282.

7. *Marine—War risks—Blockade of port of destination—Ship returning to port of loading—Liability of underwriter for expenses.*—The plaintiffs effected a policy of insurance with the defendants upon 810 bags of rice by a vessel from Liverpool to any port in Cuba. The policy was expressed to be against "all consequences of . . . hostilities or warlike operations." The vessel sailed from Liverpool to Havana, and in the course of the voyage war was declared, and hostilities begun between the United States and Spain, and Havana was blockaded. On learning this at a port of call the master, under powers conferred on him by the bill of lading, refused to proceed with the voyage, and returned to Liverpool. The plaintiffs paid the freight and incurred other expenses.

Held, that the defendants were not liable on the policy as the plaintiffs' loss was due to a proper exercise by the master of his discretion.—NICKELS *v.* LONDON GENERAL INSURANCE CO., *Q.B.D.*; 70 L. J. Q. B. 29.

See also Sale of Goods, 2.

JOINT TENANCY:—

Settlement—Trustees—Tenancy in common—Assignment—Commensurate estates, legal and equitable—Merger.—A leasehold property settled by a testator on his two daughters in equal shares as tenants in common was, at their request, assigned by the trustee to them as joint tenants for the residue of the lease, they entering into a joint covenant with him to pay the rent, &c., and to indemnify him. One of the daughters having died.

Held, that the assignment created a joint tenancy, the original tenancy in common not raising a presumption against the merger of the equitable estate of such tenancy in common in the legal estate; the entirety, therefore, belonged to the surviving daughter.

The rule that one person cannot be trustee for himself (*Selby* v. *Alston*, 3 Ves. 339) applies also to a case of two or more absolute owners.—SELOUS, RE, THOMSON *v.* SELOUS, *Ch.D. Farwell, J.*, 440; [1901] 1 Ch. 921; 70 L. J. Ch. 402; 84 L. T. 318.

See also Will, 29.

JUSTICES:—

1. Certiorari—*Confirming authority, order of—Justices—Disqualification—Bias, likelihood of.*—The Corporation of Sunderland having, for the purpose of a street improvement, purchased certain premises licensed for the sale of intoxicating liquors, an agreement was entered into between the corporation and a brewery company, by which the company agreed to pay to the corporation a sum of money in the event of a licence being granted to the company for the sale of intoxicating liquors on certain premises belonging to them, and the corporation agreed to close the before-mentioned licensed premises, and not to make, or allow to be made, any application for a renewal of the licence in respect of them. Certain justices for the borough, who were also members of the borough council, had taken an active part in the council in support of the proposal that the before-mentioned agreement should be entered into by the corporation. These justices subsequently sat on the hearing of an application to the licensing committee on behalf of the brewery company for a licence in respect of their before-mentioned premises, which was granted. On the application to the confirming authority under the Licensing Act, 1872, for a confirmation of the grant of the licence, the same justices again sat to hear the application, which was granted. A rule *nisi* having been obtained for a *certiorari* to bring up and quash the order of the confirming authority on the ground of bias on the part of the before-mentioned justices, the Divisional Court discharged the rule on the authority of *Reg.* v. *Stockport Justices*, 60 J. P. 552.

Held, that a *certiorari* would lie to bring up the order of the confirming authority; and that, there being a real likelihood of bias on the part of the justices, the writ ought to be issued. The appeal was therefore allowed.—REX *v.* SUNDERLAND JUSTICES, *C.A.*; [1901] 2 K. B. 357.

2. *Justices' clerk—Power to appoint—Payment of salary—Fines and fees payable to county treasurer—Borough without separate commission of the peace—Justices' Clerks Act*, 1877 (40 & 41 *Vict.* c. 43), *s.* 5—*Municipal Corporations Act*, 1882 (45 & 46 *Vict.* c. 50), *ss.* 154, 159.—Courts of petty sessions cannot be held for a borough without a separate commission of the peace except as courts for the petty sessional division in which the borough is situate.

A separate clerk cannot be appointed by the justices usually acting in a borough in which petty sessions are so held, but the justices of the petty sessional division may appoint a separate clerk in respect of each place appointed for holding petty sessions in the division, under section 5 of the Justices' Clerks Act, 1877.

The salary of every clerk so appointed is payable by the county council; and the unappropriated fines and fees must be paid to the county treasurer.

—HUNTINGDON CORPORATION *v.* HUNTINGDON COUNTY COUNCIL, *K.B.D.*; [1901] 2 K. B. 257; 70 L. J. K. B. 755.

3. *Licensing law—Conviction—Continuing offence—Averment of commission of offence on different days.*—Motion *ex parte*, on behalf of B., the licensed occupier of a public-house, for a *certiorari* to bring up to be quashed a conviction of the said B. for having, on the 26th, 28th, 29th and 31st days of January, and the 1st, 4th, 5th and 6th days of February, 1901, permitted his premises to be used as a brothel, contrary to section 15 of the Licensing Act, 1872. The objection to the conviction was that it was bad on the face of it as being one conviction for eight separate offences committed upon eight separate and discontinuous days, whereas section 10 of the Summary Jurisdiction Act, 1848, provides that every information "shall be for one offence only and not for two or more offences."

Held, that, notwithstanding that the days mentioned in the conviction were not continuous, the offence stated was one continuing offence, and that the conviction was good.—BURNBY, EX PARTE, *K.B.D.*; [1901] 2 K. B. 458; 70 L. J. K. B. 739.

4. *Unsound meat—Exposure of for sale—Aiding and abetting exposure—Negligence—Sufficiency for conviction—Summary Jurisdiction Act*, 1848 (11 & 12 *Vict. c.* 43), *s.* 5—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 117.—Negligence on the part of a veterinary surgeon in making an examination and giving a certificate that meat which is in fact unsound is sound and healthy is not of itself sufficient to justify a conviction against the veterinary surgeon for aiding and abetting the exposing of the unsound meat for sale although such negligence in fact causes the exposure of the meat.—CALLOW *v.* TILLSTONE, *Q B.D.*; 83 L. T. 411.

See also Married Woman, 4-6.

LANDLORD and TENANT:—

1. *Agricultural holding—Compensation for improvements—Retrospective effect of statute—Agricultural Holdings (Scotland) Act*, 1883 (46 & 47 *Vict. c.* 62)—*Market Gardeners Compensation (Scotland) Act*, 1897 (60 & 61 *Vict. c.* 22), *s.* 4.—The Market Gardeners Compensation (Scotland) Act, 1897, is not retrospective, and does not entitle tenants under leases current at the commencement of the Act to compensation in respect of market garden improvements executed prior to the commencement of the Act.

Decision of Court of Session, [1900] 2 F. 1140.—SMITH *v.* CALLANDER, *H.L.*; [1901] A. C. 297; 70 L. J. P. C. 53; 84 L. T. 801.

2. *Distraint of patented article—Sale—*2 & 3 *Will. & Mary, c.* 5. *s.* 1—*Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 16—*Infringement of patent—Injunction.*—A patentee's right is distinct from the right of property in a chattel.

On a sale by a landlord under a distress, a purchaser only acquires such a chattel interest as the landlord could and did seize.

It is essential to a distress that the property distrained should be capable of physical possession.

A patent right is not a *chose in possession.* A *chose in action* is incapable of manual seizure.—BRITISH MUTOSCOPE, &c., CO. *v.* HOMER, *Ch.D. Farwell, J.*, 277; [1901] 1 Ch. 671; 70 L. J. Ch. 279; 84 L. T. 26.

3. *Fixtures—Removable fixtures—Fruit trees—Glasshouses—Compensation—Agricultural Holdings (England) Act*, 1883 (46 & 47 *Vict. c.* 61), *ss.* 3, 34, 54, 55, 60—*Market Gardeners Compensation Act*, 1895 (58 & 59 *Vict.* 27), *ss.* 3, 4, 6.—Where a market gardener has erected glasshouses for the purposes of his trade he may, in the absence of a covenant in his lease to the contrary, remove them as trade fixtures at the end of his tenancy.

Where a clause in a lease gives power to the tenant to convert meadow-land into an orchard, such a clause constitutes the consent in writing of the landlord required by section 3 of the Agricultural Holdings (England) Act, 1883, and entitles the tenant to claim compensation for orchard trees planted by him.

If the said Act is excluded by the lease, such exclusion is good as regards section 34 of the Act, and is not, to that extent, hit by section 55.

Section 4 of the Market Gardeners Compensation Act, 1895, gives no right to compensation except in respect of improvements made after the Act.—MEARS *v.* CALLENDER, *Ch.D. Cozens-Hardy, J.*, 584; 70 L. J. Ch. 621; 84 L. T. 618.

4. *Lease, construction of—Covenant to pay taxes, &c.*—Under a demise of premises for sixteen years the lessee covenanted that he would "pay and discharge all taxes, rates, including sewers and main drainage assessments, and impositions whatsoever which now are, or which at any time or times hereafter may during the continuance of the said term hereby granted, be taxed or rated, assessed, charged or imposed upon or in respect of the said premises or any part thereof, on the landlord, tenant, or occupier of the same premises by authority of Parliament or otherwise howsoever (landlord's property tax and tithe only excepted)." There was no covenant to repair on either side.

Held, that expenses incurred by the landlord in complying with a notice of the sanitary inspector to abate a nuisance by the execution of structural alterations on the premises were not expenses which he was entitled to charge to the lessee under the covenant.—FOULGER *v.* ARDING, *K.B.D.*, 442; [1901] 2 K. B. 151; 70 L. J. K. B. 580; 84 L. T. 467.

5. *Lease to company of public-house—Condition for re-entry on liquidation—Forfeiture—Underlessee—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14—*Conveyancing Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4—*Waiver.*—A voluntary winding up by a solvent company for the purpose of amalgamating with another company works a forfeiture under a condition for re-entry on liquidation.

On forfeiture of the head lease the court has power, under section 4 of the Conveyancing Act, 1892, in granting relief to an underlessee, to vary (even by way of increase) the amount of rent reserved by the underlease, and will direct an inquiry for that purpose.

Decision of Kekewich, J. (48 W. R. 443), affirmed.—EWART *v.* FRYER, *C.A.*, 145; [1901] 1 Ch. 499; 70 L. J. Ch. 138; 83 L. T. 551.

6. *Lease—Lease of house—Collateral warranty as to condition of drainage—Right of action for breach of warranty.*—An action lies for breach of a collateral warranty, on the granting of a lease of a house, that the drainage is in good condition.—DE LASALLE *v.* GUILFORD, *C.A.*, 467; [1901] 2 K. B. 215; 70 L. J. Ch. 533; 84 L. T. 549.

7. *Lease—Lease of theatre—Covenant not to assign—Grant of right to supply refreshments—Breach of covenant.*—The lessee of a theatre covenanted "not to assign, demise, or otherwise part with the indenture" of lease, "or any estate or interest therein," without the licence of the lessor. Subse-

quently the lessee granted to a third person the free and exclusive licence and right to use the refreshment rooms and bars in the theatre.

Held, that the lessee had not assigned any estate or interest in the premises so as to give rise to any breach of his covenant.

Decision of Kekewich, J. (48 W. R. 360), affirmed. DALY *v.* EDWARDES, *C.A.*, 244; 83 L. T. 548.

8. *Lease—Surrender—Possession of old lease and counterpart.*—Where a lease is surrendered and a new lease for the same property is granted, the lessor cannot require the lessee to hand the old lease over to him, nor can the lessee demand possession of the counterpart of the old lease.—KNIGHT *v.* WILLIAMS, *Ch.D. Cozens-Hardy, J.*, 427; [1901] 1 Ch. 256; 70 L. J. Ch. 92; 83 L. T. 730.

9. *Lease—Underlease—Covenant by sub-lessee on obtaining extension from freeholder to grant new lease—Covenant running with land—Perpetuity—32 Hen. 8, c. 34, s. 2.*—A covenant by an underlessee to grant a new lease on obtaining an extension from the freeholder is not strictly a covenant running with the land, and is not an exception from the rule against perpetuities.

The statute 32 Hen. 8, c. 34, s. 2, applies to a reversion which is vested in the covenantor at the time he enters into the covenant.

Held, that a person who was an assignee of an underlessee, and who had acquired a new lease from the freeholder, was not bound by the covenant to grant a new lease entered into by the underlessee—MULLER *v.* TRAFFORD, *Ch.D. Farwell, J.*, 132; [1901] 1 Ch. 54; 70 L. J. Ch. 72.

10. *Licence—Revocation—Notice—Agreement—Advertising station—Tenancy from year to year.*—By an agreement in writing the defendant agreed to let the plaintiff erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a bill-posting station at a yearly rent payable on the usual quarter-days from the then ensuing quarter-day.

Held, that this was not a tenancy from year to year, but a licence revocable at will on reasonable notice, and that a quarter's notice terminating at the end of a year of the currency of the agreement was a reasonable notice.—WILSON *v.* TAVENER, *Ch.D. Joyce, J.*; [1901] 1 Ch. 578; 70 L. J. Ch. 263; 84 L. T. 48.

11. *Mortgagor in possession—Breach of covenant by lessee—Ejectment—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-section* 5—*Conveyancing Act*, 1881, *s.* 10.—A mortgagor in possession of land subject to a lease is not entitled, by section 25, sub-section 5, of the Judicature Act, 1873, to sue for re-entry on breach of covenants by the lessee.—MATTHEWS *v.* USHER, *C.A.*, 40; [1900] 2 Q. B. 535; 69 L. J. Q. B. 856; 83 L. T. 353.

12. *Parol agreement to rent furnished flat—Payment of one week's rent in advance—Before entry defendant repudiates agreement—Part performance—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.—The defendant verbally agreed to hire the plaintiff's flat for thirteen weeks at £4 10*s.* a week, and paid the first week's rent in advance, but in fact never took possession.

Held, in an action to recover rent for the full period, that the payment of one week's rent in advance on a parol agreement was not such a part performance as would take the case out of the 4th section of the Statute of Frauds, and that the action could not be maintained.—THURSBY *v.* ECCLES, *Q.B.D.*, 281; 70 L. J. Q. B. 91.

See also Bankruptcy, 14-16; Company, 36.

LANDS CLAUSES ACTS:—

1. *Charity—Compulsory purchase of lands—Payment into court—Costs of investment—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 69, 76, 80.—Where a corporation acquired, under the provisions of the Lands Clauses Consolidation Act, 1845, compulsory powers for the purchase of lands owned by a charity—the legal estate in the lands being vested in the official trustee—and after arbitration deposited the purchase-money in court,

Held, that the corporation must pay the costs of the investment of the purchase-money.—LEEDS GRAMMAR SCHOOL, RE, *Ch.D. Cozens-Hardy, J.*, 120; [1901] 1 Ch. 228; 70 L. J. Ch. 89; 83 L. T. 499.

2. *Common—Extinction of commonable rights—Land taken for public undertaking—Compensation—Apportionment—Machinery provided by Acts—Jurisdiction of court—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 104—*Inclosure of Land Act*, 1854 (17 & 18 *Vict. c.* 97), *ss.* 15, 16, 17.—Action by a person as commoner against committees of commoners claiming moneys in their hands received from a local body as compensation for extinction of commonable rights. The defendants objected to the jurisdiction of the court, and desired to proceed under section 104 of the Lands Clauses Act, 1845, which empowers committees to apportion compensation moneys among those interested, sections 15, 16, and 17 of the Inclosure of Land Act, 1854, which empowers committees, if they cannot satisfactorily apportion, to apply to the Inclosure Commissioners to call meetings and award compensation as therein set out, and other Acts of Parliament.

Held, that, machinery being provided by the above sections for the determination of claims, the court had no jurisdiction now to interfere, and that the action must be dismissed.—RICHARDS *v.* DE WINTON, *Ch.D. Kekewich, J.*; 84 L. T. 831.

3. *Compensation—Capital moneys—Ecclesiastical law—Application of capital money—Repairs to chancel—Parliamentary costs—Jurisdiction.*—The court has jurisdiction to order purchase-money for a churchyard, taken compulsorily under statutory powers, to be applied towards the repairs of the chancel of the church, and also towards payment of the rector's Parliamentary costs.—LONDON COUNTY COUNCIL, RE, PENNINGTON, EX PARTE, *Ch.D. Kekewich, J.*; 84 L. T. 808.

4. *Compensation—Interest in land—Taken or injuriously affected—Right of lessee of minerals to sink pits—Reasonable approval of lessor—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 68.—The owner of land on which there was a colliery demised by lease for a term of years the colliery, with its buildings, pits, and shafts, and also the minerals in and under the adjoining land. The lease contained a proviso that the lessee might at any time during the term, on giving notice, sink a pit or pits on any part of the land the surface of which was not demised, but so that the position of such pit or pits should be subject to the reasonable approval of the lessor, his heirs or assigns. The lessor afterwards agreed to sell a portion of the surface to a railway company, and the company gave notice to the lessee to treat in respect of any interest which he might have in such portion. On the same day the lessee gave the lessor notice of his intention to sink a pit in that portion of the land.

Held, that the lessee, under the proviso in the lease, had an interest in the land taken by the company, for the loss of which he was entitled to

compensation under section 68 of the Lands Clauses Consolidation Act, 1845.

Decision of the Divisional Court (*ante*, p. 29. [1900] 2 Q. B. 677) affirmed.—MASTERS v. GREAT WESTERN RAILWAY Co., *C.A.*, 499; [1901] 2 K. B. 84; 70 L. J. K B. 516; 84 L. T. 515.

5. *Compulsory purchase of land—Property held for term to secure annuity for lives—Cessor of term on dropping of last life—Annuitant in possession—Reversioner unknown—Investment of purchase-money—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 79.—By indenture dated the 1st of September, 1810, A. H. covenanted to pay S. H., his executors, administrators and assigns, during the lives of nine persons and the lives and life of the survivors and survivor of them, an annuity of £100, and for better securing the annuity A. H. demised certain premises to S. H. for the term of 200 years upon trust, in case default should be made in payment of the annuity, that S. H., his executors, administrators and assigns, should out of the rents and profits, or by selling, demising, or mortgaging the premises, raise sufficient to satisfy the annuity and suffer A. H., her heirs and assigns, to receive the residue of the rents and profits for their own use and benefit; provided that, after the termination of the annuity by the dropping of the last life, the trusts aforesaid should cease. Default was made in the payment of the annuity, and from 1829 to 1900 S. H. and his successors in title had been in continuous receipt of the rents of the premises, and the surplus over and above the amount of the annuity had been retained by the person for the time being entitled to the annuity without any claim on the part of any reversioner. The last life dropped on the 31st of May, 1895. In 1900 the premises were compulsorily acquired by the London County Council, who paid the purchase-money into court. Upon a petition by the successor in title of S. H. for payment out, the court declined to order the fund to be paid out, and directed it to be invested and the dividends only to be paid to the petitioner until the lapse of twelve years from the 31st of May, 1895, or further order.—HARRIS, RE, LONDON COUNTY COUNCIL, EX PARTE, *Ch D. Joyce, J*; [1901] 1 Ch. 931; 70 L. J. Ch 432; 84 L. T. 203.

6. *Notice to treat—Withdrawal of notice—Power to give fresh notice—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 18, 92, 123.—Where notice to treat for the compulsory purchase of land is given under the Lands Clauses Act, and such notice is subsequently withdrawn, a second notice to treat may be given in respect of the same property, or a part thereof.—ASHTON VALE IRON Co. *v.* BRISTOL CORPORATION, *C.A.*, 295; [1901] 1 Ch. 591; 70 L. J. Ch. 230; 83 L. T. 694.

7. *Practice—Costs—R. S. C., ord.* 22, *r.* 17—*Cost of* interim *investment—Lands Clauses Consolidation Act*, 1845, *ss.* 70, 80.—Where money has been paid into court under the Lands Clauses Consolidation Act, 1845, and has been invested in securities authorized by R. S. C, ord. 22, r. 17, the whole of the costs of such investment must be paid by the promoters of the undertaking under section 80 of the said Act as though such securities had been expressly authorized by the Act.—GASELEE *v.* LONDON COUNTY COUNCIL, *Ch.D Buckley, J.*, 372; [1901] 1 Ch. 923; 70 L. J. Ch. 441; 84 L. T. 386.

8. *Railway company—Notice to treat—Rights of landowner in respect of adjoining land.*—Where land has been taken by a railway company under ordinary compulsory powers and not under a special Act, the landowner may between the time the notice to treat is given, and the time the damages are actually assessed, deal with his adjoining lands; and persons who *bonâ fide* thus acquire interests in such adjoining lands are not deprived of their claim to compensation for being injuriously affected by works subsequently executed, simply because the railway company have made a settlement with their vendor in respect of the land taken and the injurious affection of his other property.—MERCER *v.* LIVERPOOL AND SOUTH LANCASHIRE RAILWAY Co., *K.B D.*; 70 L. J. K. B. 775.

LAND TAX:—

Exemption—Hospitals — Land in occupation of tenants—Land Tax Act, 1797 (38 *Geo.* 3, *c.* 5) *s.* 25. —Any houses or lands, which on or before the 25th of March, 1693, belonged to any of the hospitals mentioned by name in section 25 of the Land Tax Act, 1797, are exempt from land tax, whether they form part of, or are appurtenant to the sites of the hospitals or not, and whether they are in the occupation of the hospitals themselves or are let on lease to tenants.—ST. THOMAS' HOSPITAL *v.* HUDGELL, *Q.B.D.*; [1901] 1 Q. B. 364; 70 L. J. Q. B. 115; 83 L. T. 677.

LAND TRANSFER ACTS. — See Executor, 2; Practice, 26; Probate, 4; Vendor and Purchaser, 11.

LEASE.—See Bankruptcy, 14-16. 33; Landlord and Tenant, 4-9; Land Clauses Acts, 4; Mortgage, 5; Settled Land, 5-7; Trustee, 9.

LIBEL:—

1. *Publication—Post-card—Privileged occasion.*—The defendant employed an architect to draw up a specification and to take out the quantities for certain building work. The architect instructed the plaintiff, a quantities surveyor, to take out the quantities, and these were sent to certain builders in order that they might tender for the work. The defendant, having discovered mistakes in the quantities, sent post-cards to two of the builders stating that the quantities were wrong. The quantities surveyor thereupon brought an action for libel against the defendant.

Held, that there was no publication of and concerning the plaintiff until the cards reached the builders, as the plaintiff's name was not mentioned, and there was no evidence that anyone into whose hands the cards might fall prior to reaching the builders would know to whom the statements referred; further, that, as between the defendant and the builders, the occasion was privileged; and that the mere fact that the statements were made on post-cards did not avoid that privilege.—SADGROVE *v.* HOLE, *C.A.*, 473; [1901] 2 K. B. 1; 70 L. J. K. B. 455; 84 L. T. 647.

2. *Slander—Words spoken of a solicitor imputing insolvency—"Money scrivener"—Imputation not upon him in his business—Words not* per se *actionable —No action lies in absence of proof of special damage.* —Words imputing to a solicitor that he had "gone for thousands" and had "lost thousands," in the absence of proof of special damage, held not capable of bearing a meaning defamatory to the plaintiff in relation to his business or profession as a solicitor; and that there was, therefore, no case to go to the jury.—DAUNCEY *v.* HOLLOWAY, *C.A.* 546; [1901] 2 K. B. 441; 70 L. J. K. B. 695; 84 L. T. 649.

LICENSING LAW:—

1. *Appeal to quarter sessions—Refusal to renew licence—Costs of licensing justices—Alehouse Act,*

1828 (9 *Geo.* 4, *c.* 61), *s.* 29.—Where licensing justices have been served with notice of appeal to quarter sessions against their refusal to renew a licence, and have appeared and successfully resisted the appeal, they are entitled, under section 29 of the Alehouse Act, 1828, to an order for the payment to them by the appellant of such a sum as shall, in the opinion of the court of quarter sessions, indemnify them against the costs to which they were put in consequence of the service upon them of the notice of appeal.—REG. *v.* WORCESTERSHIRE JUSTICES, *C.A.*, 89; [1900] 2 Q. B. 576; 69 L. J. Q. B. 826; 83 L. T. 272.

2. *General annual licensing meeting—Adjournment beyond September*—Certiorari—*Aggrieved person—Alehouse Act*, 1828 (9 *Geo.* 4, *c.* 61), *s.* 3—*Wine and Beerhouse Act*, 1870 (33 & 34 *Vict. c.* 29), *s.* 11.—Licensing justices, in counties other than Middlesex and Surrey, have no power to hold a meeting, or an adjourned meeting, for the purpose of hearing original applications for the grant or renewal of licences after September.

Section 11 of the Wine and Beerhouse Act, 1870, which enables the justices to adjourn a meeting or an adjourned meeting beyond September where "the applicant for the grant or renewal of a certificate has, through inadvertence or misadventure, failed to comply with any of the requirements" of the Act, does not enable them to adjourn an application for an alehouse licence.

A brewer having licensed premises in the district within which a licence has been granted, who has opposed the grant of the licence and the order confirming the same, is a person aggrieved by such order, and is entitled to a writ of *certiorari ex debito justitiæ*.—REX *v.* GROOM, *K.B.D.*, 484; [1901] 2 K. B. 137; 70 L. J. K. B. 636; 84 L. T. 534.

3. *Licence, lapse of—Value of house—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 45.—A licence for the sale of beer had been held for a house from a date before the 10th of August, 1872, continuously down to the 10th of October, 1886, when it expired, the tenant's application for a renewal having been refused in September. On the 12th of October, 1886, a new tenant applied to the justices in special session for a transfer of the licence under 9 Geo. 4, c. 61, s. 14.

Held, that, notwithstanding the licence had changed hands, and there had been a break in the continuity of the licence since the 10th of August, 1872, the justices could not refuse to renew the licence on the ground only that the house was not of the annual value required by section 45 of the Licensing Act, 1872, in the case of premises not licensed at the time of the passing of the Act.—IGOE *v.* SHANN, *K.B.D.*, 559; 84 L. T. 656.

See also Justices, 3.

LIGHT:—

Prescription—Extent of right—User of premises—Purpose requiring extraordinary quantity of light.—The plaintiffs' windows had enjoyed the access of an extraordinary quantity of light for over twenty years; during the earlier part of that time they had been used for a business requiring ordinary light only; during the latter part and at the time of the obstruction complained of they had been used for a business requiring an extraordinary quantity of light. The defendant, by erecting a building, diminished the access of light to the windows, but left sufficient light for ordinary purposes.

Held, that the plaintiffs had no cause of action.—WARREN *v.* BROWN, *Q.B.D.*, 208; [1900] 2 Q. B. 722; 83 L. T. 318.

See also Easement, 1, 2.

LIMITATION STATUTES:—

1. "*Concealed fraud*"—*Real Property Limitation Act*, 1833 (3 & 4 Will. 4, *c.* 27), *s.* 26—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.—"Concealed fraud," to bring into operation section 26 of 3 & 4 Will. 4, c. 27, must be the fraud of the person setting up the statute or of his predecessor in title.

The section does not apply where neither the person sued nor his predecessors in title were party or privy to the fraud at the time when it was perpetrated.—MCCALLUM *v.* MCCALLUM, *C.A.*, 129; [1901] 1 Ch. 143; 70 L. J. Ch. 206; 83 L. T. 717.

2. *Land tax—Redemption—Interest, recovery of*—42 *Geo.* 3, *c.* 116, *s.* 123—3 & 4 *Will.* 4, *c.* 27, *s.* 1—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 8.—The yearly sum payable, under section 123 of 42 Geo. 3, c. 116, by way of interest on the sum paid as a consideration for the redemption of land tax, is "rent" within the meaning of section 1 of the Real Property Limitation Act, 1874; so that an action to recover the same is barred unless it is brought within the times limited by section 1 in respect of actions to recover any land or rent.—SKENE *v.* COOK, *K.B.D.*; [1901] 2 K. B. 7; 70 L. J. K. B. 556; 84 L. T. 684.

3. *Mortgage—Person claiming under a mortgage—Possession adverse to mortgagor—Real Property Limitation Acts*, 1833, *ss.* 2, 20; 1837; 1874, *s.* 9.—The plaintiff, the sister of the defendant, sought to recover possession of a house which was held by their father under a lease expiring in 1922.

In 1876 the father demised and assigned this and other premises to a mortgagee for the whole term except the last day; and in 1882 he assigned all the premises to a second mortgagee for the whole term, subject to the first mortgage.

The father died on the 1st of January, 1885, having by his will bequeathed the lease to trustees in trust to secure an annuity to his widow for her life, and after her death an annuity to his daughter (the plaintiff) for her life, and subject thereto in trust for the defendant.

After the father's death the widow was allowed to reside in the house until her death in July, 1899, under circumstances which the plaintiff alleged gave her a title by possession, under the Real Property Limitation Acts, 1833 and 1874, for the remainder of the term. By her will the mother bequeathed all her property to the plaintiff, who continued to reside in the house until December, 1899, when the defendant took possession and excluded her.

In 1888 the defendant paid off the second mortgage, and in 1893 the first mortgage, and obtained a transfer of the property. In 1894 he purchased the reversion subject to the lease on the whole of the premises. It was admitted that, up to the transfer in 1893, interest upon the mortgage debts had been duly paid by the mortgagor or his assigns, and therefore within twelve years of the son taking possession.

Held (reversing the decision of Grantham, J.), that as the mortgage was not extinguished, the defendant was entitled to rely upon the Real Property Limitation Act, 1837, and to take possession as mortgagee, the mortgage having been created before the possession of the mother commenced; and further, that section 20 of the Act of 1833 did not apply.—LUDBROOK *v.* LUDBROOK, *C.A.*, 465; [1901] 2 K. B. 96; 70 L. J. K. B. 552; 84 L. T. 485.

4. *Mortgage—Payment of interest by person liable to the mortgagor to pay—Real Property Limitation*

Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8.—The payment to the mortgagee of interest due upon the mortgage debt by a person who, as between himself and the mortgagor, is bound to make the payment, is a sufficient payment within section 8 of the Real Property Limitation Act, 1874, to prevent time running against the mortgagee under the statute. — BRADSHAW *v.* WIDDRINGTON, *Ch.D. Buckley, J.*, 698.

LOCAL GOVERNMENT:—

1. *Buildings—Bye-laws—Wooden structure—Stable—"New building"—Local Government Act*, 1858 (21 & 22 *Vict. c* 98), *s.* 34.—Under the powers given by section 34 of the Local Government Act, 1858, a local board made a bye-law that every person intending to erect any "new building" should give fourteen days' notice to the local board of such intention, and should at the same time deliver detail plans and sections of the proposed new building.

Held, that a wooden structure, being under 20ft. each way and with a slanting roof of 12ft. high, intended for a stable and erected in the centre of inclosed private ground of nearly an acre in extent, was a "new building" within the meaning of this bye-law.—SOUTH SHIELDS (MAYOR) *v.* WILSON, *K.B.D.*; 84 L. T. 267.

2. *Building—New building—Shelter for weighing machine—Movable shop for sale of refreshments.*—A movable wooden structure 10ft. long, 7ft. broad, 10ft. high in front and 8ft. high behind, having shutters in front and a door at one side, not fixed in the soil, without sanitary arrangements or provision for artificial lighting or heating, was erected at Southend-on-Sea as a shelter for a weighing machine, and it contained beside the machine a table and two chairs, and was open in the day during the summer months and visited by persons using the weighing machine.

Held, this was not a "new building" within the meaning of the bye-law of the Borough of Southend-on-Sea, which provided that "every person who shall erect a new building shall cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials."—SOUTHEND-ON-SEA CORPORATION *v.* ARCHER, *K.B.D.*; 70 L. J. K. B. 328; 84 L. T. 264.

3. *Building—Refusal to approve—Plans of proposed building—Grounds of refusal*—Mandamus.—A prerogative writ of *mandamus* will not be granted to compel a local authority to approve plans of a proposed building which the local authority has in good faith refused to approve upon the ground that the building would contravene the provisions of the Public Health (Buildings in Streets) Act, 1888, by being brought forward beyond the front main wall of the building on one side thereof in the same street.—WRIGHT *v.* EASTBOURNE CORPORATION, *C.A.*; 83 L. T. 338.

4. *Burial Acts—Transfer of powers of burial board to urban district council—Burial expenses—Moneys borrowed under the Burial Acts—Poor rate—General district rate—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 53 (3), 62 (1), 67 (3).—Where an urban district council takes over the powers and duties of a burial board under section 62 of the Local Government Act, 1894, the expenses incurred by the council in carrying into execution the Burial Acts and the payment of interest upon, and the repayment of moneys borrowed in pursuance of the Burial Acts, are chargeable to the poor rates of the parish or parishes for which the burial board was formed, and are not payable out of the general district rate.—REX *v.* CONNAH'S QUAY OVERSEERS, *K.B.D.*, 463; [1901] 2 K. B. 174; 70 L.J. K. B. 651; 84 L. T. 601.

5. *Fire brigade of urban district—Superintendent—Implied authority to call in other fire brigade—Remuneration—Town Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *s* 32—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 171.—The superintendent of the fire brigade of an urban district has, in the absence of express regulations to the contrary, an implied authority from the district council to call in, where necessary for the proper discharge of his duties, the services of another fire brigade, and the fire brigade so called in, in the absence of evidence showing that the services were rendered gratuitously, are entitled to receive from the district council reasonable remuneration for the work of the members and for the use of the fire engine and other necessary implements.

"Purchase or provide" fire engines, &c., in section 32 of the Town Police Clauses Act, 1847, enable an urban district council not merely to buy, but, where necessity arises, to hire temporarily fire engines, &c. —JANES *v.* STAINES URBAN COUNCIL, *Q.B.D.*; 83 L. T. 426.

6. *Hackney carriage—Standing or plying for hire—Licensed carriage sent from yard to execute booked order only — Number-plate covered over—Bye-law—Towns Police Clauses Act*, 1847 (10 & 11 *Vict. c.* 89), *ss.* 38, 68.—A "hackney carriage" within the meaning of section 38 of the Towns Police Clauses Act, 1847, is a carriage which is in fact used by the proprietor from time to time for the purpose of standing or plying for hire in any street within prescribed boundaries.

Held, therefore (dismissing the appeal), that the appellant had rightly been convicted for sending out a licensed hackney carriage from his yard to execute only a booked order, without showing the number-plate as required by the bye-law, as, in the opinion of the court, the words of the section, "every wheeled carriage used in standing or plying for hire," were not limited to the period of time during which such carriage was actually standing or plying for hire in the streets, as a hackney carriage remained subject to the bye-laws applicable thereto at all times, so long as the license was in force.—HAWKINS *v.* EDWARDS, *K.B.D.*; 487; [1901] 2 K. B. 169; 70 L. J. K. B. 597; 84 L. T. 532.

7. *Highway—Defect in sewer causing hole under surface of road—Subsidence—Nuisance—Highway authority—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 13, 15, 19.—In an action against an urban sanitary authority for damages for injury sustained by a horse while passing along a highway, owing to one of its feet going through the crust of the road into a hole underneath, it was proved that this hole was caused by a defect in a mortar joint in a sewer running under the highway, which defect was caused by rats working through the mortar. The sewer had been constructed by a private body, and had been taken over by the defendants many years before the accident. Under the weight of the horse the crown of the road gave in, thereby causing the injury. Nothing had occurred to give the defendants warning that there was anything wrong with the sewer, and there was no evidence of negligence on their part.

Held, that, in the absence of negligence on the part of the defendants, the action was not maintainable. The responsibility of the defendants to maintain the sewer rested upon the Public Health Act, 1875, and no action would lie for injury caused

by the execution of that statutory duty unless it had been negligently performed.—LAMBERT *v.* LOWESTOFT (MAYOR), *K.B.D.*, 316; [1901] 1 K. B. 590; 70 L. J. K. B. 333; 84 L. T. 237.

8. *London County Council—Statutory powers—Omnibus business—Ancillary business—Incidental powers*—Ultra vires—*Attorney-General, action by—Ratepayers—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s* 10, *sub-section* 1—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 1, 2, 68, 79—*London County Tramways Act*, 1896 (59 & 60 *Vict. c. li.*), *ss.* 2, 10—*London Tramways Company (Limited) Act*, 1896 (59 & 60 *Vict. c. clxxxix.*), *s.* 31—*London County Council (Vauxhall Bridge Tramways) Act*, 1896 (59 & 60 *Vict. c. ccxi.*), *s.* 21.—A county council, being incorporated under section 79 of the Local Government Act, 1888, is a purely statutory body, and does not possess, under section 2 of that Act coupled with section 10, sub-section 1, of the Municipal Corporations Act, the wide powers of a municipal or common law corporation.

Consequently, where a county council had statutory powers to own and work "tramways" only,

Held, that the council was acting *ultra vires* in becoming omnibus proprietors and running omnibuses as feeders to the tramways, the omnibus business not being covered by the council's statutory powers as being a business by necessary implication incidental or ancillary to the tramway business.

Held, also, that an action for injunction was properly brought in the name of the Attorney-General by rival omnibus proprietors who were also ratepayers in the county.—ATTORNEY-GENERAL *v.* LONDON COUNTY COUNCIL, *C.A.*; [1901] 1 Ch. 781; 70 L. J. Ch. 367; 84 L. T. 245.

9. *Nuisance—Abatement—"Owner" of premises—Appeal—Case remitted—"Owner" ceasing to be owner before rehearing—Jurisdiction to make order on "owner"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 96, 98, 104.—The court having held, upon a case stated by justices, that the respondent, a person receiving the rack-rents as agents for the landlord, was the "owner" of the premises upon whom an order could be made under sections 94 and 96 of the Public Heath Act, 1875, to abate a nuisance thereon arising from structural defects (see *ante*, p. 205), the agent resigned before the case came again before the justices, who, under the change of circumstances, refused to make the order.

Held, that the justices should have made the order on the agent, for it would not be entirely nugatory, as, if disobeyed, it would have enabled the local authority to enter on the premises and do the work itself and charge the expenses on the person liable.—BROADBENT *v.* SHEPHERD (No. 2), *K.B.D.*, 521; [1901] 2 K. B. 274; 70 L. J. K. B. 628; 84 L. T. 844.

10. *Nuisance — Liability to abate — Structural defects—Collector of rents—"Owner"—Liability of collector—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 94, 95.—A collector of the rents of property who is acting merely as agent for another person, is "owner" within sections 4 and 94 of the Public Health Act, 1875, and may be served under the latter section and required to abate nuisances on the premises arising from structural defects.—BROADBENT *v.* SHEPHERD, *Q.B.D.*, 205; 83 L. T. 504.

11. *Nuisance by sewage—Use of drain—Sewer—Notice—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 21.—Certain inhabitants of a village were in the habit of sending slops, &c., down what was originally a highway drain, which had become vested in the local authority. The defendant, without notice to the local authority, connected a water-closet with this drain and sent fœcal matter down it. He thereby created a nuisance on the plaintiff's land.

Held, that, even assuming the drain in question to be a sewer within the meaning of section 21 of the Public Health Act, 1875, the defendant, not having complied with the statutory requirement as to notice, could not avail himself of the provisions of that section, and might be restrained by injunction from sending fœcal matter down the drain.—GRAHAM *v.* WROUGHTON, *C.A.*, 643; 84 L. T. 744.

12. *Public health—Powers of local authority—Drainage of new house—Requirements "for the effectual drainage of such house"—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 25.—Section 25 of the Public Health Act, 1875, enacts that "it shall not be lawful in any urban district to erect any house unless and until a covered drain or drains be constructed of such size and materials, and at such level, and with such fall as on the report of the surveyor may appear to the urban authority to be necessary for the effectual drainage of such house."

Held, that in considering what is necessary for the effectual drainage of a house the urban authority are not entitled to take into consideration the general requirements of their district in regard to the means of disposing of the sewage.

An urban council, in order to facilitate the ultimate disposal of the sewage in its district, formed a scheme for conveying the sewage and the surface water by means of separate sewers and constructed separate sewers accordingly. With a view to carry out this scheme the council ordered a person proposing to build a new house to construct two main drains in connection with his house, one for conveying sewage only, to be connected with their sewage sewer, and the other for conveying surface water only, to be connected with their surface water sewer.

Held, that the order was bad.—MATTHEWS *v.* STRACHAN, *K.B.D.*, 651; 70 L. J. K. B. 806.

13. *Public health — Unsound food — Order for destruction—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 47.—Where an article has been seized by a medical officer or sanitary inspector under section 47 of the Public Health (London) Act, 1891, and application is made to a magistrate under that section to condemn it and to order its destruction, the duty of the magistrate is ministerial only, and he is bound to make the order on being satisfied that the article is in fact unsound or unwholesome, or unfit for the food of man; and he has no jurisdiction to inquire whether it was intended for food, or exposed or deposited for sale or preparation for sale.

White v. *Redfern*, 28 W. R. 168, 5 Q. B. D. 15, followed.—THOMAS *v.* VAN OSS *Q.B.D.*, 57; [1900] 2 Q. B. 448; 69 L. J. Q. B. 665; 82 L. T. 845.

14. *Rating—Exemption—Land reclaimed from the Thames—7 Geo.* 3, *c.* 37, *s.* 51—*City of London Sewers Act*, 1848 (11 & 12 *Vict. c. clxiii.*), *s.* 169.—Section 51 of 7 Geo. 3, c. 37, which vested certain land in the City of London reclaimed from the River Thames in the owners of the land abutting thereon "free from all taxes and assessments whatsoever," only exempts the reclaimed land from rates and assessments that were in existence at the time of the passing of the Act, and therefore does not exempt the land from the consolidated rate imposed on the occupiers of land in the City of London under section 169 of the City of London Sewers Act, 1848, the consolidated rate being substantially a new rate imposed by that Act.—

SION COLLEGE *v.* LONDON (MAYOR), *C.A.*, 361; [1901] 1 Q. B. 617; 70 L. J. K. B. 369; 84 L. T. 133.

15. *Rating—Exemption—Society instituted for purposes of science exclusively—Manufacture and sale of scientific remedies—Annual voluntary contributions—Donations—Scientific Societies Act*, 1843 (6 & 7 *Vict. c.* 36), *s.* 1.—A society was instituted for the purposes of advancing the study and application of preventive medicine. It taught and examined students, undertook original investigations, and prepared and sold certain scientific remedies. The sale of these remedies did not cover the expense of their manufacture. It was supported partly by the payments received for medicines sold, partly by large donations, some of which had been devoted to the erection of buildings for the purposes of the society, and partly by fees paid by students. Certain rooms were sub-let to the Local Government Board at a yearly rent, which rooms, by the terms of the tenancy, were to be used exclusively for investigations in connection with vaccination, and for the manufacture of pure lymph.

Held, that as the society carried on the manufacture and sale of preventive medicines, it was not a society instituted for purposes of science exclusively, within section 1 of the Scientific Societies Act, 1843, and was therefore not entitled to have its premises exempted from rates.

Per Channell, J.: The occupation of the Local Government Board of part of the assessed premises was not such an occupation as would make the board capable of being separately assessed in respect thereof, and therefore on this ground also the society was liable to rates.

Query, Whether the society was supported by voluntary contributions within section 1.—JENNER *v.* ST. GEORGE'S, HANOVER-SQUARE, UNION, *Q.B.D.*; 83 L. T. 344.

16. *Rating—General district rate—Shop closed during winter months—Stock removed—Fixtures and articles left in shop—Occupation—Liability to rate—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 211, *sub-section* 2.—The respondent held certain premises under a lease or licence for a term of years, and had entered into possession and used the premises as a shop. As the business was remunerative only during the summer, the respondent at the end of the summer locked up and left the shop with the intention of not reopening the same for business until the beginning of the following summer, and during this interval he had not in fact returned to the shop and no one lived therein. Before he left he removed all his stock, but left in the premises certain fixtures and other articles. He was entitled under his lease to occupy the premises and carry on his business continuously throughout the year except for certain hours during the night. A general district rate was made for the half-year during the whole of which the shop was so closed in the winter. The respondent having objected to pay the rate made in respect of the shop on the ground that in law the premises were unoccupied by him during the time the shop was closed,

Held, that the respondent was in occupation of the premises during the time they were so closed, and was liable to pay the half-year's rate accordingly.—SOUTHEND-ON-SEA (CORPORATION) *v.* WHITE, *Q.B.D.*; 83 L. T. 408.

17. *Rating—Machinery—Cranes in docks—Warehouses in different parish—Docks in different parishes in same union—Deductions.*—The London and India Docks used cranes worked by hydraulic power communicated to them by means of mains laid under the surface of the docks in which they were used alongside the rails upon which the cranes travelled. The cranes could be made to travel along the rails upon which they rest by means of hand gearing attached to them, or by means of hydraulic capstans, or by means of levers. When in use such cranes were firmly and securely attached, by means of a flexible tube capable of resisting a pressure of 700lb. to the square inch, to the hydraulic main by the side of the rails. While so attached the cranes could be moved along the rails 6ft. in either direction, but in order to move them from one quay to another new lines of rails would have to be laid, or they would have to be moved by floating derricks.

Held, that these cranes must be treated as enhancing the rateable value of the dock undertaking, as they were on the premises for the purpose of making them fit as premises for the purpose for which they were used.

The London and India Docks also used certain warehouses, situate outside the parishes in the Poplar Union, in connection with and for the purposes of their undertaking. These warehouses were separately assessed in the parishes in which they were situate, and they did not adjoin the dock warehouses or docks.

Held, that the net receipts derived from these warehouses should be deducted from the net receipts derived by the London and India Docks from their whole undertaking, inclusive of such warehouses, when ascertaining the rateable value of the premises of the London and India Docks within the parishes in the Poplar Union.

Where one system of docks is situated in different parishes in the same union, the rateable value ought to be ascertained upon the parochial principle as laid down in *Sculcoates Union* v. *Hull Dock Co.* (71 L. T. Rep. 642).

Expenses of one company, such as superannuation allowances or rents of premises made payable by such company, upon an amalgamation of several companies to form one undertaking, ought not to be deducted from receipts in order to arrive at the net revenue of the undertaking.—LONDON AND INDIA DOCKS *v.* POPLAR UNION, *Q.B.D.*; 83 L. T. 371.

18. *Rating—Waterworks—Intake—Payment under statutory obligation for user of intake—Cost of land and works—Assessment.*—The proper principle of assessment of the property of the New River Co. is for the valuer to see what the site and construction of the works costs, and then to take a percentage on the capital amount so expended as representing the rent a hypothetical tenant would give; and to exclude the amount paid and payable by the company under their Acts for the user of the intake as being no part of the cost of construction nor a condition precedent to the construction of the works.

Liverpool Corporation v. *Llanfyllin Union*, [1899] 2 Q. B. 14, 47 W. R. Dig. 148, followed.—NEW RIVER CO. *v.* HERTFORD UNION, *K.B.D.*, 619; 70 L. J. K. B. 740.

19. *Right of way—Obstruction to—Duty of district council to take legal proceedings for protection of public right of way—Transfer of duty to county council—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26, *sub-sections* 1, 3, 4.—In an action by the owners of an estate against private persons for an alleged trespass in removing certain obstacles, erected by the plaintiffs, to an alleged public right of way over such estate, the county council, where the parish council have appealed under section 26 of

the Local Government Act, 1894, to the rural district council for assistance in protecting such right of way, and the rural district council have refused or failed to take any proceedings in consequence, are authorized under such section, on petition by the parish council, to pass a resolution that the powers and duties conferred upon the rural district council by such section shall be transferred to the county council, and that the county council shall contribute towards the costs of the defendants in the action.—REX *v.* NORFOLK COUNTY COUNCIL, GREEN, EX PARTE, *K.B.D*, 542; [1901] 2 K. B. 268; 70 L. J. K. B. 575; 84 L. T. 822.

20. "*Sewer*" — "*Drain*" — "*Building*"—*Semi-detached houses—Effect of laying sewer in another person's land—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 13.—The plaintiff and the defendent were the owners respectively of two plots of land adjoining a road in which there was a public sewer vested in the local authority. Each of them was also the owner of one-half of the road so far as it ran with his plot. The defendant first acquired his plot, and built thereon a pair of semi-detached houses. The drains from each of the houses joined at a point on the defendant's land, and from that point the sewage was carried by one culvert into the public sewer. Part of the culvert was carried through the portion of the road which then belonged to the plaintiff's predecessor in title, and was constructed under circumstances which made its construction a trespass. The plaintiff, having purchased his plot and the adjoining half of the road, required the defendant to remove the portion of the culvert which lay under the latter.

Held, (1) that the defendant's pair of semi-detached houses constituted "one building only" within the meaning of section 4 of the Public Health Act, 1875, and that the culvert, from the point of junction of the drainage of the two houses, was a "drain" and not a "sewer" within the meaning of that section; (2) that even if the culvert was a sewer the defendant could not by his wrongful act vest in the local authority the part of it which lay in the plaintiff's land, and that the plaintiff was entitled to have that part removed.—HEDLEY *v.* WEBB, *Ch.D. Cozens-Hardy, J.*; [1901] 2 Ch. 126; 70 L. J. Ch. 663; 84 L T. 526.

21. *Sewers—Prescriptive right of drainage—Trade effluents—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss*, 17, 21—*Public Health Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 17—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 7, 16.—Where the owners of buildings have acquired a right to discharge drainage into a public sewer through a connection lawfully made, that right extends to the discharge of trade and manufacturing effluents, and section 7 of the Rivers Pollution Prevention Act, 1876, does not justify a local sanitary authority in cutting off the connection with their sewer, even although it is shown that the discharge of the trade effluent prejudicially affects the disposal of the sewage matter conveyed through the sewer.

Decision of Byrne, J. (48 W. R. 614), affirmed.—EASTWOOD *v.* HONLEY DISTRICT COUNCIL, *C.A.*, 308; [1901] 1 Ch. 645; 70 L. J. Ch. 313; 84 L. T. 169.

22. *Sewer—Sewage matter—Pollution of stream—Trade effluent—Pollution of river—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55).—A district council, having taken over a sewage farm from a local board, their predecessors in title, collected and treated on such farm the sewage of the district and discharged the effluent therefrom into a river. By a contract between the board and the owner of a margarine factory it was agreed that the said owner should be entitled to discharge the liquids and effluents from the said factory into the sewers of the board, subject to the condition that the said owner before so doing should extract all solid fat or fatty matters in suspension from the said liquids and effluents. This condition was not efficiently fulfilled, and the result was that the effluents, containing fat and fatty matter, became mixed with the sewage on the farm and the land became clogged with the fat and was not capable of filtering the sewage. On a summons being taken out under the Middlesex County Council Act, 1898, by the county council against the district council for "causing and suffering" sewage and other injurious and offensive matter to flow and pass from the said farm into the river the justices ordered the district council to discontinue such flow or passage.

Held, on appeal, that such order was rightly made, and that the district council had "caused or suffered" the filthy effluent to pass into the river. The district council were not compelled to receive into their sewers liquid containing fat or fatty matters, and if they did receive it they were bound to adopt some process on their farm which would effectually purify the effluent therefrom.—SOUTHALL NORWOOD DISTRICT COUNCIL *v.* MIDDLESEX COUNTY COUNCIL, *Q.B.D.*, 376; 83 L. T. 742.

23. *Street—Naming of new street by local authority—Right of owner of the estate—Towns Improvement Clauses Act*, 1847 (10 & 11 *Vict. c.* 34), *s.* 64.—The appellant, the owner of a building estate situate within the respondents' district, laid out a new street and submitted plans thereof and of the houses he proposed to erect in such street to the respondents, who approved of the same. The appellant on the plans named the street "Midhurst-avenue," and also put up a board with such name affixed thereon at one end of the street. After several houses had been erected the respondents proposed calling the street "Collingwood-avenue," and put up a board on one of the houses with that name upon it. The appellant objected to the latter name and removed the board put up by the respondents. On an information preferred against the appellant under section 64 of the Towns Improvement Clauses Act, 1847, the justices convicted him.

Held, that section 64 gave the local authority the right to decide and fix up the name of a new street, and that the appellant had committed an offence under that section in removing such name.—COLLINS *v.* HORNSEY DISTRICT COUNCIL, *K.B.D.*, 620; [1901] 2 K. B. 180; 70 L. J. K. B. 802; 84 L. T. 839.

24. *Working classes — Dwelling-houses — Closing order—Housing of the Working Classes Act*, 1890 (53 & 54 *Vict. c.* 70), *ss.* 29, 32 (2).—Where proceedings under section 32 of the Housing of the Working Classes Act, 1890, are taken by the local authority against the owner of any dwelling-house for closing of the same, on the ground that it is unfit for human habitation, the fact that such dwelling-house has already been voluntarily closed by the owner to human habitation, and has been kept so closed, is no objection to a closing order being made.

Section 29, which defines "dwelling-house" as "any inhabited building," was not intended to negative the natural meaning of sections 32 and 33.—ROBERTSON *v.* KING. *K.B.D.*, 542; [1901] 2 K. B. 265; 70 L. J. K. B. 630; 84 L. T. 842.

See also Charity, 5; Poor Law, 8.

LONDON BUILDING ACTS.—See Metropolis, 1-6, 18.

LUNACY:—

1. *Jurisdiction of master—Appointment of person to exercise power of appointing new trustees—Vesting order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-sections* 1 (c), 2; *ss.* 128, 129, 135—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-section* 1.—A master in Lunacy has jurisdiction under the Lunacy Act. 1891, s. 27, sub-section 1, and the Lunacy Act, 1890, ss. 128, 129, to make an order appointing a person to exercise a power, vested in a person of unsound mind not found lunatic by inquisition, of appointing new trustees and to vest property in the trustees when appointed.—FULLER, RE, *Lunacy*, 90; [1900] 2 Ch. 550; 69 L. J. Ch. 638; 83 L. T. 208.

2. *Jurisdiction of master—Vesting order—Trust property—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5) *ss.* 116-130, 136—*Lunacy Act*, 1891 (54 & 55 *Vict.* 65), *s.* 27, *sub-section* 1.—A master in Lunacy has no power to make an order vesting in new trustees already appointed trust property standing in the names of old trustees, one of whom is a lunatic—the making of the order under such circumstances not being part of the "administration" or "management" of the lunatic's estate within section 27, sub-section 1, of the Lunacy Act, 1891, which gives jurisdiction to the master.

In re Fuller, ante, p. 90, [1900] 2 Ch. 551, distinguished.—LANGDALE, RE, *Lunacy*, 177; [1901] 1 Ch. 3; 70 L. J. Ch. 38; 83 L. T. 451.

3. *Lunatic—Private international law—English domicil—Committee appointed by foreign court—Personal estate in England—Right to recover—Next friend—R. S. C., ord.* 16, *r.* 17.—A lady of English domicil, confined in an asylum at New York, is adjudged by an order of the Supreme Court of New York to be of unsound mind, and committees are appointed authorized to take proceedings in England to recover and obtain payment of certain trust personal estate in this country to which she was entitled. In this action, brought by the committees and the lunatic lady suing by a "next friend" against the trustees,

Held, that the court had a discretion to order the moneys claimed to be paid to the committees; and, in the circumstances of this case, the proceedings being for the benefit of the lady, an order was made recognizing the title of the co-plaintiffs to recover the property.—NEW YORK SECURITY CO. *v.* KEYSER *Ch.D. Cozens-Hardy, J.*, 371; [1901] 1 Ch. 667; 70 L. J. Ch. 330; 84 L. T. 43.

4. *Lunatic debtor—English lunacy—Committee—*Curator bonis—*Scottish jurisdiction*—Locus standi—*Bankruptcy proceedings by committee—Right to represent lunatic—Lunacy jurisdiction—Procedure—Consent of court in Lunacy to bankruptcy proceedings—Directions, summons for—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 148.—Where, in an English lunacy, a committee has been appointed, a *curator bonis* appointed by the Scottish Court of the lunatic's estates in Scotland (especially where appointed, prior to the lunacy, on account of physical incapacity) has no *locus standi*, under section 148 of the Bankruptcy Act, 1883—which provides that, for the purposes of the Act—"a lunatic may act by his committee or *curator bonis*"—to intervene in English bankruptcy proceedings by the committee in the name and on behalf of the lunatic. The committee is, when appointed, the only person entitled under the section to represent the lunatic in the proceedings, and the *curator bonis* is only entitled to act therein for the lunatic where there is no committee.

Where the committee of a lunatic debtor has been authorized by the Court in Lunacy to take preliminary proceedings with a view to making him bankrupt, by filing in his name a declaration of insolvency, no subsequent steps, such as admitting the debt of a creditor who may have presented the bankruptcy petition, or consenting to an adjudication, should be taken by the committee without first obtaining the sanction of the Court of Lunacy.—R. S. A., RE, *C.A.*; [1901] 2 K. B. 32; 70 L. J. K. B. 475; 84 L. T. 477.

5. *Pauper lunatic—Maintenance—Receiver—Debt—Death of lunatic—Administration action—Creditors, rights of—Jurisdiction.*—A pauper lunatic, while being maintained by the guardians of a union, became entitled to a fund, whereupon, on a summons in Lunacy by the guardians, who claimed six years' arrears for past maintenance, an order was made by the Court in Lunacy appointing a receiver of the fund, and directing him to pay thereout to the guardians part of the arrears, and to apply the balance for future maintenance. While under the care of the guardians the lunatic died. There then being a surplus in the hands of the receiver, the guardians commenced a creditors' administration action in the Chancery Division against the lunatic's administrator to obtain payment of the balance of the six years' arrears.

Held, reversing the decision of Kekewich, J., that the balance of arrears was a valid legal debt enforceable after the lunatic's death, and that the order in Lunacy was no bar to the action.—TAYLOR, RE, EDMONTON UNION *v.* DEELY, *C.A.*; [1901] 1 Ch. 480; 70 L. J. Ch. 332; 84 L. T. 35.

6. *Practice—Appeal, special leave to—Victoria Lunacy Act*, 1890—*Construction.*—Neither under the Victoria Lunacy Act of 1890 nor under a *habeas corpus* is a person lawfully detained as a lunatic entitled as of right to have the question of his lunacy decided by means of a jury.

Special leave to appeal from certain orders of court refused, the petitioner's object being to obtain a jury's decision as to his lunacy.—GREGORY, EX PARTE, *P.C.*; [1901] A. C. 128; 70 L. J. P. C. 19.

See also Divorce, 4; Probate, 16; Vendor and Purchaser, 22.

MANOR:—

Tenure of ancient demesne—Tenants—Freehold—Custom of manor—Fine on alienation—Quia Emptores (18 *Edw.* 1, *c.* 1)—*Act of* 8 *Edw.* 2 (*Parliament Roll, vol.* 1, *p.* 298).—A lord of the manor claimed a fine in respect of the alienation to, or purchase by, a defendant of a piece of land held to be within the ambit of the manor. The manor originally belonged to the Crown, and lands in it were held by the tenure of ancient demesne.

Held, that the freehold was in the tenants, and not in the lord.

Held, that the alleged custom, even if it could be proved, was bad in law, as it was inconsistent with the statute 18 Edw. 1, c. 1, *Quia Emptores*, and a statute of 8 Edw. 2 (Parliament Roll, vol. 1, p. 298).—MERTTENS *v.* HILL, *Ch.D. Cozens-Hardy, J.*, 408; [1901] 1 Ch 842; 70 L. J. Ch. 489; 84 L. T. 260.

MARKET:—

Statutory remedy—Construction of Act of Parliament—Jurisdiction of the High Court—Injunction.—Where there is a liability existing at common law which is re-enacted by statute with a special form of remedy, unless the statute contains words necessarily excluding the common law remedy, the

plaintiff has his election of proceeding either under the statute or at common law.

Wolverhampton New Waterworks Co. v. *Hawkesford*, 7 W. R. 464, followed.

Where a remedy in Chancery is wider than the old common law remedy, the Court of Chancery has jurisdiction to grant an injunction, unless the statute deprives it of such jurisdiction.

The enactment of special penalties or remedies by a statute does not exclude the jurisdiction of the High Court unless it is so expressly provided.—STEVENS *v.* CHOWN, STEVENS *v.* CLARK, *Ch.D. Farwell, J.*, 460; [1901] 1 Ch. 894; 70 L. J. Ch. 571; 84 L. T. 796.

MARRIED WOMAN:—

1. *Bankruptcy of husband—Proof of debt—Wife surety for husband's debt—Payment of debt by wife—Right of exoneration—Money lent by wife to husband—Onus of proving whether lent for purpose of husband's business—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 3.—A wife at the request of her husband (a trader) deposited with his bankers the title deeds of her separate real estate as security for advances to be made by them to him for the purpose of his business. The bankers made advances to him on the security of the deeds and a memorandum of deposit signed by the wife. She afterwards paid off his debt to the bankers. After his death an order was made for the administration of his estate in bankruptcy.

Held, that section 3 of the Married Women's Property Act, 1882, did not apply, and that the wife was entitled to prove against the estate for the amount which she had paid to the bankers, with interest thereon.

The wife also lent a sum of money to her husband, and she claimed to prove against his estate for that sum. She did not in her affidavit say that the loan was not made for the purpose of the husband's business, and the trustee of the estate adduced no evidence that it was made for that purpose, and he did not cross-examine the wife.

Held, that the proof ought to be admitted.

Per Vaughan Williams, L.J.—*In re Genese*, 16 Q. B. D. 700, must not be understood as a decision that section 3 of the Married Women's Property Act, 1882, in every case throws on a wife who is claiming to prove in her husband's bankruptcy for money lent by her to him the onus of showing that the loan was not made for the purpose of his business.—CRONMIRE, RE, CRONMIRE, EX PARTE, *C.A.*; [1901] 1 Q. B. 480; 70 L. J. K. B. 310; 84 L. T. 342.

2. *Carrying on a trade—Bankruptcy—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 5.—A married woman who has once carried on business apart from her husband continues, even after she has ceased to carry it on, to be subject to the bankruptcy laws in respect of debts incurred by her during the period of her trading.

In re Dagnall, 45 W. R. 79, [1896] 2 Q. B. 407, followed.—WORSLEY, RE, LAMBERT, EX PARTE, *C.A.*, 182; [1901] 1 Q. B. 309; 70 L. J. Q. B. 93; 84 L. T. 100.

3. *County court—Costs—"Proceeding instituted"—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2—*County Court Rules*, 1889, *ord.* 26, *rr.* 1, 2, 4 (a)—A written claim by a married woman to goods taken in execution under the process of a county court, and served by her on the high bailiff, is a "proceeding instituted" by her within section 2 of the Married Women's Property Act, 1893.

Where, therefore, she fails, in subsequent interpleader proceedings, to establish her claim, the court has jurisdiction under that section to order payment of the execution creditor's costs of the interpleader proceedings, out of the property of the married woman, which is subject to a restraint on anticipation, and to enforce payment by the appointment of a receiver.—NUNN *v.* TYSON, *K.B.D.*; [1901] 2 K. B. 487.

4. *Divorce—Allowance for wife—Husband's earnings—Mode of assessing proportion to be allowed—Separation order—Justices—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).—In assessing the amount which a husband is to be ordered to pay for the support of his wife who has obtained a separation order against him under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), courts of summary jurisdiction are to be guided by the principles and practice upon which allotments of alimony are made in cases of judicial separation in the High Court.—COBB *v.* COBB, *P.D. & Ad.D.*; [1900] P. 294; 83 L. T. 716.

5. *Divorce—Appeal—Husband's appeal—Effect of withdrawal of previous summons—Technical objection not taken in court below—Appeal allowed—Wife's costs—Justices—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).—The withdrawal of a summons under the Summary Jurisdiction (Married Women) Act, 1895, has the effect of putting an end to the complaint in respect of which it is issued, and, after the withdrawal, no fresh summons can be issued upon the same cause of complaint.

A ground of objection, however technical, is not waived by the omission to take the objection on the hearing of a summons under the Act, but where such an objection is taken by the husband for the first time on the hearing of an appeal and is allowed, the wife (respondent) will be allowed her costs of the appeal.—PICKAVANCE *v.* PICKAVANCE, *P.D. & Ad.D.*; [1901] P. 60; 70 L. J. P. 14; 84 L. T. 62.

6. *Divorce—Desertion—Justices—Summary Jurisdiction (Married Women) Act*, 1895, *s.* 4—*Costs.*—If a wife leaves her husband in consequence of a mere expression on his part that she can go where she likes and do what she likes, and then refuses to return home at his request, the husband is not guilty of desertion.

To constitute desertion by the husband there must be an intention on the part of the husband to break off matrimonial relations.—CHARTER *v.* CHARTER, *P.D. & Ad.D.*; 84 L. T. 272.

7. *Election—Restraint on anticipation—Married woman becoming discovert—Will—Intention.*—A testator by his will, after directing the proceeds of sale of his Turkish real estate to go into his personal residue, gave a life interest in a share of his personal residue to each of his two married daughters, upon whom he placed a restraint on anticipation. By Turkish law the testator's Turkish real estate devolved on his next-of-kin in certain shares. Since the testator's death one of the married daughters became discovert. Upon petition to decide whether, if the married daughters elected to take their shares in the Turkish real estate by inheritance, they were bound to compensate out of their life interests in the personal estate those who lost benefits under the will by such election,

Held, that the restraint on anticipation excluded the application of the doctrine of election, and, being a declaration by the testator of a particular

intention that the married daughters should not be able to alienate, was not affected by the fact with respect to one of them that she was now discovert; and that both the married daughters were therefore entitled to take their shares of the Turkish real estate by inheritance without making compensation out of their life interests under the will.—HAYNES *v.* FOSTER, *Ch.D. Kekewich, J.*, 327; [1901] 1 Ch. 361; 70 L. J. Ch. 302; 84 L. T. 139.

8. *Restraint on anticipation—Increase of income—Court investments—Absolute interest, subject to restraint—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 39.—Under a will a married woman, being past child-bearing, had become, in the events that had happened, absolutely entitled to certain settled trust funds subject only to a restraint on anticipation by the will imposed upon her during coverture. These funds were now in court, under the Trustee Relief Act, to her separate account, invested in court securities. Under her marriage settlement certain other funds settled by her were in the hands of trustees upon trust, during the joint lives of herself and her husband, for her separate use without power of anticipation, and after the death of either to the survivor for life, and after the death of the survivor to the children of the marriage; and in default of children, then upon the usual trusts for the benefit of the wife. The settlement contained a covenant for the settlement of other and after-acquired property of the wife. The investments allowed by the settlement were much wider than the court or statutory investments. With a view to her and her husband obtaining a larger income, the wife applied to have the funds in court transferred to the trustees of her settlement in pursuance of her covenant, and for that purpose for the removal of her restraint on anticipation under section 39 the Conveyancing Act, 1881. The application was supported by a scheme, verified by affidavit, of the proposed investments of the funds under the wide powers of the settlement, which would result in a considerable increase of income. Farwell, J., refused the application.

The Court of Appeal held that no case had been made out justifying any interference with the decision of Farwell, J. Increase of income was not a sufficient reason for allowing a change from court securities to securities of a speculative nature. The benefit of a larger income would be bought at the expense of a greater risk to the capital; and the court was not satisfied that the proposed change of investments would really be for the benefit of the lady, even having regard to the fact that, in the events that had happened, she was all but mistress of the property.—BLUNDELL, RE, *C.A.*; [1901] 2 Ch. 221; 70 L. J. Ch. 522; 84 L. T. 706.

9. *Restraint on anticipation — Wife's contracts during coverture—Judgment after cessation of coverture—Separate property—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 1.—A married woman, who was possessed of separate property the income of which she was restrained from anticipating, entered into a contract, and was subsequently divorced. Judgment having then been obtained against her, it was sought to enforce it by means of a garnishee order attaching income which had accrued due to her from this property subsequently to the divorce.

Held, that this income was protected by the proviso to section 1 of the Married Women's Property Act, 1893, and could not be attached.—BARNETT *v.* HOWARD, *C.A.*; [1900] 2 Q. B. 784; 83 L. T. 301.

10. *Separation deed—Breach of covenant—Subsequent cohabitation — Accord and satisfaction.*—Where a husband and wife are living apart under a deed of separation, and the husband has made default in payment of instalments due to the wife under the deed, a resumption of cohabitation subsequent to such default does not of itself amount to accord and satisfaction of the cause of action already accrued in respect of the arrears of the instalments.—MACAN *v.* MACAN, *Q.B.D.*; 70 L. J. Q. B. 90.

11. *Wife's tort—Contract—Husband's liability in damages—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-section* 2.—In May, 1898, the defendant G. K., the wife of the defendant H. K., induced the plaintiff, a widow, to lend her £5,300, the only security being her I O U. In July, 1898, the plaintiff was asked by G. K. to join her in the purchase of some shares which she said had been recommended to her by a financier, and for that purpose she asked the plaintiff to raise a sum of £2,000 to be invested in the purchase. The plaintiff, at first unwilling, consented to raise the £2,000 when the shares had been purchased. Shortly after, the plaintiff, relying on the representation of G. K. that she had bought the shares, signed two promissory notes for £1,000 each, and, her solicitor having discounted them, paid the proceeds to G. K., and the plaintiff paid the notes on maturity. G. K. never in fact purchased any shares at all with the moneys. The defendant H. K. was made a co-defendant by amendment. In an action for damages by the plaintiff against the defendants,

Held, by Byrne, J., and the Court of Appeal, that the contract was effected prior to and independently of the misrepresentation; that the misrepresentation was not the means of effecting or inducing the contract; and that the husband was liable in damages for his wife's tort.

There is nothing in the Married Women's Property Act, 1882, which deprives a plaintiff in such a case, by giving him a right against the separate estate of the wife which may or may not exist, of the right to go against the husband in respect of a tort committed by the wife after the marriage.

The distinction between *Liverpool Adelphi Loan Association* v. *Fairhurst*, 2 W. R. 233, 9 Exch. 422, and *Wright* v. *Leonard*, 9 W. R. 944, 11 C. B. N. S. 258, explained and approved.

Seroka v. *Kattenburg*, 34 W. R. 542, 17 Q. B. D. 177, followed.—EARLE *v.* KINGSCOTE, *C.A.*, 3; [1900] 2 Ch. 585; 69 L. J. Ch. 725; 83 L. T. 377.

12. *Will—Reversionary interest in personalty—Assent of husband after death—General grant of administration with will annexed—Old probate practice—Construction of will and of assent—Costs.*—When a married woman dies entitled to a reversionary interest in personal estate, it vests beneficially in her surviving husband immediately upon her death, and whether he takes administration to her estate or not; and if someone else becomes administrator, this latter holds the interest upon trust for the husband. And this is so, even if the wife has made a will not dealing with the reversionary interest, and the husband has assented to a grant of administration with the will annexed being made in general terms to the executors named in the wife's will.

It is not necessary for the validity of the assent that it should have been given before the death of the wife.

The defendants, being the residuary legatees as well as the executors, ordered to pay costs.—

ELLIOT *v.* NORTH, *Ch.D. Buckley, J.*, 247; [1901] 1 Ch. 424; 70 L. J. Ch. 217.

See also Divorce, 12, 13; Power, 1; Settlement, 3-5.

MASTER and SERVANT :—

1. *Contract of employment—Salesman—Refusal of master to provide work—Readiness to pay salary—Extent of master's obligation.*—By an agreement in writing the defendants agreed to engage and employ the plaintiff as their representative salesman for four years and to pay him a salary of £250 a year, and the plaintiff agreed to devote his time to the service of the defendants. The defendants, considering that they had ground to complain of the plaintiff's conduct, ceased to avail themselves of his services during the term of four years, but offered to pay him his full salary.

Held, that the plaintiff was not entitled to maintain an action against the defendants for breach of the contract to employ him.—TURNER *v.* SAWDON, *C.A.*, 712.

2. *Employers' Liability—Accident—Compensation—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (1).—A workman was employed by the defendants in the work of lifting and removing planks from a stack of timber; one night there was rain and frost, and the planks became frozen together, the planks lower in the stack being more firmly frozen together than those above; on the next day the workman began the work in the morning, and lifted and removed planks all day; about 4 p.m., while trying to lift a plank, he ruptured himself.

The workman claimed compensation under the Workmen's Compensation Act, 1897, and the county court judge found that the injury was caused by the lifting of the plank, and was an injury by "accident" within the meaning of the Act.

Held (dismissing the appeal), that there was evidence of something fortuitous and unexpected upon which the county court judge might properly find that the injury was caused by "accident" within the meaning of the Act.—TIMMINS *v.* LEEDS FORGE CO., *C.A.*; 83 L. T. 120.

3. *Employers' Liability—Accident—Compensation—Blood poisoning—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.—A miner was employed in hewing coal, and while so employed a piece of coal worked itself into his knee, with the result that blood poisoning set in and the workman died.

Held, that his death was the result of an "injury by accident" within section 1 of the Workmen's Compensation Act, 1897.—THOMPSON *v.* ASHINGTON COAL CO., *C.A.*; 84 L. T. 412.

4. *Employers' liability—Accident—Compensation—Building — Scaffolding — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that, at the time of the accident, the workman was standing on a structure of trestles and boards in one of the rooms of an unfinished house, and was engaged in plastering the ceiling. The arbitrator found that the structure was not a "scaffolding" within section 7 of the Act. The county court judge set aside that finding.

Held, that, though *Maude* v. *Brook*, 48 W. R. 290, [1900] 1 Q. B. 575, showed that such a structure of trestles and boards might be a "scaffolding" within section 7, yet the question whether it was a "scaffolding" within the section was a question of fact for the arbitrator, and that his finding was not open to review.—FERGUSON *v.* GREEN, *C.A.*, 105; [1901] 1 Q. B. 25; 70 L. J. Q. B. 21; 83 L. T. 461.

5. *Employers' liability—Accident—Compensation—Building exceeding thirty feet in height—Building being constructed or repaired by means of a scaffolding—Scaffolding inside building—Workmen's Compensation Act*, 1897 (60 & 61 *Vict c.* 37), *s.* 7, *sub-section* 1.—A building over thirty feet high, measured to the top of the roof, was being stiffened with iron stays some months after its completion according to the original specifications. Planks supported on ledgers and trestles, inside the building and about eight feet from the ground, were used for the purposes of the work, and while lifting material on this platform one of the workmen was injured.

Held (Lord Shand and Lord Lindley dissenting), that the building was being constructed by means of a scaffolding within the meaning of section 7 of the Workmen's Compensation Act, 1897.

Decision of the Court of Appeal (47 W. R. 499, [1899] 1 Q. B. 1018) reversed.

The meaning of "building being constructed or repaired by means of a scaffolding" considered.—HODDINOTT *v.* NEWTON, *H.L.*, 380; [1901] A. C. 49; 70 L. J. Q. B. 150; 84 L. T. 1.

6. *Employers' liability—Accident—Compensation—Building—Repair of building—Whitewashing—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—Whitewashing the ceilings of a house held to be "repairing" a building within the meaning of section 7 of the Workmen's Compensation Act, 1897.

Wood v. *Walsh*, 47 W. R. 504, [1899] 1 Q. B. 1009, is overruled by *Hoddinott* v. *Newton, Chambers, & Co., ante*, p. 380, [1901] A. C. 49.—DREDGE *v.* CONWAY, *C.A.*, 518; [1900] 2 K. B. 42; 70 L. J. K. B. 494; 84 L. T. 345.

7. *Employers' liability—Accident—Compensation—"Claim for compensation"—Initiation of proceedings—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *ss.* 1, 2 (1)—The claim for compensation required under section 2, sub-section 1, of the Workmen's Compensation Act to be made within six months of the accident causing the injury, refers not to the filing a request for arbitration in the county court, but to the actual claim made by the workman upon his employer.

Decision of Court of Appeal (48 W. R. 534, [1900] 2 Q. B. 145) reversed.—POWELL *v.* MAIN COLLIERY CO., *H.L.*, 49; [1900] A. C. 366; 69 L. J. Q. B. 758.

8. *Employers' liability—Accident—Compensation—Continuous employment—Weekly earnings—Contract to work two days in the week—Casual earnings from same employers—Earnings from other employers—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Schedule I.* (1).—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant entered into a contract of employment with his employers to work for them on two days in every week at certain wages. He was injured by an accident in the course of such employment in the third week of his service. On the other days of each week he was free to work as he pleased; sometimes he did casual work for the same employers, sometimes he did work for other employers.

Held, that the applicant's contractual employment was continuous employment, and that his "average weekly earnings" within the meaning of the First Schedule to the Act were the wages he received weekly under his contract of employment, and that he was not entitled to have taken into account either the earnings he received from other

employers or the earnings he received for casual work for the same employers.—HATHAWAY *v.* ARGUS PRINTING CO., *C.A.*, 113; [1901] 1 Q. B. 96; 70 L. J. Q. B. 12; 83 L. T. 465.

9. *Employers' liability—Accident—Compensation—Course of the employment—Disobedience to master's orders—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1.—A workman was employed as a carpenter, part of his duty being to sharpen his tools at a grindstone, which was worked by means of a leather band passed over shafting connected with an engine. While sharpening his tools the band slipped off the stone. In trying to replace it he was caught by it and injured. He had been told not to touch the machinery, and in trying to replace the band he was acting contrary to his orders. The county court judge having awarded him compensation under the Workmen's Compensation Act, 1897,

Held, that, in the circumstances, it could not be said as a matter of law that the accident did not arise out of and in the course of the employment.—WHITEHEAD *v.* READER, *C.A.*, 562; [1901] 2 K. B. 48; 70 L. J. K. B. 546; 84 L. T. 514.

10. *Employers' liability—Accident—Compensation—Dock—"Factory"—"Undertakers"—Repair of ship—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—The appellant's husband was at work on a vessel which was being repaired by the respondents in a dry dock hired by them for the purpose. In the course of his employment, when crossing from the vessel by a plank to the side of the dock the plank tilted, and he was thrown into the dock and killed.

Held (reversing the decision of the Court of Appeal), that the dock was, by section 7, sub-section 2 of the Workmen's Compensation Act, 1897, a "factory," and that the respondents as occupiers thereof were liable to pay compensation.—RAINE *v.* JOBSON, *H.L.*, 705; 70 L. J. K. B. 771.

11. *Employers' liability—Accident—Compensation—"Earnings"—Deduction from wages—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. I., cl.* 1 (a).—A workman was employed as a miner, and, in the course of such employment, was killed by an accident. In accordance with the practice of the mine, a sum of sixpence was always deducted from his weekly wages to defray the cost of the oil for a lamp used by him at his work, the oil being provided by the employers.

On an application for compensation under the Workmen's Compensation Act, 1897, the county court judge decided that the sixpence a week for oil could not be deducted in ascertaining the weekly "earnings" of the deceased, and that compensation must be based upon the full amount of the wages.

Held, on appeal, that the principle on which the county court judge based his award was correct—HOUGHTON *v.* SUTTON HEATH COLLIERIES CO., *C.A.*, 196; [1901] 1 Q. B. 93; 70 L. J. Q. B. 61; 83 L. T. 472.

12. *Employers' liability—Accident—Compensation—Enforcement of award—Committal order—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62). *s.* 5—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. II., cl.* 8.—A county court judge has jurisdiction to enforce an award under the Workmen's Compensation Act, 1897, by means of an order of committal under section 5 of the Debtors Act, 1869.—BAILEY *v.* PLANT, *C.A.*, 103; [1901] 1 Q. B. 31; 70 L. J. Q. B. 63; 83 L. T. 459.

13. *Employers' liability—Accident—Compensation—"Factory"—Ship unloading at quay—"Undertakers"—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A ship carrying cattle and other cargo was moored alongside a quay not belonging to the shipowners. The shipowners were going to discharge the ship by their own men. A workman in the employment of the shipowners was on the quay engaged in getting a gangway from the quay on to the ship when he slipped and fell between the ship and the quay wall, and was killed. The gangway was for the purpose of enabling the workmen and crew to get to and from the ship, but was not used, or about to be used, in the process of unloading. The cattle were, on the day in question, discharged into lighters on the other side of the ship. No other cargo was discharged on that day.

In an application for compensation under the Workmen's Compensation Act, 1897, the county court judge held that the deceased man was employed on or in or about a ship, and that, therefore, the employment was not within the Act.

Held, that the employment, at the time of the accident, was on the quay, and therefore on a "factory" within section 7 of the Act; that the shipowners had at the time the "actual use" of that part of the quay where the ship was moored, and were, therefore, the occupiers of it, and came within the definition of "undertakers" in section 7, sub-section 2, of the Act; and that the Act applied.

Held, also, that the gangway was not plant used in the process of unloading on to the quay, and was not, therefore, a "factory" within section 7 of the Act, as defined by section 23, sub-section 1 (*a*), of the Factory and Workshop Act, 1895.—MERRILL *v.* WILSON, *C.A.*, 161; [1901] 1 Q. B. 35; 70 L. J. Q. B. 97; 83 L. T. 490.

14. *Employers' liability—Accident—Compensation—Factory—Steam-engine on farm—Mill for grinding meal—"By way of trade or for purposes of gain"—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 93—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7.—A workman employed on a farm to drive a steam-engine for working a mill used to grind meal for the farm stock is not employed in a "factory" within the meaning of the Factory and Workshop Act, 1878, so as to come within section 7 of the Workmen's Compensation Act, 1897.—NASH *v.* HOLLINSHEAD, *C.A.*, 424; [1901] 1 Q. B. 700; 70 L. J. K. B. 571; 84 L. T. 483.

15. *Employers' liability—Accident—Compensation—"Machinery connected with or used in the business of the employer"—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 (1).—A workman was injured while assisting on a Sunday in the removal of a machine in his employers' workshop. The machine, which was defective to the knowledge of the foreman, had broken down on the previous day and had finally ceased to be used in the employers' business at the time of the accident; it was being removed from its place in the centre of the workshop out of the way until it could be finally removed from the premises.

Held, that the machine was not "machinery or plant connected with or used in the business of the employers" within section 1, sub-section 1, of the Employers' Liability Act, 1880, and that the employers were not liable.—THOMPSON *v.* CITY GLASS BOTTLE CO, *K.B.D.*; [1901] 2 K. B. 483.

16. *Employers' liability—Accident—Compensation—Machinery used in loading from a quay—Occupier*

—*Person using machinery—"Undertaker"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7—*Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-section* 1. — The person using machinery in the process of loading a ship from a quay is an occupier of a factory within section 23, sub-section 1, of the Factory and Workshop Act, 1895, and therefore an "undertaker" within the meaning of the Workmen's Compensation Act, 1897, *s.* 7.—CARRINGTON *v.* BANNISTER, *C.A.*; [1901] 1 Q. B. 20; 70 L. J. Q. B. 31; 83 L. T. 457.

17. *Employers' liability—Accident—Compensation—Order on insurance company—Appeal—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 5; *Sched. II.* (4).—There is no appeal to the Court of Appeal from the refusal of a county court judge to make an order on an insurance company under section 5 of the Workmen's Compensation Act, 1897.—LEECH *v.* LIFE ASSURANCE ASSOCIATION, *C.A.*, 482; [1901] 1 Q. B. 707; 70 L. J. K. B. 544; 84 L. T. 414.

18. *Employers' liability—Accident—Compensation—"Railroad"—Construction of railway signal box—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-sections* 1, 2.—A workman was accidentally injured in the course of his employment on the construction of a signal box on a new line of railway.

Held, that his employment was on, in, or about a work of construction of a "railroad" within the meaning of the definition of "engineering work" in section 7 of the Workmen's Compensation Act, 1897, so as to entitle him to compensation under the Act.—FULLICK *v.* EVANS, *C.A.*; 84 L. T. 413.

19. *Employers' liability—Accident—Compensation—Strain of unusual exertion—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 (1).—A woman, who was employed as a box maker, was ordered to work upon boxes which were larger and heavier than those upon which she had previously worked. When she had finished some of the boxes and was working upon another, she suffered internal injury from the strain of the unusual exertion.

The county court judge found that the injury did not arise from an "accident" within the meaning of section 1 (1) of the Workmen's Compensation Act, 1897.

Held, that the judge had properly found that the injury did not arise from an "accident" within the meaning of the Act.—ROPER *v.* GREENWOOD, *C.A.*; 83 L. T. 471.

20. *Employers' liability—Accident—Compensation—Sub-contracting — Work ancillary to business of undertakers — Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c* 37), *s.* 4.—In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the workman's employers, who were engineers, had contracted with a firm of cotton spinners to supply and fix a driving-wheel for a steam-engine on their factory, and that the workman was accidentally killed while engaged in the operation of lifting the wheel into its place.

Held, that the cotton spinners were not liable to pay compensation under section 4 of the Act, because the work of fixing the wheel was merely ancillary or incidental to, and was no part of or process in, their business.—WRIGLEY *v.* BAGLEY, *C.A.*, 472; [1901] 1 K. B. 780; 70 L. J. K. B. 538; 84 L. T. 415.

21. *Employers' liability—Accident—Compensation—Weekly earnings—Average weekly earnings before accident—Review of weekly payment—Average amount workman able to earn after accident—Apprentice—Value of tuition—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), 1*st Schedule* (2), (12).—An apprentice sustained an injury to his right hand which prevented his working as a skilled artizan, and the indenture of apprenticeship was cancelled. On an application for compensation under the Workmen's Compensation Act, 1897, he obtained an award of a weekly payment based on his wages for the previous year. He returned to the employment of the same employers as a workman, at weekly wages higher than his wages at the time of the accident, but less than those that would be ordinarily paid to a workman employed on the same class of work, since the injury he had sustained affected his ability to earn full wages. On an application by the employers for the review and termination of the weekly payment, the county court judge dismissed the application, on the ground that the workman was earning less, by a sum equal to the amount of the weekly payment awarded, than if he had had the use of his right hand. On appeal,

Held, that on a review of a weekly payment made by award under the Act, the test to be applied is the difference between the amount of the average earnings before the accident and the average amount which the workman is able to earn after the accident; that in the absence of evidence of advantages incidental to the employment, and capable of being appraised at a money value, the earnings before the accident must be determined by the wages received; that the county court judge was therefore wrong in refusing to review the weekly payment; but that the weekly payment should be continued at a nominal amount, in order to preserve the right of the applicant to make any further application that might become necessary.

Semble, that the value of the tuition given to an apprentice should not be taken into account in arriving at the amount of his average weekly earnings. — POMPHREY *v.* SOUTHWARK PRESS, *C.A.*; [1901] 1 Q. B. 86; 70 L. J. Q. B. 48; 83 L. T. 468.

22. *Employers' liability—Accident—Compensation—Weekly earnings—Employed less than two weeks—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1; *Schedule—Loading and unloading a vessel.*—It is not necessary for a workman to be two weeks in the service of his employer in order to be entitled to the benefit of the Workmen's Compensation Act, 1897.

The 1st section of the Act gives the compensation; the schedule the method of computing it.

Where a stevedore was killed on a vessel whilst engaged in placing the beams which support the hatchway, and this took place after the cargo had been stowed from the wharf or quay,

Held (Lord Lindley dissenting), that the process of loading was not then completed within the meaning of the Act.

Decisions of the Court of Appeal (48 W. R. 408, [1900] 1 Q B. 780, and 48 W. R. 598, [1900] 2 Q. B. 95) reversed.—LYSONS *v.* KNOWLES; STUART *v.* NIXON, *H.L.*, 636; [1901] A. C. 79; 70 L. J. Q. B. 170; 84 L. T. 65.

23. *Factory—Fine for breach of rule as to good order and decorum.—Truck Act*, 1896 (59 & 60 *Vict. c.* 44), *s.* 1, *sub-section* 1 (b) (c).—The respondents, who were corset manufacturers, and were the occupiers of a factory within the meaning of the Factory Acts, 1878 to 1895, entered into a contract with a girl, Helen Robbins, and employed her as a machinist in their factory. The following rule (*inter alia*) formed part of the contract: "All

workers shall observe good order and decorum while in the factory, and shall not do anything which may interfere with the proper and orderly conduct of the business thereof, or of any department thereof, and shall in all respects obey the lawful commands of the general manager, forewoman, or superintendent of their respective departments. A fine of sixpence (or less, at the discretion of the manager) shall be paid by each worker who shall be guilty of any infringement of this rule."

The employees were, if they wished, allowed to have their dinners in the workroom. On one occasion the clerk in charge of the factory heard a considerable noise in the workroom, and on going there discovered disorder, the girl Robbins playing a small harp and the other girls dancing. For this disorder Robbins and some of the others were fined the sum of twopence each.

The appellant, an inspector of factories, thereupon by an information made complaint that the respondents had committed breaches of section 1, sub-section 1 (*b*) and (*c*), of the Truck Act, 1896, on the ground that the said rule did not specify the acts or omissions in respect of which a fine might be imposed, and that the fine imposed was not in respect of some act or omission within the meaning of sub-section 1 (*c*).

The justices found that good order and decorum were not observed, and that dancing and disorder were likely to cause loss or damage to the respondents, and that the said rule constituted a reasonable contract, and complied with section 1, sub-section 1 (*b*) and (*c*), of the said Act, and they accordingly dismissed the information. On appeal by the inspector of factories,

The court held that the justices had decided rightly; the rule was good and was not too general, and there had been such a breach thereof as justified a fine being imposed. The words "good order and decorum" must be construed with reference to the special circumstances under which a particular business is carried on, having regard to the place in which any alleged disorder takes place.—SQUIRE *v.* BAYER, *K.B.D.*, 557; [1901] 2 K. B. 299; 70 L. J. K. B. 705.

24. *False imprisonment — Arrest by servant — Liability of master.*—The plaintiff, a barman, who was employed by the defendant, the owner of a public-house, was given into custody on the charge of stealing whisky belonging to the defendant by M., who was the manager of the said public-house and the servant of the defendant. M., in giving the plaintiff into custody, acted under a complete misapprehension, and withdrew the charge as soon as they arrived at the police-station.

There was no evidence that any whisky had been stolen, or that it was necessary to give the barman into custody in order to protect the property of his master. The defendant was in the habit of visiting his public-house nearly every day.

The plaintiff brought an action against the defendant for false imprisonment.

Held that no action lay against the defendant, and that, under the circumstances of the case, there was no evidence that there was any implied authority on the part of the manager to give the plaintiff into custody.—HANSON *v.* WALLER, *Q.B.D.*, 445; [1901] 1 Q. B. 390; 70 L. J. Q. B. 231; 84 L. T. 91.

25. *Hire of horse, brougham, and driver from jobmaster at so much a week to include driver's wages —Brougham used by hirer's traveller for his rounds— Theft from brougham of jewellery through negligence of driver leaving carriage unattended—Master parting with control of servant—Control of hirer—Non-liability of jobmaster to hirer.*—The plaintiff, a wholesale jeweller, hired from the defendant a jobmaster, a horse, brougham, and driver for £3 a week, to include the man's wages. The brougham was for the use of his traveller.

The brougham was out one day and the driver left it unattended while he had his dinner. During his absence it was driven away, and jewellery to the value of some £460 was stolen.

Held, that, although the loss was due to the negligence of the coachman in leaving the brougham unattended, yet that, under the contract, the defendant did not accept the duty of taking care of the goods, and, therefore, was not liable for the loss.—ABRAHAMS *v.* BULLOCK, *K.B.D.*, 653.

26. *Mine—Person employed by contractor in coal mine—Conditions of employment—Liability of mine owner—"Workman"—Coal Mines Regulation Act,* 1887 (50 & 51 *Vict. c.* 58)—*Employers and Workmen Act,* 1875 (38 & 39 *Vict. c.* 90), *s.* 10—*Employers' Liability Act,* 1880 (43 & 44 *Vict. c.* 42), *s.* 8.—By section 8 of the Employers' Liability Act, 1880, the expression "workman" means any person to whom the Employers and Workmen Act, 1875, applies; and by section 10 of that Act of 1875 a "workman" means "any person who, being a labourer, . . . miner, or otherwise engaged in manual labour . . . has entered into or works under a contract with an employer," whether the contract be express or implied.

By the special rules of a colliery framed under the Coal Mines Regulation Act, 1875, conditions of employment were made, No. 5 of which was for "drawers and persons working under contractors only," and was as follows: "Every drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall, at the request of such miner or contractor, obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such drawer, workman, or other person shall, in consideration of being employed at the works, be bound, both as between himself and the miner or contractor, and between himself and the owner, by the terms of these conditions."

M. entered into a contract with the owners of the colliery to sink a shaft in their coal mine and to provide the labour for doing so. F., a workman, was engaged by M., and, while engaged upon the said work, was killed by an accident, and the father of the deceased then brought an action against the colliery owners under the Employers' Liability Act, 1880, to recover damages for his death.

Held, that, although the above condition created a privity of contract between the mine owners and the deceased workman of the contractor, it was only collateral and in addition to the contract he entered into with M., and that it did not make him a servant or workman of the mine owners within the meaning of section 10 of the Employers and Workmen Act, 1875; and that, therefore, the Employers' Liability Act, 1880, did not apply.—FITZPATRICK *v.* EVANS, *K.B.D.*, 491; [1901] 1 K. B. 756; 70 L. J. K. B. 353; 84 L. T. 233.

27. *Negligence—Personal injury—Accident caused by defendant's servant—Action against defendant—Notice of accident previously given by plaintiff to his employers—Wages paid as before—No further proceedings taken against employers under Workmen's Compensation Act,* 1897, *ss.* 2, 6—*Right of plaintiff to sue defendant.*—The plaintiff, a sawyer, who

worked for Messrs. Jones Brothers, met with an accident caused by the negligence of a servant in the employment of the defendant.

Having given notice of the accident to his employers, Messrs. Jones Brothers, they continued to pay the plaintiff the same wages as before, and no further steps were taken by him to obtain compensation under the Workmen's Compensation Act, 1897.

In a common law action against the defendant for damages,

Held, the action was maintainable, because a mere notice of an accident given under section 2 of the Workmen's Compensation Act, 1897, to the employer was not a "proceeding" against the employer within the meaning of section 6, and did not, therefore, preclude the plaintiff from bringing an action against a person, other than his employer, whose negligence caused the injury.—PERRY *v.* CLEMENTS, *K.B.D.*, 669.

See also Scotland, Law of.

MERCHANDIZE MARKS.—See Sale of Goods, 6; Trade-mark, 2-4.

METROPOLIS:—

1. *Building—District surveyor—Fees—Builder in default—Right to recover fees from owner or occupier—Limitation of time—Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *s.* 11—*London Building Act,* 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 154, 157 (1) (2).—A district surveyor can take summary proceedings to recover his fees from the owner of a building under section 157 of the London Building Act, 1894, within six months from the date of the receipt of the bill of fees by the owner.—CORBETT *v.* BADGER, *K.B.D.*, 539; [1901] 2 K. B. 278; 70 L. J. K. B. 640; 84 L. T. 602.

2. *Building—Electric lighting—Boxes in street—Notice to district surveyor—London Building Act,* 1894 (57 & 58 *Vict c. ccxiii.*), *s.* 145.—Where a local authority within the meaning of the Electric Lighting Acts, 1882 and 1888, in pursuance of those Acts, has been granted a provisional order confirmed by a statute, and under the provisions of that order has constructed in a street boxes for the purposes in connection with the supply of electric energy, such boxes are buildings, structures, or works, within section 145 of the London Building Act, 1894, and a notice under that section must be served on the district surveyor before they are commenced.—WHITECHAPEL BOARD OF WORKS *v.* CROW, *K.B.D.*; 84 L. T. 595.

3. *Building—General line of buildings—"Projection"—Electric sign affixed to wall of house—Lapse of time between offence and information—London Building Act,* 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 73, *sub-section* 8—*Summary Jurisdiction Act,* 1848 (11 & 12 *Vict. c.* 43), *s.* 11.—By an agreement in writing the appellant let to an advertiser's agent a position covering the first-floor window of a house in the Seven Sisters-road for the purpose of erecting an electric advertising sign. The sign consisted of a wooden case with a glass front, which was attached to the external wall of the house by iron brackets, a space of six inches intervening between the back of the case and the level of the front wall. The cornice of the shop-front, which was below the sign, projected twenty inches beyond the external wall of the premises so that the sign projected four inches less than the existing projection of the premises.

More than six months after the sign completely erected, the respondents laid information against the appellant for an offence under section 73, sub-section 8, of the London Building Act, 1894, in extending a projection beyond the general line of buildings, without the respondents' permission. The summons was heard by a metropolitan magistrate, and at the hearing a further point was raised by the appellant, whether the prosecution of the alleged offence was barred under section 11 of the Summary Jurisdiction Act, 1848, by lapse of time, the sign having been erected on the 20th of June, 1899, notice to remove served on the 16th of March, 1900, and the information laid on the 17th of May, 1900, which information alleged that the offence was committed on or about the 19th of December, 1899, the date when the sign was first brought to the attention of the council. The magistrate decided in favour of the council, and convicted the appellant.

Held (allowing the appeal), that the erection of the sign was not an offence within section 73 (8) of the London Building Act, 1894, which section only extended to such projections as were part of the architectural structure of the building itself.

Held, also, that if this sign were a "projection," nevertheless the information was barred by lapse of time under section 11 of the Summary Jurisdiction Act. 1848.

Held, further, that the tenancy would have been no answer to the charge.—HULL *v.* LONDON COUNTY COUNCIL. *K.B.D.*, 394; [1901] 1 K. B. 580; 70 L. J. K. B. 364; 84 L T. 160.

4. *Building—Hospital—Building used for a public purpose—Home for defective children—London Building Act,* 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 5 (27).—In order to provide effectually for the education of children of defective intellect within their district, the Metropolitan Asylums Board established homes close to board schools specially equipped and adapted for the education of children of that class, in which it was intended the children should live while attending such schools.

Held, that a building acquired by the board for this purpose, not having a cubical capacity of more than 250,000 feet, or sleeping accommodation for more than 100 persons, was not a "public building" within the London Building Act, 1894, not being a "hospital" or a building "used or constructed, or adapted to be used, for any other public purpose" within section 5 (27). — MOSES *v.* MARSLAND, *Q B.D.*, 217; [1901] 1 Q. B. 668; 70 L J. Q. B. 261; 83 L. T. 740.

5. *Building—Prevention of danger from fire—Music-hall licensed prior to* 1878—*Powers of London County Council to require alterations—Second exercise of power—Metropolis Management and Building Act,* 1878 (41 & 42 *Vict. c.* 32), *s.* 11.—When the London County Council or their predecessors, the Metropolitan Board, have exercised the powers conferred on them by section 11 of the Metropolis Management and Building Act, 1878, for the prevention of danger from fire in theatres, music-halls, and other public buildings which had been licensed for the first time prior to 1878, by requiring alterations to be made in a building, and such requirements have been duly complied with, they cannot again exercise the powers of the section by requiring further alterations, unless, in the meantime, the owner has so altered the building as in the opinion of the council to increase the danger from fire.—ST. JAMES'S HALL CO. *v.* LONDON COUNTY COUNCIL, *K.B.D*, 572; [1901] 2 K. B. 250; 70 L. J. K. B. 610; 84 L. T. 568.

6. *Building—Public-house—Separation of part used for trade from part used as dwelling-house—Fire-*

resisting materials—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 74, *sub-section* 2.—On the hearing of an objection by a district surveyor that the erection of a proposed beerhouse without the use of fire-resisting materials would be in contravention of section 74, sub-section 2, of the London Building Act, 1894, the magistrate found as a fact that part of the building was intended to be used for the purposes of the trade of a beerhouse, and that part was intended to be used as a dwelling-house for the licensed occupier, but he held that the case was governed by *Carritt* v. *Godson*, [1899] 2 Q. B. 193, 47 W. R. Dig. 126, and he accordingly overruled the objection.

Held (reversing the decision of the King's Bench Division, *ante*, p. 523), that on the finding of the magistrate the objection must be held to be good. —DICKSEE *v.* HOSKINS, *C.A.*, 693.

7. *Management Acts — Highway — Obstruction—Lamp-post—Use of street by adjoining occupier—Private right—Special individual interest—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 130. —The placing of a post in a highway which interferes with the use of the highway by the occupier of premises abutting on the highway to the maximum of his convenience is not an interference with his private right, but with his public rights, if any, although he has such a special individual interest as to be able to sue to enforce those public rights, if any, without joining the Attorney-General as a party.

A local authority, acting in good faith and making a reasonable use of their statutory authority, cannot be sued by an adjoining occupier for interfering with his convenient use of the highway.

The defendants, acting under section 130 of the Metropolis Management Act, 1855, proposed to set up a lamp-post in a particular place in a London street where the plaintiffs occupied business premises. The plaintiffs alleged that a lamp-post in that place would interfere with the use they had been accustomed to make of the highway for loading and unloading their goods, and they asked for an injunction to restrain the defendants.

Held, that in the absence of bad faith being shown on the part of the defendants, the court would not interfere with their discretion, and the injunction was refused.—CHAPLIN *v.* WESTMINSTER (MAYOR), *Ch.D. Buckley, J.*, 586; [1901] 2 Ch. 329.

8. *Management Acts—Order of vestry—Sufficiency—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 76.—The respondent having applied to the vestry for permission to lay a drain according to an annexed plan, received from the surveyor to the vestry the following communication: "I have considered your application . . . and have to inform you that, subject to the conditions mentioned below, and which I have placed upon your notice, the work can be proceeded with, and I shall report to that effect to my vestry. . . ."

The vestry subsequently passed a resolution approving the report of the surveyor.

Held, that this was a sufficient "order" of the vestry within section 76 of the Metropolis Management Act, 1855.—STOKES *v.* HAYDON, *K.B.D.*; 84 L. T. 531.

9. *Management Acts—Sewer—Drain—Nuisance—Drainage of group of houses by combined operation—Order of Commissioners of Sewers—Departure from plan authorized—Increased burden on pipe—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Metropolis Local Management Acts Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 112.—In 1855 an order of the Metropolitan Commissioners of Sewers was obtained for draining four houses in the metropolis by a combined operation. The work was carried out before the 1st of January, 1856, but not in accordance with the plan authorized by the commissioners. From the group of four houses one was left out, and two others were added. A nuisance having arisen in regard to the pipe draining the group, and the owner of the houses having been required to abate the nuisance,

Held, that the departure from the plan authorized was material, and, there being no evidence that such departure was sanctioned by the commissioners, the pipe was not a drain but a sewer, and that therefore the owner was not liable to abate the nuisance.—BULLOCK *v.* REEVE, *Q.B.D.*, 93; 70 L. J. Q. B. 42; 84 L. T. 53.

10. *Management Acts—Street—New street—Paving expenses—Apportionment of—Strip of land added to old highway—Cost of paving added part—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 105 —*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 77, 112.—An old public highway of 16ft. in width, which, prior to and since 1855 had existed as a formed road, with some houses on the south side thereof, and had been repaired by the district board of works, was widened in 1898 by the addition thereto on the north side of a strip of land of 24ft. in width, thereby making the width of the whole road 40ft., and there were buildings on both sides of the roadway. The board resolved to pave the road as a "new street" under the Metropolis Management Acts, and they apportioned the expenses of paving the added part amongst the owners of houses and lands on the north side only, exempting the owners on the south side.

Held, that the added part of 24ft. was the "new street" within the meaning of the Metropolis Management Acts, and that the expenses of paving the added part were properly apportioned on the owners on the north side only, as the houses and lands on the south side of the roadway abutted on the old highway, and not on the "new street."—PROPERTY EXCHANGE *v.* WANDSWORTH BOARD OF WORKS, *K.B.D.*; 84 L. T. 689.

11 *Management Acts—Street—New street—Paving expenses—Open space—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 105, 250—*Metropolis Local Management Act Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 77—*Metropolitan Open Spaces Act*, 1877 (40 & 41 *Vict. c.* 35), *s.* 1—*Metropolitan Open Spaces Act*, 1881 (44 & 45 *Vict. c.* 34), *s.* 5—*Open Spaces Act*, 1887 (50 & 51 *Vict. c.* 32), *s.* 6—*London Open Spaces Act*, 1893 (56 & 57 *Vict. c. lxxi.*), *s.* 25.—By virtue of section 1 of the Metropolitan Open Spaces Act, 1877, and section 6 of the Open Spaces Act, 1887, metropolitan vestries have power to acquire open spaces of land within their parishes, and to hold the same "in trust for the perpetual use thereof by the public for exercise and recreation."

By section 5 of the Metropolitan Open Spaces Act, 1881, metropolitan vestries have power to acquire open spaces of land "in trust to allow, and with a view to, the enjoyment by the public of such open space . . . in an open condition free from buildings . . . and for no other purpose."

By the London Open Spaces Act, 1893, the vestry may "erect and maintain on any of the open spaces belonging to them or under their control buildings for the accommodation of keepers, constables, and other persons employed by them in connection with the maintenance and management of such open spaces and also such other convenient and ornamental

mental buildings and such appliances as they may think requisite for the purposes of exercise and recreation and for refreshment-rooms, band-stands, conveniences, and for other like purposes."

An open space of land was conveyed to a metropolitan vestry in 1894 "to the end and intent that it should at all times be kept and maintained as an open space for the perpetual use thereof by the public for exercise and recreation." In pursuance of the powers given by the Metropolitan Open Spaces Act, 1893, the vestry erected on the land a band-stand, a cloak-room, and a refreshment stall. They let the refreshment stall to a caterer and the seats near the band-stand to a contractor.

Held, that the land must be deemed to have been acquired under the more beneficial Acts of 1877 and 1887, and not under that of 1881, and that the vestry were "owners" of the land within the meaning of the Metropolis Local Management Acts, 1855 and 1862, and were liable to contribute to the expenses of paving a new street on which the land abutted.—FULHAM VESTRY *v.* MINTER, *Q.B.D.*, 415; [1901] 1 Q. B. 501; 70 L. J. K. B. 348; 84 L. T. 49.

12 *Management Acts — Street — "New street" —Sewering — Expenses — New buildings on one side of old street—Sewer put in on new side —Liability of frontagers—Metropolis Management Amendment Act,* 1862 (25 & 26 *Vict. c.* 102), *ss.* 52, 53.—An old highway, in the centre of which was the boundary between the parish of H., in the county of M., and the parish of C., in the county of London, had buildings erected on the H. side of it for almost its whole length before 1856, when the Metropolis Management Act, 1855, came into operation. On the C. side there were then only a few houses, but recently this side also has been covered with buildings; and in 1898 a sewer was constructed on the C. side to receive the drainage of the houses on that side. It was found as a fact that the road, taken as a whole, was sufficiently built upon to be a street before the Metropolis Management Act, 1855, came into operation.

Held, that, for the purpose of determining whether the C. side of the road was a "new street" within the Metropolis Management Acts, so as to render the frontagers on that side liable to the expenses of sewering, the road must be taken as a whole, and the portion of the road on the C. side could not be taken by itself, and could not, therefore, form a "new street" so as to render the frontagers liable—ST. JAMES, CLERKENWELL, VESTRY *v.* EDMONDSON, *Q.B.D.*, 171; [1901] 1 Q. B. 264; 83 L. T. 501.

13. *Management Acts—Street—Widening street—Compulsory purchase—Power of vestry to take part of houses—Injunction to restrain proceeding under notice to treat—Michael Angelo Taylor's Act* (57 *Geo.* 3, *c.* 29), *ss.* 80, 82.—Where the authority having control of the streets in a metropolitan district has adjudged that part of a house obstructs and prevents the widening of a street, sections 80 and 82 of 57 Geo. 3, c. 29, give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner; but where the part so desired to be taken is a substantial portion the taking of which will substantially injure the use of the house and prevent it from being occupied and enjoyed as the kind of building it was before, the authority has no such power, and can be compelled by an owner who is able and willing to sell and convey the whole to them, to take the whole.

A limitation is to be placed on the word "part" in the construction of section 80 of 57 Geo. 3, c. 29.

Gordon v. *Vestry of St Mary Abbott's, Kensington,* [1894] 2 Q. B. 742, discussed.—GIBBON *v.* PADDINGTON VESTRY, *Ch.D. Stirling, J.* 8; [1900] 2 Ch. 794; 69 L. J. Ch. 746; 83 L. T. 136.

14. *Public health—Houses let in lodgings—Byelaws—Artizans dwellings—Public Health* (*London*) *Act,* 1891 (54 & 55 *Vict. c.* 76), *s.* 94.—A building was divided into a number of separate two-roomed and one-roomed tenements, each of which were occupied by a separate family. The passages and staircases were used in common, and there was a water-closet, sink, water-tap, and dust shoot for the use in common of each set of three or four tenements. There was a front door at the entrance of the building, but there was no means of fastening it beyond a Norfolk latch. The landlord did not live on the premises, but a caretaker lived on the ground floor, who attended to minor repairs and cleaned the common passages, staircases, and water closets.

Held, that the building was not a house let in lodgings or occupied by members of more than one family within the meaning of section 94 of the Public Health (London) Act, 1891, or of bye-laws made thereunder.—WEATHERITT *v.* CAUTLAY, *K.B.D.*, 568; [1901] 2 K. B. 285; 70 L. J. K. B. 799; 84 L. T. 768.

15. *Public health—Nuisance—Sending forth black smoke—No evidence offered that any particular individual or property was annoyed or injured thereby—Necessarily a nuisance—Public Health* (*London*) *Act,* 1871 (54 & 55 *Vict. c.* 76), *s.* 24 (b).—The appellant company was convicted under section 24 (*b*) of the Public Health (London) Act, 1891, of sending forth black smoke "in such quantities as to be a nuisance."

Held, that as the evidence proved that black smoke was sent forth in such quantity and for such periods as must necessarily amount to a nuisance, the conviction must be affirmed, as it was not necessary in such circumstances to show that the black smoke was a nuisance or an injury to any particular individual or property—SOUTH LONDON ELECTRIC SUPPLY CORPORATION *v.* PERRIN, *K.B.D.*, 539; [1901] 2 Q. B. 186; 70 L. J. K. B. 643; 84 L. T. 630.

16. *Rating—Appeal—Valuation list—Alteration in list striking out whole amount of rate—Rates paid during appeals—Right to recover—Valuation* (*Metropolis*) *Act,* 1869 (32 & 33 *Vict. c.* 67), *s.* 44.—The plaintiff, an advertising contractor, was entered in a provisional valuation list as the occupier of an advertising station and hoarding. He appealed against the valuation list to the assessment committee and the quarter sessions, on the ground that he was not the rateable occupier. The quarter sessions confirmed the assessment, subject to a case for the opinion of the High Court. The High Court held that the plaintiff was not the rateable occupier, and ordered the entry of the plaintiff as occupier to be struck out in the valuation list. While these proceedings on appeal were pending, the plaintiff had paid several rates, two of which were paid after summonses to enforce the payment of the same had been taken out.

Held, that the plaintiff was entitled, under section 44 of the Valuation (Metropolis) Act, 1869, to recover the whole amount of the rates so paid, including those paid after summonses had been taken out, as the entire alteration of the whole amount of the rate was an "alteration in such valuation list" within the meaning of the section.—

BURTON *v.* ST. GILES, BLOOMSBURY, VESTRY, *Q.B.D.*, 334; [1900] 1 Q. B. 389; 70 L. J. Q. B. 127; 84 L. T. 30.

17. *Rating—Supplemental valuation list—Alteration in value—Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 43, 46, 47.—To justify the inclusion in a supplemental list of an alteration in the value of a hereditament, as required by section 47 of the Valuation (Metropolis) Act, 1869, the alteration must be one arising from a cause which directly affects the value of the particular hereditament; and it lies upon those who desire to alter the assessment to prove the nature and cause of the alteration in value.

The fact that, after the quinquennial valuation, a premium was paid for the lease of the premises is not of itself sufficient evidence of alteration within the meaning of the statute.

Decision of the Court of Appeal (48 W. R. 162, [1900] 1 Q. B. 68) affirmed. — CAMBERWELL ASSESSMENT COMMITTEE *v.* ELLIS, *H.L.*, 239; [1900] A. C. 570; 83 L. T. 201.

18. *Surveyor's fees—Land of school board—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 21, 154.—By section 21 of the London Building Act, 1894, any building to be erected upon any lands belonging, at the time of the coming into operation of the Act, to the London School Board, may be erected in accordance with the provision of any Act in force immediately before the passing of the Act.

Held, that the fees payable to the district surveyor were also regulated by such earlier Act.—MARSLAND *v.* WALLIS, *Q.B.D.*; 83 L. T. 761.

See also Common; Sheriff.

MINE:—

1. *Coal mine—Order of Secretary of State—Notice of—Coal Mines Regulation Act*, 1896 (59 & 60 *Vict c.* 43), *s.* 6.—On the hearing of a summons against the manager of a mine for contravention of an order purporting to be made by a Secretary of State under section 6 of the Coal Mines Regulation Act, 1896, a Queen's printer's copy of the order was put in evidence; but no evidence was given of any notice by the Secretary of State of the making of the order or of any direction by him as to the manner in which notice of the order should be given.

Held, that the provisions as to the giving of notice were directory only, and were not conditions precedent to the coming into operation of the order, and therefore that the order was valid.—JONES *v.* ROBSON, *Q.B.D.*; [1901] 1 Q. B. 673; 70 L. J. Q. B. 419; 84 L. T. 230.

2. *Minerals—Coal mine—Abandonment of mine—Delivery of plan of abandoned mine to Secretary of State—Limitation of proceedings—Notice requiring compliance with the Act—Continuing offence—Coal Mines Regulation Act*, 1887 (50 & 51 *Vict. c.* 46), *ss.* 38 (5), 59.—By section 38 of the Coal Mines Regulation Act, 1887, it is enacted that, where a mine or seam of coal is abandoned, the owner shall, within three months after the abandonment, send a plan of the workings to a Secretary of State, and that, if an owner of a mine or seam fails to comply with the section, he shall be guilty of an offence; and it is further provided (sub-section 5) that "a complaint or information of an offence under this section may be made or laid at any time within six months after abandonment of the mine or seam, or after service on the owner aforesaid of a notice to comply with the requirements of this section, whichever last happens."

Held, that an information could not be laid of an offence under the section after a period of six months had elapsed since the service of a notice to comply with the section.

Held, also, that section 59 (2) of the Act did not apply to offences under section 38.

Held, also, that a notice in the following terms: "I beg to point out to you that no plan of the abandoned workings in the seven-feet coal seam has yet been forwarded as required by section 38 of the Mines Act. Will you please give the matter your early attention?" is a good notice under the section.—STOKES *v.* HILL, *K.B.D.*, 375; [1901] 1 K. B. 493; 70 L. J. K. B. 331; 84 L. T. 122.

3. *Quarry—Stone or "other minerals"—Sand and gravel—Quarries Act*, 1894 (57 & 58 *Vict. c.* 47), *s.* 1 —*Metalliferous Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 77), *ss.* 11, 28—*Regulation of Railways Act*, 1871 (34 & 35 *Vict. c* 78), *s.* 6.—By section 1 of the Quarries Act, 1894, it is provided that "This Act shall apply to every place (not being a mine) in which persons work in getting slate, stone, coprolites, or other minerals, and any part of which is more than twenty feet deep, and every such place is in this Act referred to as a quarry under this Act."

Held, that gravel and sand are minerals within the meaning of this section.

Held, also, that the getting of sand and gravel by a railway company for their own use as ballast, out of land belonging to them, is not an act done "in the course of working the railway," within the meaning of section 6 of the Regulation of Railways Act, 1871.—SCOTT *v.* MIDLAND RAILWAY CO., *Q.B.D.*, 318; [1901] 1 Q. B. 317; 70 L. J. Q. B. 228; 83 L. T. 737.

See also Master and Servant, 26.

MONEY-LENDER:—

Harsh and unconscionable transaction—Re-opening —Money-lenders Act, 1900 (63 & 64 *Vict. c.* 51), *s.* 1. —The words in section 1, sub-section 1, of the Money-lenders Act, 1900, "or is otherwise such that a court of equity would give relief," are not exclusive of the previous words "harsh and unconscionable," and in order to entitle the person sued to relief the transaction must be such that a court of equity would relieve against it on the ground of its being harsh and unconscionable.—WILTON & CO. *v.* OSBORN, *K.B.D.*; [1901] 2 K. B. 110; 70 L. J. K. B. 507; 84 L. T. 694.

MORTGAGE:—

1. *Appropriation by mortgagor's agent of money intended to be applied in discharge of mortgage—Subsequent transfer of mortgage debt and security to mortgagor's agent, followed by transfer by him to an assignee without privity of mortgagor — Account between mortgagor and mortgagee—Reconveyance by assignee to mortgagor.*—A mortgagor of a house put her solicitor in funds for the express purpose of paying off the mortgage. The solicitor did not pay off the mortgage, but appropriated the funds to his own use. He continued to pay the interest due under the mortgage. The mortgagor did not ask for the title deeds or a reconveyance of the legal estate. The solicitor took a transfer of the mortgage debt and security to himself, and the following day transferred the same to the defendant, who took the transfer in good faith, but made no inquiry as to the state of the account between mortgagor and mortgagee. The solicitor absconded, and, on the mortgagee applying to the mortgagor for interest, the fraud was discovered by both.

Held, that the charge on the property ceased to

exist the moment that the debt and security were transferred to the solicitor, and that the transferee from him took subject to the account between mortgagor and mortgagee at the date of his transfer, and was accordingly bound to reconvey the property to the mortgagor, subject only to the costs of reconveyance.—TURNER *v.* SMITH, *Ch.D. Byrne, J.*, 186; [1901] 1 Ch. 213; 70 L. J. Ch. 144; 83 L. T. 704.

2. *Company—Shares—Fluctuating security—Power of sale in mortgagee—Costs.*—The plaintiff instructed the defendants, who were brokers, to buy shares of a fluctuating nature for him, but only paid a part of the purchase-moneys in spite of repeated applications; in pursuance of an agreement between the plaintiff and the defendants the shares were entered on the register in the name of the defendants and so held by way of security for the payment of the balance owed to them. Upon the company announcing a scheme of reconstruction the defendants wrote again to the plaintiff for instructions and payment of his debt. Receiving no reply, they themselves applied for new shares in exchange and sold 300 to pay expenses and the remainder later. The plaintiff now alleged that the sale was improper and claimed redemption of the shares or, in the alternative, damages for the alleged wrongful sale.

Held, that the defendants, as mortgagees, were justified in realizing the 300 shares to pay the expenses of obtaining the new shares under the reconstruction of the company; and, further, apart from a power of sale implied by agreement between the parties, the defendants, as mortgagees with a security of a fluctuating nature, were, after making their applications for payment and the lapse of a reasonable time, entitled to sell the shares without commencing an action of foreclosure and without an express power of sale.

Tucker v. *Wilson*, 1 P. Wms. 261 (*sub. nomine Wilson* v. *Tooker*, 5 Br. Parl. Cas. 193), discussed and approved.—DEVERGES *v.* SANDEMAN, *Ch.D. Farwell, J.*, 167; [1901] 1 Ch. 70; 70 L. J. Ch. 47; 83 L. T. 706.

3. *Fixtures—Dog-grates not attached to the freehold.*—After the execution of a mortgage of a freehold house the mortgagor removed certain fixed grates which were in the house, and substituted for them dog-grates which were not fixed, but rested by their weight upon the ground. The mortgagor subsequently assigned the equity of redemption, together with the furniture in the house, and the assignee removed the dog-grates from the house. The mortgagee, having foreclosed the mortgage, brought an action against an assignee to recover possession of the dog-grates, on the ground that they were fixtures passing with the freehold.

Held, that physical annexation to the freehold was not necessary to make the dog-grates fixtures as between mortgagor and mortgagee so as to pass with the freehold; that, as the grates were in fact placed in the house in substitution for the old fixed grates for the purpose of improving the house, they were fixtures passing with the freehold —MONTI *v.* BARNES, *C.A.*, 147; [1901] 1 Q. B. 205; 70 L. J. Q. B. 225; 83 L. T. 619.

4. *Joint account—Part discharge of joint debt—Receipt by one of two joint creditors—Remedies of mortgagor at law and in equity—Joint account clause—Disclosure of trusts.*—In a foreclosure action for £4,000 the defendant claimed to redeem for £3,000, contending that a payment of £1,000 to a firm in which one of his joint creditors was a partner, but which did not appear to have been authorized to act as agent in the matter, discharged the mortgage *pro tanto.*

Held, that, although the payment to one of the joint creditors might have been a good discharge of the joint debt in law, yet the court of equity would consider all the facts of the case and decide whether it was equitable to deprive the plaintiffs of their legal title to the charge as a whole, and that in this case the plaintiffs were entitled to foreclosure, the principal sum being £4,000.

Steeds v. *Steeds*, 37 W. R. 378, 22 Q. B. D. 537, explained.

Matson v. *Denis*, 4 De G. J. & S. 345, followed.—POWELL *v.* BRODHURST, *Ch.D. Farwell, J.*, 532; [1901] 2 Ch. 160; 70 L. J. Ch. 587; 84 L. T. 620.

5. *Lease — Goodwill — Priority — Marshalling — Apportionment.*—A mortgagor on three different occasions mortgaged a leasehold house where he carried on a business, and included the goodwill of the business in the first and third mortgages, but not in the second mortgage. The first mortgagee sold the whole security for a sum allocated in specific proportions to the lease and the goodwill respectively.

Held, that the goodwill of the business was something apart and different from the lease, and that the purchase-money ought to be apportioned between the lease and the goodwill.—BAGLIONI *v.* CAVALLI, *Ch.D. Cozens-Hardy, J.*, 236; 83 L. T. 500.

6. *Lease by mortgagor in possession—Sporting rights over mortgaged land not in occupation of mortgagor—Validity—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.—A lease by a mortgagor in possession of a house and adjoining premises included the right of sporting and shooting over a portion of the mortgaged property, which was in the occupation of an agricultural tenant, to whom it had been, previously to the mortgage, leased with a reservation of the sporting rights.

Held, that, as against the mortgagee, the lease was valid under section 18 of the Conveyancing Act, 1881.—BROWN *v.* PETO, *C.A.*, 324; [1900] 2 Q. B. 653; 83 L. T. 303.

7. *Priorities*—Chose in action—*Land held by several persons on trust for sale—Mortgage of beneficial reversionary interest of one of trustees—Absence of notice to other trustees—Subsequent mortgage with notice to trustees — Priority.*—Land was settled upon trust to sell the same and pay the income to X. for life, and after her death to divide the proceeds among her children, one of whom was P. P., being then one of the three trustees of the settlement, in the lifetime of X. and before the land was sold, mortgaged his share to G., but no notice of this mortgage was given to the other trustees. P. subsequently (concealing the mortgage to G.) mortgaged his share to the plaintiffs, who made inquiry of the trustees as to prior incumbrances, and themselves gave notice of their own mortgage to the trustees.

Held, (1) that, having regard to the trust for sale, the principle of *Dearle* v. *Hall*, (1823) 3 Russ. 1, 27 R. R. 1, applied; (2) following *Browne* v. *Savage*, (1859) 4 Drew. 635, that the mortgage of the plaintiffs, had priority over that of G.—LLOYD'S BANK *v.* PEARSON, *Ch D. Cozens-Hardy, J.*; [1901] 1 Ch. 865; 70 L. J. Ch. 422; 84 L. T. 314.

8. *Priorities—Trust—Fraud of trustee—Legal estate*—Tabula in naufragio—*Relation back.*—The rule that an equitable mortgagee without notice may gain priority by getting in the legal estate, even though in the interval he has received notice

of a prior incumbrance, does not apply where there is an express trust for the incumbrancer whose equity it is sought to displace.

As between purely equitable titles, that one will have priority which has the better right to call for the legal estate.

Conduct which will postpone an incumbrancer considered.—TAYLOR *v.* LONDON AND COUNTY BANKING CO., LONDON AND COUNTY BANKING CO. *v.* NIXON, *C.A.*, 451; [1901] 2 Ch. 231; 70 L. J. Ch. 477; 84 L. T. 397.

9. *Receipt clause—Mortgagor's signature induced by fraud of his solicitor—Estoppel—Title of mortgagee—Conveyancing Act*, 1881 (44 & 45 *Vict. c.* 44), *ss.* 54, 56.—Two trustees advanced money on a mortgage of real estate. S, one of the trustees, paid the money to E., a solicitor, who produced to him the mortgage deed executed by K. as mortgagor. The deed, which contained the usual receipt for the money in the body of it, was handed over by E. to S., who retained it. K., the mortgagor, had been induced to sign the deed by E., who was his solicitor, and in whom he had confidence, but K. did not know that the deed he signed was a mortgage, and had not instructed E. to obtain a mortgage for him. E. misappropriated the money and absconded. K., on discovering the fraud, brought an action against the trustees to have the mortgage set aside.

Held, that K. was estopped by his conduct from denying that the mortgage was valid, and that E. had authority to receive the mortgage money.—KING *v.* SMITH, *Ch.D. Farwell, J.*; [1900] 2 Ch. 425; 69 L. J. Ch. 598.

10. *Reconveyance — Words of limitation — Habendum to grantee "in fee"—Supplying omission from context—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 51.—Under section 51 of the Conveyancing and Law of Property Act, 1881, in a deed, in order to pass the legal estate in fee simple, it is necessary, in the absence of the word "heirs," to use the actual words of limitation mentioned in the section—namely, in fee simple.

Therefore, where, after the passing of the Act, freehold land, upon payment off of a mortgage thereon, was expressed to be reconveyed to the mortgagor to hold the same unto and to the use of the mortgagor in fee freed from the mortgage,

Held, that (apart from any question of rectification) the word "simple" could not consistently with the Act be supplied by construction from the context, and that the legal estate in the fee simple didnot pass.—ETHEL AND BUTLER'S CONTRACT, RE, *Ch.D. Joyce, J.*; [1901] 1 Ch. 945; 70 L. J. Ch. 498; 84 L. T. 459.

11. *Redemption—Collateral advantage to mortgagee—Advantage continuing after redemption—Fetter on redemption.*—The holder of shares in a tea company mortgaged them to secure repayment of an advance, and at the same time agreed to use his best endeavours to secure that the mortgagee should always thereafter have the sale of all the company's teas as broker, and, in the event of the company's teas being sold otherwise than through the mortgagee, to pay to the mortgagee the amount of the commission which he would have earned if the teas had been sold through him.

Held, that the collateral advantage secured to the mortgagee by this agreement was one which might be bargained for; for, although the effect of it was to continue after redemption, it did not fetter the mortgagor's right to redeem.—CARRITT *v.* BRADLEY, *C.A.*, 593.

12. *Redemption—Once a mortgage always a mortgage—Option to lender to enter into partnership with the mortgagor upon terms affecting the property—Option to be exercised within time limited for redemption—Conditional sale—Exercise of option—Sale or mortgage.*—Prior to July, 1898, plaintiffs advanced to defendant £5,000 upon the security of a ship and other property, upon the terms of an agreement made between them on the 23rd of April, 1896, whereby the money was not to be called in or paid for two years, and the plaintiffs might at any time within the two years elect to enter into partnership with the defendant upon the terms of their releasing the mortgage debt and the ship and other property becoming partnership assets. On the 9th of July, 1898, another agreement was entered into between the plaintiffs and defendant. It recited the agreement of 1896; that the plaintiffs had not entered into partnership; that the plaintiffs had applied for, and the defendant was unable to pay, the £5,000, and had requested the plaintiffs to extend the term of two years for a further period of five years; and it was thereby agreed (1) that the plaintiffs might, within five years, elect to enter into partnership with the defendant; (2) that the plaintiffs should in that event release the defendant from payment of the £5,000 and transfer the mortgaged property for the purposes of the partnership; (3) that the capital of the partnership property should belong to defendant and plaintiffs in equal shares.

In February, 1900, the plaintiffs exercised their option, and communicated to the defendant their election to enter into partnership with him, but he refused to comply, alleging that the effect of the agreement was to render the property irredeemable, and that it was an illegal clog on the equity of redemption.

Held, that the agreement amounted in law to a conditional sale of the property; that the condition was valid; and, on the condition being satisfied, the purchase took effect, the doctrine of equity as to clogging an equity of redemption not having any application to such a case.

Observations upon the nature of an equity of redemption and the doctrine of equity as to clogging an equity of redemption.—LISLE *v.* REEVE, *Ch.D. Buckley, J.*, 188; 83 L. T. 731.

13 *Solicitor-mortgagee—Profit costs—Judgment—Further consideration—Mortgagee's Legal Costs Act*, 1895 (58 & 59 *Vict. c.* 25), *s.* 3 —An order for foreclosure was obtained in 1893 by a solicitor-mortgagee in an action to enforce his security. In 1898 an order was made on further consideration of the action directing taxation of costs. The taxing-master allowed the mortgagee, who had himself acted, profit costs. On a summons to vary the certificate,

Held, that the rights of the parties were ascertained by the order of 1893, and must be determined by the law in force at that date; consequently, the mortgagee was not entitled to the benefit of the Mortgagee's Legal Costs Act, 1895, *s.* 3.—DAY *v.* KELLAND, *C.A.*, 66; [1900] 2 Ch. 745; 70 L. J. Ch. 3; 83 L. T. 447.

See also Bankruptcy, 1, 28, 32; Infant, 3; Landlord and Tenant, 11; Limitation Statutes, 3, 4; Partnership, 2.

NATAL, LAW of:—

Will—Roman-Dutch law—Direct substitution in favour of children who survive the testator's widow—Heirs of pre-deceased children excluded — Fideicommissary substitution — Appeal from Natal. — Where by will executed in Natal the testator directed that after his wife's death his estate should

"be equally divided among my children or such as may be then alive,"

Held, that the children who survived the wife took by direct substitution to the exclusion of the issue of any child who predeceased her. There is do rule of construction in Roman-Dutch law which authorizes children to be read as including grandchildren.

Where a substitution is direct there is no implied condition, under Roman-Dutch law, in favour of the institute, *si sine liberis decesserit.* But where the substitution is *fidei-commissary*, such a condition may be annexed to the *fidei-commissum*, so that unless the condition happens the *fidei-commissum* does not arise and the substitution fails of effect.—GALLIERS *v.* RYCROFT, *P.C.*; [1901] A. C. 130; 83 L. T. 79.

NEGLIGENCE:—

1. *Injury causing death—Alien—Negligence of British subject—Cause of action outside jurisdiction—Fatal Accidents Acts*, 1846 *and* 1864 (9 & 10 *Vict. c.* 93; 27 & 28 *Vict. c.* 95).—An action will lie in England, under the provisions or the Fatal Accidents Acts, 1846 and 1864, by the widow of an alien whose death has been caused on the high seas when navigating a ship of his own country, against an English owner of a British ship whose servants have negligently caused the collision and consequent death.

Adam v. *The British and Foreign Steamship Co.*, [1898] 2 Q. B. 430, 47 W. R. Dig. 139, disapproved.—DAVIDSSON *v.* HILL, *K.B.D.*, 630; 70 L. J. K. B. 788.

2. *Personal injuries—Acceptance of money in full discharge of claim for compensation—Subsequent development of injuries not before apparent—Claim for further damages—Right to bring action.*—The plaintiff, who was injured in a railway collision, signed a receipt for a sum of money paid him by the railway company in full satisfaction and discharge of all claims. He returned to work, but his eyesight soon began to fail, and he became totally blind.

Having commenced an action to recover damages from the railway company, the defendants pleaded that the action was not maintainable, and the question was ordered to be tried first whether the plaintiff had by his conduct debarred himself from suing for damages.

Held, that the action was maintainable, it being a question for the jury.—ELLEN *v.* GREAT NORTHERN RAILWAY CO., *K.B.D.*, 395.

See also Master and Servant, 27; Railway, 3, 4; Ship, 16, 17, 28.

NEW SOUTH WALES, LAW of:—

1. *Crown lands—Inquiry as to falsity of statements by applicant for conditional purchase—Powers of Land Board—Findings of fact by Land Court final—Power to reserve points of law—Jurisdiction of Supreme Court—Crown Lands Acts*, 1884, *ss.* 20, 26; 1889, *ss.* 5, 8, *sub-section* 6.—A Land Board and a Land Appeal Court having found, on an inquiry directed by the Minister for Lands under section 20 of the Crown Lands Act of 1884, that certain statements made by the respondent in applying for a conditional purchase were false within the meaning of section 26,

Held, on a special case submitted to the Supreme Court under section 8, sub-section 6, of the Crown Lands Act of 1889:

(1) That the jurisdiction of the Supreme Court is confined to the decision of submitted questions of law.

(2) That the decision on questions of fact by the Land Board or by the Land Appeal Court is final and conclusive.

(3) That the inquiry directed was within the cognizance of the Land Board under section 20 of the Act of 1884.

(4) That the Land Appeal Court has power to review the finding of the Land Board, and as incident thereto to reject irrelevant evidence, draw reasonable inferences of fact, correct errors and shortcomings of the board; to act as a court of rehearing as well as of appeal.

Under section 5 of the Act of 1889 and No. 7 of the Crown Lands Regulations of the 2nd of December, 1889, the Minister for Lands can order the inquiry to be held at any place that he may think fit.—MINISTER FOR LANDS *v.* WILSON, *P.C.*; [1901] A. C. 315; 84 L. T. 242.

2. *Income tax—Assessment—Income from ore produced in New South Wales and sold outside it—New South Wales Income Tax Act*, 1895 (59 *Vict. No.* 15), *s.* 15, *sub-sections* 3, 4.—Where income was in part derived from the extraction of ore from the soil of New South Wales Colony, and from the conversion in the latter colony of the crude ore into a merchantable product,

Held, that this income was assessable under the New South Wales Land and Income Tax Assessment Act of 1895, s. 15, sub-sections 3, 4, notwithstanding that the finished products were sold exclusively outside the colony.

In re Tindal, [1897] 18 N. S. W. L. R. 378, overruled.—COMMISSIONERS OF TAXATION *v.* KIRK, *P.C.*; [1900] A. C. 588; 69 L. J. P. C. 87.

3. *Interest in land—New South Wales Real Property Act*, 1862 (26 *Vict. No.* 9), *s.* 117—*Construction—Limitation—Section* 122—*Rights of beneficiares whose trustees are barred—Bankruptcy.*—Where a rent-charge or annuity is held by trustees to be applied by them for the maintenance and education of children or the survivor,

Held, that the children take a joint interest therein, but that the shares of the minors are to be applied as directed.

The interest of each child is an interest in land within the meaning of the New South Wales Real Property Act, s. 117.

Where the estate out of which the rent-charge issued passed to a bankrupt's assignee under a certificate of title negligently granted to the bankrupt free of incumbrance,

Held, in an action brought by the beneficiaries against the Registrar-General for compensation out of the assurance fund created by the said Act, that their rights, being under the Act independent of the trustees and being saved by the provisions of the Act (see section 122) in regard to persons under disability, could be enforced notwithstanding that their trustees' rights were barred.—WILLIAMS *v.* PAPWORTH, *P.C.*; [1900] A. C. 563; 69 L. J. P. C. 129.

NEW ZEALAND, LAW of:—

Native Rights Act, 1865 (29 *Vict. No.* 11), *ss.* 3, 4, 5—*Crown lands—Native title—Action against officer of Crown—Suit upon a native title—Jurisdiction of court.*—An aggrieved person may sue an officer of the Crown to restrain an act purporting to be done in pursuance of an Act of Parliament, but in fact outside the statutory authority. The Attorney-General is neither a necessary nor a proper party to such action.

The effect of the New Zealand Native Rights Act, 1865, ss. 3, 4, 5, is that a suit may be brought

upon a native title to land, and the court has jurisdiction to inquire whether such title has or has not been extinguished by cession to the Crown.

Therefore, where a native of New Zealand can prove that he and the members of his tribe are in possession and occupation of lands under a native title, which has not been lawfully extinguished, he can maintain an action against the Commissioner of Crown Lands to restrain an unauthorized invasion of his title.—NIRRAHA TAMAKI *v.* BAKER, *P.C.*; 84 L. T. 633.

NUISANCE:—

1. *Gas company—Pollution of water by gas—Evidence—Statute—Gasworks Clauses Acts*, 1847 *and* 1871.—The plaintiffs were the owner and the occupiers of two houses which obtained their water supply from a well by means of a pipe laid in the main road and belonging to the owner of the houses.

The defendants were a gas company incorporated under Acts of Parliament, and owned gas mains and pipes which were laid in the same road.

In an action by the plaintiffs to restrain the company from polluting the water supply with gas escaping from their pipes, which the plaintiffs alleged to be defective,

Held, that the defendants had no statutory authority to create a nuisance, and that there was a nuisance; as, however, it had ceased after action brought, there would be no injunction, but a declaration that the defendants were not entitled to pollute the plaintiffs' water.

Held, also, that evidence was inadmissible on the following three points raised by the defendants: (1) That their pipes were well laid, and they had a statutory right to do what they did, some escape of gas being unavoidable. (2) That the plaintiffs' water pipe was defective. (3) That the plaintiffs' water supply was otherwise unfit for domestic purposes.—BATCHELLER *v.* TUNBRIDGE WELLS GAS CO., *Ch.D. Farwell, J.*; 84 L. T. 765.

2. *Non-feasance—Highway—Abatement—Right of private individual to abate.*—Even if the right to abate a nuisance by an individual for purposes of passage exists in the case of a nuisance arising by non-feasance, it does not justify an individual in entering and erecting a permanent structure on another person's land, inasmuch as the right of the public upon a highway is that of going and coming only, and the right of abatement in an individual is merely ancillary thereto. Nor is an individual in such a case justified in his action by the fact that the local authority have the right to enter to abate the nuisance but have failed to do so, for the default of the local authority cannot extend the burden imposed on the land.—CAMPBELL DAVYS *v.* LLOYD, *C.A.*, 710.

3. *Noxious trade—Reasonable use of premises—Injunction.*—In an action to restrain a nuisance, the question whether the defendant is acting reasonably from his own point of view is not material, and if he is carrying on business so as to cause a nuisance to his neighbours he is not acting reasonably as regards them, and may be restrained by injunction, although he may be conducting his business in a proper manner.

Reinhardt v. *Mentasti*, 42 Ch. D. 685, 690, is not inconsistent with the observations of Lord Selborne in *Ball* v. *Ray*, L. R. 8 Ch. 467, or with *Bamford* v. *Turnley*, 3 B. & S. 62.—ATTORNEY-GENERAL *v.* COLE, *Ch.D. Kekewich, J.*; [1901] 1 Ch. 205; 70 L. J. Ch. 148; 83 L. T. 725.

See also Highway, 9; Local Government, 7, 9-11; Metropolis, 15.

PARTNERSHIP:—

1. *Inspection of partnership books—Right of partner to inspect by agent—Partnership Act*, 1890 (53 & 54 *Vict. c.* 29), *s.* 24 (9).—The right of inspection of partnership documents conferred on partners by the Partnership Act, 1890, s. 24 (9), is not personal to the partners, but may be exercised by any partner by means of a competent agent, so long as it is not exercised in such a way as to be prejudicial to the other partners.

Decision of Joyce, J. ([1901] 1 Ch. 724), reversed.—BEVAN *v.* WEBB, *C.A.*, 548; [1901] 2 Ch. 59; 70 L. J. Ch. 536; 84 L. T. 609.

2. *Mortgage of share by one partner—Dissolution—Right of mortgagee to an account—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 31.—A mortgagee of a share in a partnership has a right to an account on dissolution in order to ascertain what the share of his mortgagor really is, even though the partners have *inter se* determined the value of the share.

Decision of Farwell, J. (48 W. R. 521), affirmed.—WATTS *v.* DRISCOLL, *C.A.*, 146; [1901] 1 Ch. 294; 70 L. J. Ch. 157; 84 L. T. 97.

3. *Solicitor—Dissolution—Agreement not to transact business with original clients — Injunction.* — In July, 1880, the plaintiff and the defendant entered into partnership as solicitors. Clause 7 of the partnership agreement provided: "Either party is to be at liberty to transact any business in his own name (if he wishes to do so), and also to transact any business for any private friends, or poor persons, without charge, he in such case paying all office out of pocket expenses." Clause 8 provided: "Either party is to be at liberty to terminate this agreement by three months' notice in writing at any time, and in such case neither is to transact any business for, or in any way to influence business with any clients who were original clients of the other.

No notice was given to terminate the partnership, but it was dissolved by mutual consent on the 10th of August, 1899. The plaintiff now moved for an injunction.

Held, that, notwithstanding no notice was given, the eighth clause of the agreement came into operation when the partnership was dissolved on the 10th of August; that "original clients" comprised those who were clients of either plaintiff or defendant before they became partners, and also those for whom the plaintiff or defendant in pursuance of clause 7 transacted business as for private friends or poor persons.—BADHAM *v.* WILLIAMS, *Ch.D. Kekewich, J.*; 83 L. T. 141.

4. *Trade name—Limited company—Sale of trade name—Abandonment—Covenant in restraint of trade—Unilateral covenant—Incident to business—Freehold premises—Name carved in structure—Erasure.*—A limited company which on being incorporated takes the name of the old firm, whose business and goodwill it has bought, and which, in accordance with the requirements of the Companies Act, 1862, adds the word "Limited" to that name, does not thereby abandon the use of the trade name of the old firm but may sell it to a purchaser of the company's business.

Montreal Lithographing Co. (*Limited*) v. *Sabiston*, [1899] A. C. 610, 48 W. R. Dig. 189, considered and distinguished.

A covenant made between two partners, whereby one of them agrees on the termination of the partnership not to carry on business within a certain distance of the place where the partnership business is situated, is of necessity an incident to the business and for its benefit, as there cannot be a

covenant in restraint of trade in gross as that would be unreasonable and therefore void.

Jacoby v. *Whitmore*, 32 W. R. 18, 49 L. T. Rep. 335, followed.

Elves v. *Crofts*, 10 C. B. 241, explained.

Where a man sells to another a freehold house on which his name is carved on part of the structure he cannot compel the purchaser to erase the name unless he has taken a direct covenant to that effect. —TOWNSEND *v.* JARMAN, *Ch.D. Farwell, J.*, 158; [1900] 2 Ch. 698; 83 L. T. 366.

See also Bankruptcy, 17; Copyright, 1; Trustee, 6, 11; Will, 33.

PATENT:—

1. *Infringement—Account of profits—Practice—Discovery — Names of customers.* — Where, in a successful action for the infringement of a patent, the plaintiff has elected to take an account of the profits, the defendant must disclose the full names and addresses of the customers to whom the infringing articles have been supplied, irrespective of any possible consequences which may thereby result to such customers.—SACCHARIN CORPORATION *v.* CHEMICAL AND DRUGS CO., *C.A.*, 1; [1900] 2 Ch. 556; 69 L. J. Ch. 820; 83 L. T. 206.

2. *Infringement — "Exercise" — Delivery of patented article abroad.*—Where defendants entered into contracts in the United Kingdom for the delivery by them abroad to an English company of saccharin made abroad, by means of a process patented in England by the plaintiffs, and where such saccharin was delivered at foreign ports,

Held, that the defendants were not exercising the invention so as to cause the infringement of the patent by such delivery, and that the knowledge of the defendants as to the ultimate destination of the saccharin was immaterial.—SACCHARIN CORPORATION *v.* REITMEYER, *Ch.D. Cozens-Hardy, J.*, 199; [1900] 2 Ch. 659; 83 L. T. 397.

3. *Infringement — Patented articles bought in England and sent abroad for sale—"Making use of" the invention—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *Schedule I., Form D —Damages—Assessment.*—The defendants having bought in England articles patented by the plaintiffs but manufactured by infringers, exported the articles to France for the purposes of sale there.

Held, that this was a "making use of" the plaintiffs' invention by the defendants, and constituted an infringement by the defendants of the plaintiffs' patent.

Minter v. *Willams*, 4 A. & E. 251, and *United Horse Shoe and Nail Co.* v. *Stewart*, 13 App. Cas. 401, 36 W. R. Dig. 63, considered and explained.

Held, also, that in the circumstances of the case the measure of damages was what the defendants would have had to pay for the permission to do that which they wrongfully did.

Judgment of Stirling, J. (48 W. R. 345, [1900] 1 Ch. 577), affirmed.—BRITISH MOTOR SYNDICATE *v.* TAYLOR, *C.A.*, 183; [1901] 1 Ch. 122; 70 L. J. Ch. 21; 83 L. T. 419.

4. *Registration — Prior publication or user — Amendment of specification—Renewal fees—West Australian Patent Act*, 1888 (52 *Vict. No.* 5), *ss.* 23, 49—*Letters of registration—Invalidity—Appeal from Western Australia.*—Under the provisions of section 49 of the West Australian Patent Act, 1888, holder of patents obtained in Great Britain or any other country are enabled to obtain letters of registration in the colony without the formalities and delay necessary on an application for a patent, but subject to all the incidents and conditions to which letters patent would be subject.

Held, accordingly, that prior publication, or even prior user of an invention in the colony after the date of its patent, affects the letters of registration.

The provisions of section 23, as to "amendment of specification," are made applicable by section 49 to letters of registration.

Where leave to amend a specification has been neither asked for nor granted, but the registrar has simply recorded an amendment without any jurisdiction to do so, it is invalid.

Renewal fees charged by the 2nd schedule of the Act on letters patent are not payable in respect of the letters of registration.—AUSTRALIAN GOLD RECOVERY CO. *v.* LAKE VIEW CONSOLS, *P.C.*; [1901] A. C. 142; 70 L. J. P. C. 14; 83 L. T. 541.

See also Bankruptcy, 6; Landlord and Tenant, 2.

PAWNBROKER:—

Unlawful pawning of stolen article—Conviction of pawner for larceny—Liability of pawner to further proceedings by pawnbroker—Pawnbrokers Act, 1872 (35 & 36 *Vict. c.* 93), *s.* 33.—Where a person steals an article and unlawfully pledges it with a pawnbroker, and is subsequently charged with the theft and is convicted, the pawnbroker does not thereby lose the right to take proceedings against the pawner under section 33 of the Pawnbrokers Act, 1872, because the pawner has been convicted of larceny by the owner of the goods.—PICKFORD *v.* CORSI, *K.B.D.*, 537; [1901] 2 K. B. 213; 70 L. J. K. B. 710; 84 L. T. 627.

PEER.—See Divorce, 3.

PHARMACY ACTS:—

Sale of poison—"Seller"—Orders transmitted by shopkeeper to duly registered vendor—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 15, 17.—An action to recover a penalty under section 15 of the Pharmacy Act, 1868, was brought in the county court against the defendant, who was a florist, for having sold a certain weed-killer, which contained a large quantity of arsenic, and was admittedly a poison within that section, the defendant not being a duly registered chemist. The judge found as a fact the defendant acted only as agent for the chemical company who manufactured the weed-killer, and was in the position merely of a canvasser for orders, with authority to receive money on account of the company, and that the defendant was not the "seller" of the poison within the Act.

Held, that, as the county court judge had found as a fact that there was no contract of sale as between the defendant and the purchaser, and as there was some evidence to support that finding, the court could not interfere to set it aside.

Decision of the Divisional Court (48 W. R. 335, [1900] 1 Q. B. 454) affirmed.—PHARMACEUTICAL SOCIETY *v.* WHITE, *C.A.*, 407; [1901] 1 Q. B. 601; 70 L. J. K. B. 386; 84 L. T. 188.

POLICE:—

Pension—"Annual pay" — Special allowance—Police Act, 1890 (53 & 54 *Vict. c.* 45), *s.* 1; *Sched. I., Parts* 1, 3.—A constable in the metropolitan police was selected by the Commissioners of Police for permanent special duty at the House of Lords, and he received for that special duty a payment of 7s. a week in addition to his ordinary pay as a police constable. He performed this duty and received the payment for several years up to the date of his retirement.

Held, that the sum of 7s. was not part of the

constable's "annual pay" within the meaning of the Police Act, 1890, so as to entitle him to have it taken into account in calculating the amount of his pension.

Decision of the Queen's Bench Division (48 W. R. 494, [1900] 1 Q. B. 680) affirmed.—UPPERTON *v.* RIDLEY, *C.A.*, 340; [1901] 1 Q. B. 384; 70 L. J. Q. B. 249; 84 L. T. 18.

POOR LAW:—

1. *Rating—Coal mine—Gross and rateable values—Underground roads and airways—Expenses of keeping in repair—Working expenses or "repairs"—Deduction of, from gross value—Parochial Assessments Act,* 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.—In rating a coal mine to poor rate the annual expenses properly incurred in keeping in repair the permanent main underground roads and airways—their maintenance in proper repair being necessary to maintain the coal mine in a state to command the rent—are not working expenses of the mine, but are "repairs" within the meaning of section 1 of the Parochial Assessments Act, 1836, and are, therefore, under that section, to be deducted from the gross estimated rental in arriving at the rateable value on which the rate is to be made.

A coal mine extended underground into the parish of D., the shafts or pits for raising the coal being in another parish and not in the parish of D. The part of the mine in the parish of D. consisted of the permanent main roads for conveying the coal from the working places to the shafts, the permanent main airways for ventilating the mine, the working places at the face of the coal, and the temporary roads. The owners of the mine, who under their lease paid a royalty rent for the coal obtained, incurred an annual expenditure in keeping in repair these permanent main roads, airways, &c., and such expenditure was necessary to maintain the mine in a state to command the rent.

Held, that, in rating that part of the mine which was within the parish of D., the expenses so incurred in keeping in repair the permanent roads, airways, &c., were "repairs," and were to be deducted from the gross estimated rental in arriving at the rateable value.—BROWN *v.* ROTHERHAM UNION, *Q.B.D.*; 83 L. T. 193.

2. *Rating—Exemption of underground sewers—Extent of exemption.*—Where exemption from rateability is claimed for an underground sewer vested in a public body, it must be shown, first, that the sewer is quite underground, so that the surface under which it runs is not occupied or in any way affected by it; and, secondly, that no payment is made to the owners of the sewer for the use of it by others.

Decision of the Queen's Bench Division (48 W. R. 382, [1900] 1 Q. B. 365) affirmed.—YSTRADYFODWG SEWERAGE BOARD *v.* NEWPORT ASSESSMENT COMMITTEE, *C.A.*, 292; [1901] 1 Q. B. 406; 70 L. J. K. B. 318; 84 L. T. 40.

3. *Rating—General district rate—Appeal—Reduction of valuation—Demand note—Summons—Matter of complaint arising within six months of issue of summons—Public Health Act,* 1875—*Jervis' Act* (11 & 12 *Vict. c.* 43), *s.* 1.—Where, on appeal against an assessment for the poor rate, the rateable value of premises is reduced and the amount of the general district rate is in consequence altered so as to agree with such reduced valuation, a summons may be issued to enforce a demand made for the payment of arrears of the amended district rate if the demand for such amended rate has been made within six months of the issue of the summons.

The right to demand the reduced amount of the amended rate comes into operation for the first time when the amended rate is made in accordance with the reduced valuation, and the fact that a demand for the payment of arrears of the district rate on the higher valuation had been made more than six months previous to the issue of the summons does not cause the claim, in respect of which the summons was issued, to be barred by virtue of section 11 of Jervis' Act (11 & 12 Vict. c. 43).—KEETON *v.* SHEFFIELD COAL CO., *K.B.D.*, 349; [1901] 2 K. B. 26; 70 L. J. K. B. 374; 84 L. T. 387.

4. *Rating — Lairages — Profit-earning capacity—Evidence of receipts and expenditure—Admissibility of evidence—Principle of assessment.*—In the assessment of premises to the poor rate the duty which the Legislature has imposed upon the overseers is to ascertain, as a matter of fact, what sum a tenant will reasonably give for them by the year, making the usual deductions. In ascertaining this sum the circumstances of the particular occupation, also the receipts and expenditure, are legitimate objects for consideration.

Decision of the Court of Appeal (48 W. R. 259, [1900] 1 Q. B. 143) affirmed.—MERSEY DOCKS *v.* BIRKENHEAD UNION, *H.L.*, 610; [1901] A. C. 175; 70 L. J. K. B. 584; 84 L. T. 542.

5. *Rating—Museum—Established by Act of Parliament—Public admission—Possibility of beneficial occupation.*—S. Museum was established by an Act of Parliament under which the building and its contents were vested in trustees named in the Act and their successors. To these trustees was given the control of the building and museum subject to regulations contained in or made under the authority of the Act. One of these regulations was that the museum should be open on two days in each week during the months of April, May, and June each year to amateurs and students of architecture, and to persons who requested and obtained admission at any other times. Two rooms were to be set aside for the residence of a curator.

The curator, besides taking care of the museum, collected the rents of a house which was settled as an endowment of the museum; and while the museum was closed to visitors the trustees of it met therein for the purpose of distributing the funds arising under a trust created for the benefit of poor architects by the founder of the museum.

Held, that the rights conferred on the public by the Act were not such as to exclude all beneficial occupation on the part of the trustees, and that consequently the building was rateable.—SOANE MUSEUM TRUSTEES *v.* BLOOMSBURY VESTRY, *Q.B.D.*; 83 L. T. 248.

6. *Rating—Railway company—Gravel pits—Exhaustion of subject-matter of assessment—Value of occupation when rate made—Occupation—Land.*—A company purchased of the owner of a bed of gravel the gravel in three separate plots of land, with the right to dig and remove it. A time was fixed in each case in which the gravel might be taken out, and the company were bound to level the ground and replace the top soil, and to give the owner possession at the date named. The company were assessed in one assessment in respect of their occupation of the three plots, and a rate was subsequently made on the basis of this assessment. When this rate was made the company were still in occupation of the three plots, and were at work on the gravel in one of them, but all the gravel in the other two plots had been taken out, and they were

only used as storage ground for gravel dug by the company. On a case stated at quarter sessions,

Held, that the company were rateable on the value, at the time of making the rate, of the land in their occupation, and that the annual value ought to be taken at the amount of rent or royalty at which the same could then be reasonably expected to be let to a tenant from year to year, regard being had to the value of the gravel in the unexhausted plot, added to the value of the exhausted plots for storage purposes.—FARNHAM FLINT, GRAVEL, AND SAND CO. *v.* FARNHAM UNION, *C.A.*; [1901] 1 Q. B. 272; 70 L. J. Q. B. 130; 83 L. T. 660.

7. *Rating—Railway—Indirectly productive portion of—Signal-box—Assessment.*—The signal-boxes of a railway are for purposes of parochial rating to be treated, not as part of the running line, but as part of the indirectly productive portion of the railway, and are consequently to be separately assessed in the respective parishes in which they are situate.—MIDLAND RAILWAY CO. *v.* PONTEFRACT ASSESSMENT, *K.B.D.*; [1901] 2 K. B. 189; 70 L. J. K. B. 691; 84 L. T. 536.

8. *Separation of parish from union—Amount to be paid by union to parish—Principle of apportionment—"Property" of the union—Jurisdiction of the Local Government Board—Poor Law Amendment Act*, 1834 (4 & 5 *Will.* 4, *c.* 76), *s.* 32—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 24 (2) (d), 26 (1).—In 1896 the Local Government Board made an order under section 32 of the Poor Law Amendment Act, 1834, for the separation of the parish of Willesden from the union of Hendon, of which theretofore it had been a part. In consequence of such order it became requisite, under the same section, for the board to ascertain the proportionate value to the parish of Willesden of the union of Hendon workhouse or "other property held or enjoyed by such union for the use of the poor or benefit of the ratepayers thereof," and also to "fix the amount to be received or paid, or secured to be paid, by" the parish of Willesden.

There were two annuities payable by the county council of Middlesex, under the Local Government Act, 1888, to the old undivided union of Hendon in respect of the salaries of registrars and costs of the officers.

Held, that these annuities came within the meaning of the words "other property" in section 32 of the Poor Law Act, 1834.

In ascertaining the proportionate value to a parish of a union of such annuities, and fixing the amount to be received or paid by such parish, the Legislature contemplated the capitalization and division of the annuities at the time of the separation of the parish from the union.

An apportionment of the annual sums according to the future rateable values of the union and parish respectively is not a fixing of the amount within the section.—REG. *v.* LOCAL GOVERNMENT BOARD, *C.A.*, 226; [1901] 1 Q. B. 210; 70 L. J. Q. B. 272; 83 L. T. 648.

9. *Settlement—Pauper lunatic—Amalgamation of part of one parish with whole of another parish—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61)—*Poor Law Act*, 1879 (42 & 43 *Vict. c.* 54)—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5).—Where a pauper has acquired a settlement in a parish, and subsequently a part of another parish is added to and amalgamated with the former, so that there results one enlarged parish, the pauper's settlement is not lost.

Reg. v. *Inhabitants of Tipton*, 3 Q. B. 215, and *Dorking Union* v. *St. Saviour's Union*, 46 W. R. 309, [1898] 1 Q. B. 594, distinguished.—WEST HAM GUARDIANS *v.* LONDON COUNTY COUNCIL, *K.B.D.*, 443; [1901] 1 Q. B. 720; 70 L. J. K. B. 503; 84 L. T. 471.

POWER:—

1. *Appointment—Married woman—Restraint on anticipation—Release of power—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 52.—A married woman had, under a settlement executed on her marriage in 1892, a life interest in personalty, subject to a restraint on anticipation, with a power of appointment amongst her children.

Held, that under section 52 of the Conveyancing and Law of Property Act, 1881, she could by deed unacknowledged release her power.—CHISHOLM, RE, HEMPHILL *v.* HEMPHILL, *Ch.D. Stirling, J.*; [1901] 2 Ch. 82; 70 L J. Ch. 533.

2. *Appointment—Settlement of wife's property—Limitation "as she shall direct."*—A marriage settlement dealing with real estate belonging to the wife provided that, should she survive her husband, which happened, the trustees should reconvey the lands to her "her heirs, executors, administrators, and assigns respectively for her and their own use and benefit, or otherwise as she shall direct."

Held, that these words did not necessarily confer a general power of appointment on the wife, it appearing that such a power would defeat the whole scheme of the deed.—VAN GRUTTEN *v.* FOXWELL, *H.L.*; 84 L. T. 545.

3. *Execution—Document "purporting" to be a will.*—Under a settlement dated in 1848 a married woman had a power of appointment amongst her children exercisable by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will or testament, "or any writing in the nature of or purporting to be a will or codicil." She signed a written document which was expressed to be her "last will," and which, if valid as a testamentary instrument, would have operated as an execution of the power. This document, having been insufficiently executed, was not admitted to probate,

Held, that although the document might not be "in the nature of" a will, yet, as it clearly "purported to be" the will of the donee of the power, it was a valid execution of the power.—BROAD, RE, SMITH *v.* DRAEGER, *Ch.D. Kekewich, J.*; [1901] 2 Ch. 86; 70 L. J. Ch. 601; 84 L. T. 577.

4. *Execution—Power exercisable by deed or writing duly executed or by will—Testamentary documents not admitted to probate—Exercise of power.*—A power of appointment exercisable by deed or writing duly executed or by will is not validly exercised by testamentary documents executed by the donee, but attested by one witness only, and containing no reference to the power or to the property subject to it.—EDMONSTONE, RE, BEVAN *v.* EDMONSTONE, *Ch.D. Byrne, J.*, 555.

5. *Execution—Will—Exercise of special power of appointment—Ademption—Wills Act*, 1837 (7 *Will.* 4 & 1 *Vict. c.* 26), *s.* 23.—It is a question of construction whether there has been a failure of an appointment under a power by reason of ademption.

The same principle applies whether the power is general or special.—DOWSETT, RE, DOWSETT *v.*

MEAKIN, *Ch.D. Farwell, J.*, 268; [1901] 1 Ch. 398; 70 L. J. Ch. 149.

6. *Execution — Special power of appointment— Power created subsequent to will purporting to execute it—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 24, 27.—A special power of appointment is not well executed by general words of disposition in a will executed prior to the date of the instrument creating the power.

Decision of Byrne, J. (*ante*, p. 21, [1900] 2 Ch. 332), affirmed.—HAYES, RE, TURNBULL *v.* HAYES, *C.A.*, 659.

7. *Execution—Special power of appointment— Word "appoint" only.*—A testatrix had a special power of appointment by will, given to her by the will of her father, over a share of his personal estate in favour of her nephews and nieces. The words of her will were simply "I appoint, devise, and bequeath my real estate, and the residue of my personal estate, to my trustees upon trust to sell or convert the same into money, and to pay and divide the proceeds (after paying my debts, funeral and testamentary expenses) equally between" four named nephews and nieces.

Held, that the power was executed.

Observations on *dictum* of Chatterton, V.C., in *In re Richardson's Trusts*, 17 L. R. Ir. 436, at p. 442, 35 W. R. Dig. 151.—MAYHEW, RE, SPENCER *v.* CUTBUSH, *Ch.D. Farwell, J.*, 330; [1901] 1 Ch. 677; 70 L. J. Ch. 428; 84 L. T. 761.

PRACTICE:—

1. *Appeal—Commercial cause—Transferring action to commercial list—Right of appeal.* — An appeal lies from an order of the judge at chambers transferring a cause to the list of commercial causes, upon the ground that the cause is not a commercial cause.

Barry v. *Peruvian Corporation*, 44 W. R. 487, [1896] 1 Q. B. 208, followed.—SEA INSURANCE CO. *v.* CARR, *C.A.*, 55; [1901] 1 Q. B. 7; 69 L. J. Q. B. 954; 83 L. T. 517.

2. *Attachment — Service — Jurisdiction — Foreign order—Enrolment—Disobedience—Recovery of Debts Act (Ireland)*, 1801 (41 *Geo.* 3, *c.* 90), *s.* 6—*Sale and Transfer of Land (Ireland) Act*, 1858 (21 & 22 *Vict. c.* 72), *s.* 36.—Motion for leave to issue a writ of attachment. An order was made by one of the land judges of the Chancery Division of the High Court of Ireland upon the respondent A. H. S. to lodge in court on oath all documents in his custody, power, or procurement relating to certain property in Ireland ordered to be sold (or account for the same on oath) within ten days after service of the said order upon him. By an order made the 26th of March, 1901, the Irish order was ordered to be enrolled in the Chancery Division of the High Court of Justice in England. On the 11th of April, 1901, a copy of the order of the 26th of March, 1901, was personally served on A. H. S. in London.

Held, that as the order to lodge the deeds in court had not been served on A. H. S. in Ireland, and no leave had been obtained to serve that order on A. H. S. out of the jurisdiction, there had been no disobedience, and the motion for leave to issue a writ of attachment must be refused.—SYNGE, RE, *Ch.D. Kekewich, J.*; 84 L. T. 756.

3. *Attachment of person—Refusal to commit— Interlocutory appeal—Leave of court—Liberty of subject—Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1 (1) (b) (i.).—An interlocutory order dismissing a motion to commit is not a case where the liberty of the subject is concerned within the exception in (*i.*) of section 1 (1) (*b*) of the Supreme Court of Judicature (Procedure) Act, 1894. No appeal from such an order can be brought, consequently, without the leave of the judge or of the Court of Appeal.—BOWDEN *v.* YOXALL, *C.A.*, 247; [1901] 1 Ch. 1; 70 L. J. Ch. 5; 83 L. T. 419.

4. *Compromise—Power to bind absent parties — R.S.C., ord.* 16, *r.* 9*a*.—A scheme for compromise of an action provided for setting aside a fund to make payments to bondholders of a certain company. This scheme was sanctioned by the Court of Appeal, and, under ord. 16, r. 9*a*, made binding on all the bondholders of the company. A certain number of bondholders failed to claim their rights within six years from the sanctioning of the compromise. On a motion to fix a time within which such bondholders must come in,

Held (Vaughan Williams, L.J., *dissentiente*), that, there being nothing in the original scheme to determine the period within which claims under it must be made, the court had no jurisdiction to vary the order by introducing such a term.—COLLINGHAM *v.* SLOPER, *C.A.*, 404; [1901] 1 Ch. 769; 70 L. J. Ch. 361; 84 L. T. 289.

5. *Costs—Action founded on contract—Separate causes of action against two defendants—Sum not exceeding £50 recovered against one—Ord.* 65, *r.* 12. —The plaintiffs, who were trustees of a friendly society, brought an action in the High Court against two defendants claiming, as against the first defendant, the treasurer of the society, a sum of £90 as money had and received by him for the society, and as against both defendants the sum of £50 upon a joint and several bond for that amount in favour of the society for the due performance by the first defendant of his duties as treasurer. At the trial the plaintiffs recovered judgment against the first defendant for £90, and against the two defendants on the bond for £50.

Held, that, under ord. 65, r. 12, the plaintiffs were not entitled, as against the second defendant, to costs on the High Court scale.—DUXBURY *v.* BARLOW, *C.A.*, 450; [1901] 2 Q. B. 23; 70 L. J. K. B. 478; 84 L. T. 518.

6. *Costs—Action "which could have been commenced in a county court"—Claim in tort exceeding £50— Less than £10 recovered—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 116.—The plaintiff in an action of trover claimed a sum exceeding £50. He recovered a sum less than £10.

Held, that the action was one "which could have been commenced in a county court" within the meaning of section 116 of the County Courts Act, 1888, and therefore the plaintiff was not entitled to costs.

Lovejoy v. *Cole*, 43 W. R. 48, [1894] 2 Q B. 861, approved.

Goldhill v. *Clarke*, 68 L. T. Rep. 414, 41 W. R. Dig. 173, disapproved.—SOLOMON *v.* MULLINER, *C.A.*, 364; [1901] 1 Q. B. 76; 70 L. J. Q. B. 165; 83 L. T. 493.

7. *Costs on higher scale—Partition action—Special grounds arising out of the difficulty of the case—Ord.* 65, *r.* 9.—The display by a solicitor of exceptional skill or ability in conducting a partition action and the proceedings incident thereto, involving great difficulty and labour, is not a "special ground" within the meaning of ord. 65, r. 9, so as to empower the court to order the taxation of the costs of the proceedings as between solicitor and client on the higher scale.

In such a case the court has no jurisdiction to order costs to be taxed on the higher scale.

In re Leeuw, 93 Law Times 333, and *Marriott* v. *Cobbett*, 38 SOLICITORS' JOURNAL 620, not followed. —RIVINGTON *v.* GARDEN, *Ch.D. Buckley, J.*, 279; [1901] 1 Ch. 561; 70 L. J. Ch. 282; 84 L. T. 197.

8. *Costs—Company — Debenture-holder's action — Insufficient assets.*—Where the assets in a debenture-holder's action are insufficient to pay the debentures in full, the plaintiff is entitled to solicitor and client costs out of the fund realized.—NEW ZEALAND MIDLAND RAILWAY CO., RE, SMITH *v.* LUBBOCK, *C.A.*, 529; 70 L. J. Ch. 595; 84 L. T. 852.

9. *Costs—Partition—Sale—Mortgages on shares—One set of costs in respect of each share—General rule —Discretion of court.*—In an action for sale and distribution of the proceeds in lieu of partition, it appeared from the chief clerk's certificate that six persons were beneficially interested in the property, and that some had mortgaged their shares.

The property was sold and the proceeds paid into court to the credit of the action, and invested in New Consols.

Upon the further consideration of the action, the question was raised whether each mortgagee who had been served with notice of the proceedings and attended ought to be allowed a separate set of costs out of the fund in court before distribution thereof, or whether only one set of costs should be allowed out of the fund in respect of each share.

Held, that only one set of costs should, as a general rule, be allowed out of the fund in respect of each share, but that the court had a discretion in the matter.—LANGRISH *v.* VASE, *Ch.D. Cozens-Hardy, J.*; 84 L. T. 761.

10. *Costs—Security for costs—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37)—*Appeal from county court.*—An appeal against a decision of a county court judge upon an application for compensation under the Workmen's Compensation Act, 1897, is not in the nature of a motion for a new trial, and the appellant can be ordered to give security for the costs of the appeal.—HARWOOD AND ABRAHAMS, RE, *C.A.*; [1901] 2 K. B. 304; 70 L. J. Ch. 746; 84 L. T. 857.

11. *Costs — Sequestration — Service — Practice — R. S. C., ord.* 41, *r.* 5; *ord.* 43, *rr.* 6, 7.—In the case of a writ of sequestration issued by leave of a judge to enforce payment of costs under ord. 43, r. 7, the provisions of ord. 41, r. 5, and ord 43, r. 6, are inapplicable. Therefore in such a case it is not necessary that the order for payment of costs should limit a time for payment or should bear the indorsement mentioned in ord. 41, r. 5, nor is personal service of it essential.

In re Lumley, Ex parte Cathcart, [1894] 2 Ch. 271, followed.—DEAKIN, RE, CATHCART, EX PARTE, *C.A.*; [1900] 2 Q. B. 478; 83 L. T. 39.

12. *Costs—Taxation—Official solicitor—Guardian* ad litem—*Party and party or solicitor and client taxation—Costs of issue that failed—R. S. C., ord.* 65, *r.* 13.—In taxing the costs of a guardian *ad litem*, the established practice is to tax the costs as between party and party and not as between solicitor and client, in the absence of a direction to the contrary in the order directing the taxation.

The costs of a guardian *ad litem* ought to be taxed on the footing that he is a successful party. The costs, therefore, even of an issue on which he has failed ought not to be disallowed him.—EADY *v.* ELSDON, *C.A.*, 595; [1901] 2 K. B. 460; 70 L. J. K. B. 701; 84 L. T. 615.

13. *Costs—Taxation—Party and party costs—Depositions taken on examination before trial not used at trial—Ord.* 65, *r.* 27 (29).—Where, under an order for examination, a witness is examined before trial, but the witness is present at the trial and his depositions are not read, the costs of his examination may be allowed if, having regard to the state of affairs at the date of the examination, they were reasonably and properly incurred.—BARTLETT *v.* HIGGINS, *C.A.*, 449; [1901] 2 K. B. 230; 70 L. J. K. B. 621; 84 L. T. 509.

14. *Costs—Taxation — Public authority — Public Authorities Protection Act*, 1893 (56 & 57 *Vict.* c. 61), *s.* 1.—An action was brought against a public authority to restrain it from infringing a patent by the use of electric meters. The public authority used the meters under powers conferred on it by a provisional order duly confirmed by Act of Parliament. The action was dismissed with costs. Upon summons to review taxation,

Held, that the public authority was entitled to costs as between solicitor and client under section 1 of the Public Authorities Protection Act, 1893.—CHAMBERLAIN *v.* BRADFORD CORPORATION, *Ch.D. Kekewich, J.*; 83 L. T. 518.

15. *Costs — Taxation — Public authority, action against—Discretion to deprive successful defendants of costs—R. S. C., ord.* 65, *r.* 1—*Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1 (*b*).—The Public Authorities Protection Act, 1893, s. 1 (*b*), which provides that, wherever in an action within the Act a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client, does not take away the discretion given to the judge at the trial by ord. 65, r. 1, to deprive the successful defendant of costs for good cause.

So held, affirming the judgment of Lord Russell of Killowen, C.J.

What constitutes "good cause" within ord. 65, r. 1, discussed.—BOSTOCK *v.* RAMSEY URBAN DISTRICT COUNCIL, *C.A.*; [1900] 2 Q. B. 616; 83 L. T. 358.

16. *Costs—Taxation—Shorthand-writer's notes—Time for application for—Power of court to vary its own order.*—The ordinary order of judgment with costs does not include the costs of a transcript of the shorthand-writer's notes. Such costs must be applied for at the hearing. Where an order has been made for judgment with costs, and that order has been drawn up, the court has no power to alter its decree by subsequently allowing special costs.—"TURRET COURT," THE, *P.D. & Ad.D.*; 84 L. T. 331.

17. *Costs—Taxation—Special fee to counsel—Disallowance.*—A "special" fee to leading counsel was disallowed on taxation as between party and party, although, owing to previous retainer by other parties, the services of a leader practising in the particular court could not be obtained by the party whose costs formed the subject of taxation.—PARSON *v.* PARSON, *Ch.D. Joyce, J.*; [1901] 2 Ch. 176; 70 L. J. Ch. 563; 84 L. T. 709.

18. *Discovery—Affidavit of documents—Further affidavits—R. S. C., ord.* 31, *r.* 19*a* (3).—To justify an application for discovery of documents under rule 19*a* (3) of order 31, the party making the application must in his affidavit name and specify, so that they can be identified, the particular documents of which he desires discovery.

It is not sufficient to make a general affidavit based on *a priori* reasoning that certain classes of documents must be in his opponent's possession or power.

The discovery sought must be of a species, not a

genus.—WHITE v. SPAFFORD, C.A.; [1901] 2 K. B. 241; 70 L. J. K. B. 658; 84 L. T. 574.

19 *Discovery—Privilege—Communications between solicitor and client—"Evasion" of statute—Production of documents.*—An information against executors claimed duties under a colonial statute, alleging that the defendants' testator had some time before his death executed voluntary conveyances of colonial property "with intent to evade the payment of duty" under the statute. One of the defendants, a member of the firm of solicitors whom the testator had instructed to prepare the conveyances, was ordered to produce the notes and records of these instructions, but objected to do so on the ground that they were privileged communications between solicitor and client for the purpose of obtaining advice.

Held, first, that the privilege was not lost by death of the testator; and secondly, that the word "evade" was ambiguous and capable of two meanings, one a perfectly innocent one, and that, without expressing any opinion as to the meaning in which it was used in the statute, there was no proof or even allegation of any fraud or illegality to displace the privilege.

The decision of the Court of Appeal ([1900] 2 Q. B. 163) reversed.—BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA, H.L.; [1901] A. C. 196; 70 L. J. K. B. 645; 84 L. T. 737.

20. *Evidence — Interlocutory affidavits—Hearsay evidence—Grounds of "information and belief"—Omission to state such grounds—Costs—Rules of the Supreme Court*, 1883, *ord.* 38, *r.* 3.—Interlocutory affidavits containing statements of the deponent's "information and belief" must in all cases state the sources of such "information and belief," in accordance with the provisions of ord. 38, r. 3, otherwise they will be regarded by the court as inadmissible as evidence, and the cost of their preparation, so far as relates to such statements, must be borne by the party responsible for them.—YOUNG MANUFACTURING CO., RE, C.A., 115; [1900] 2 Ch. 753; 83 L. T. 418.

21. *Evidence—Presumption—Past child-bearing—Widow.*—The practice of the court in the case of spinsters as to the presumption of a woman being past the age of child-bearing was adopted in the case of a widow who had had a son, but who had subsequently lived many years as a married woman without further children.

A widow, aged fifty-six and three months, who had a son thirty-four years ago, and had lived as a married woman twenty-three years subsequently without further children. was presumed past child-bearing.—WHITE, RE. WHITE v. EDMOND, Ch.D. Buckley, J., 429; [1901] 1 Ch. 570; 70 L. J. Ch. 300; 84 L. T. 199.

22. *Injunction — Deceit — Action of — Get-up — Passing off—Evidence—Probability by deception—Inspection—View by judge—R. S. C.*, 1883, *ord.* 50, *r.* 4.—In an action for deceit brought on the ground that a particular article used by the defendant is a colourable imitation of the plaintiff's, the conclusion of the judge, on a view by him of the two articles—such as two rival omnibuses—under the Rules of the Supreme Court, 1883, ord. 50, r. 4, that the defendant's article is calculated to deceive, is not sufficient by itself to support an injunction. The judge must be satisfied by independent evidence that there is at least a reasonable probability of deception.

North Cheshire and Manchester Brewery Co. v. *Manchester Brewery Co.*, [1899] A. C. 83, considered.—LONDON GENERAL OMNIBUS CO. v. LAVELL, C.A.; [1901] 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453.

23. *Injunction—Motion by defendant before pleading — Mandatory interlocutory injunction against plaintiff—Order to deliver up possession of a house.*—A defendant may before delivering a counterclaim apply by motion for an injunction against the plaintiff if he and the plaintiff are both suing upon the same contract.

An interlocutory injunction was, on the defendant's motion, granted to restrain the plaintiff from interfering with or disturbing the defendant in his possession and occupation of a house.

Spurgin v. *White*, (1860) 2 Giff. 473, followed.—COLLISON v. WARREN, C.A.; [1901] 1 Ch. 812; 70 L. J. Ch. 382; 84 L. T. 482.

24. *Judgment or order—Correction of mistake—Certificate of taxing-master—Accidental omission in bill of costs—R. S. C.*, 1883, *ord.* 28, *r.* 11.—A plaintiff, who had obtained judgment for a certain sum with costs, carried in his bill of costs for taxation, but one item which ought to have been included was accidentally omitted. After the taxing-master had given his certificate the mistake was discovered.

Held, that the court had power to order that the item should be referred to the taxing-master, and that his certificate should be amended.—CHESSUM v. GORDON, C.A., 309; [1901] 1 Q. B. 694; 70 L. J. K. B. 394; 84 L. T. 137.

25. *Particulars—Reasonable ground for belief—Company—Director—Liability.*—Where in an action for compensation under the Directors' Liability Act, 1890, in respect of alleged false statements in a prospectus, the defendant pleads that he had reasonable grounds for believing the statements to be true, he may be ordered to give particulars of the grounds of such belief.—ALMAN v. OPPERT, C.A.; 70 L. J. K. B. 745; 84 L. T. 825.

26. *Parties—Mortgage—Action for foreclosure—Executrix only made defendant—Rector and churchwardens residuary legatees—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1, *sub-section* 1; *s.* 2, *sub-section* 1—*Ord.* 16, *r.* 8.—A testator after making certain bequests, gave to his wife an estate for life (determinable on certain events) in the residue of his estate, with remainder over to the rector and churchwardens of W. C. Church. The estate of the testator was, however, mortgaged to the extent of £30,000.

In a foreclosure action by the mortgagee against the wife, the sole legal representative of the testator, the wife entered an appearance but delivered no defence.

On a motion for judgment it was ordered that the rector and churchwardens of W. C. Church be made parties to the action.—WATTS v. LANE, Ch.D. Joyce, J.; 84 L. T. 144.

27. *Parties—Representative action—Action on behalf of a class of the public—Joinder of plaintiffs—Joinder of several causes of action—R. S. C., ord.* 16, *rr.* 1, 9.—Ord. 16, r. 9, which provides for persons suing or being sued as representing a class, is not confined to persons who have or claim some beneficial proprietary right which they are asserting or defending. To justify a person suing in a representative character it is enough that he has a common interest with those whom he claims to represent.

Several plaintiffs sued on behalf of themselves and all others the growers of fruit, flowers, vegetables, roots and herbs, within the meaning

of the Covent Garden Market Act, 1828, to enforce various preferential rights to stands in the market, which they alleged to have been given to the class of growers by the Act. The defendant was the lord of the market.

Held, that without prejudging the construction of the Act the plaintiffs had an interest in common, and that the defendant was not entitled to have the action stayed either on the ground that the plaintiffs had no beneficial proprietary right, or that the joinder of plaintiffs claiming separate and different rights under the Act, both personally and as representing a class, would embarrass or delay the trial.

Decision of Court of Appeal ([1899] 1 Ch. 494) affirmed by Lords Macnaghten, Morris and Killanin, and Shand, the Earl of Halsbury, L.C., and Lord Brampton dissenting. *Temperton* v. *Russell*, [1893] 1 Q. B. 435, reflected on.

Quære, whether it was necessary to join the Attorney-General as a defendant. — BEDFORD (DUKE OF) *v.* ELLIS, *H.L.*; [1901] A. C. 1; 70 L. J. Ch. 102; 83 L. T. 686.

28. *Pauper—Suing* in formâ pauperis—*Assigning official solicitor to assist pauper—Ord.* 16, *r.* 26.—The official solicitor of the court ought not, except in special circumstances, to be assigned to assist a litigant suing or defending *in formâ pauperis.*—MOUTRIE *v.* MITCHELL, *C.A.*, 274; [1901] 1 Q. B. 596; L. J. K. B. 401; 84 L. T. 187.

29. *Payment out—Estate duty—Fund in court—Tenant for life—Finance Act*, 1900 (62 & 63 *Vict. c.* 7), *s.* 11.—When payment out of court is authorized of funds in which one of the petitioners had a life interest now released, the practice of the court is to retain a sufficient sum of money to satisfy the amount of estate duty payable in the event of the death of the tenant for life within twelve months of the date of the release.—TAYLOR *v.* PONCIA, *Ch.D. Cozens-Hardy, J.*, 596.

30. *Payment out—Fund in court—Payment to wrong parties—Stop order—Liability of Treasury to replace fund—Default of Paymaster-General—Court of Chancery (Funds) Act*, 1872 (35 & 36 *Vict. c.* 44), *s.* 5.—"All" the property of a bankrupt was by an agreement—confirmed by an order of the court—vested in a company, and the bankruptcy annulled. The agreement contained a list of the bankrupt's properties, which did not, however, include a fund in court to which the bankrupt, unknown to any of the parties to the agreement or their solicitors, was then absolutely entitled. The late bankrupt subsequently obtained an order of the court for payment out to him of the fund upon affidavits that he had not encumbered. No stop order was ever obtained against the fund. The same solicitor acted for the bankrupt in both matters. Upon petition by the company claiming the fund and asking that the Treasury might be ordered to replace it,

Held, (1) that the agreement and vesting order vested the fund in the company, and that the late bankrupt and his solicitor were severally liable to pay the amount of the fund to the company; (2) on the authority of an unreported case of *Jones* v. *Jones*, that the Paymaster-General had not been "guilty of default" within section 5 of the Court of Chancery (Funds) Act, 1872, with respect to the payment out, and that the Treasury were not, therefore, bound to replace it.—BATH *v.* BATH, *Ch.D. Kekewich, J.*, 341; [1901] 1 Ch. 460; 70 L. J. Ch. 270; 84 L. T. 107.

31. *Striking out defence—Frivolous and vexatious—Abuse of process of court—Admissions in correspondence—Judgment for plaintiff—R. S. C.*, 1883, *ord.* 25, *r.* 4; *ord.* 32, *r.* 6.—In an action for specific performance of an agreement to purchase leasehold property, the court, upon the pleadings and correspondence, having come to the conclusion that the defence was a dishonest one, and put in for the purpose of gaining time, ordered it to be struck out under ord. 25, r. 4, and gave immediate judgment for the plaintiffs. — MACKELLAR *v.* HORNSEY, *Ch.D. Buckley, J.*, 301.

32. *Transfer—Crown—Prerogative of—Action by Attorney-General—Relator—Choice of tribunal.*—The fiat of the Attorney-General merely authorizes the relator to proceed with a matter involving public interests, but does not clothe him with any prerogative of the Crown. Nor is it the practice of the Attorney-General, on issuing his fiat, to exercise any discretion as to the tribunal before which the action should be tried.

The court has, therefore, the same discretion in dealing with an application for change of tribunal as if the tribunal had been elected by the relator suing as plaintiff.

Decision of Kekewich, J. (*ante*, p. 152), reversed.—ATTORNEY-GENERAL *v.* WILSON, *C.A.*, 195; 70 L. J. Ch. 234; 83 L. T. 646.

33. *Trial—New trial—Appeal to House of Lords—Competency—Supreme Court of Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 9.—By section 9 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), " . . . The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, . . . shall be final except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, . . . or is upon a question of law on which the Court of Appeal give leave to appeal, and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts."

Where the Divorce Court has granted a decree *nisi* after a trial before a jury, and the Court of Appeal has ordered a new trial, an appeal lies to the House of Lords against the order granting a new trial.—BUTCHART *v.* BUTCHART, *H.L.*; [1901] A. C. 276; 70 L. J. P. 29; 84 L. T. 209.

34. *Writ—Solicitor—Undertaking to enter appearance—Duration of undertaking—R. S. C., ord.* 8, *r.* 1; *ord.* 9, *r.* 1.—The solicitors of a defendant, with the defendant's authority, upon the issue of a writ of summons gave the plaintiff a written undertaking in these terms, "We accept service" (of the writ) "for the defendant and will enter an appearance in due course."

Held, that such an undertaking continued binding on the defendant and his solicitors even after the lapse of more than twelve months from the date of issue of the writ, and could be enforced by attachment of the defendant's solicitors.

Judgment of Farwell, J. (*ante*. p. 199), affirmed.—KERLY, RE, *C.A.*, 211; [1901] 1 Ch. 467; 70 L. J. Ch. 189; 83 L. T. 699.

See also Administration, 3; Bankruptcy, 22-24; Company, 30; Divorce, 4-18; Landlord and Tenant, 11; Land Clauses Acts, 7; Lunacy, 3; Market.

PRESCRIPTION.—See Easement, 3, 4, 7; Inclosure; Light; Vendor and Purchaser, 4.

PRINCIPAL and AGENT:—

1. *Authority—Power of attorney—Construction—General power to borrow—Money applied by agent for his own purposes—Acceptance of bills* "per pro"—*Action for money had and received—Application of*

equitable principles—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 25.—A power of attorney which authorizes the agent in England of an Australian firm to purchase goods in connection with the business carried on by the principal, and either for cash or on credit, and, "where necessary, in connection with any purchases made on my behalf as aforesaid or in connection with my said business to make, draw, sign, accept, or indorse any bill or bills of exchange . . . and to sign my name, or my said trading name, to any cheques or orders for the payment of money on my banking account in London, England," does not confer a general borrowing power on the agent.

Money borrowed by such agent under the power from a lender who is fixed with notice of the contents of the power of attorney, and secured by bills of exchange accepted by him in the name of his principal and paid into the London banking account of the firm, and then drawn out by the agent and applied for his own purposes, cannot be recovered in an action for money had and received to the use of the lender in the absence of proof by the lender that the principal knew, or had the means of knowledge, that the money, whilst it remained on the banking account, was the money of the lender, and not of the agent, or else that the principal had the benefit of it.

Moses v. *Macferlan*, 2 Burr. 1005, and *Marsh* v. *Keating*, 1 Bing. N. C. 198, discussed and applied. —JACOBS *v.* MORRIS. *Ch.D. Farwell, J.*, 365; [1901] 1 Ch. 261; 70 L. J. Ch. 183; 84 L. T. 112.

2. *Commission—House agent—Special bargain as to commission—Purchaser procured—Default of purchaser—Purchase not completed.*—The owner of certain houses, who was desirous of selling, made an agreement with an agent in the following terms: "I agree to accept a sum of £1,150 for the above property, and you are to be at liberty to receive anything over and above that as a commission, it being understood that I am to receive the full sum of £1,150 without deduction."

The agent found a purchaser who entered into a contract to purchase for £1,250, but the purchase was never completed owing to the default of the purchaser.

Held (reversing the judgment of the Queen's Bench Division), that the agent was not entitled to recover commission under the agreement.—BEALE *v.* BOND, *C.A.*; 84 L. T. 313.

3. *Fraud of agent—Sale of goods—Conduct of principal enabling agent to commit the fraud—Estoppel.*—The plaintiffs, who were timber merchants, imported timber which they warehoused at the docks. The timber, when sold by them, was delivered to purchasers by means of delivery orders addressed by the plaintiffs to the dock company. The plaintiffs gave their confidential clerk authority to sign delivery orders for the purpose of carrying through sales, and gave the dock company notice to honour delivery orders signed by him. The clerk, by means of delivery orders, signed by him in fraud of the plaintiffs, had certain timber at the docks transferred into a fictitious name, and then sold the timber in this fictitious name to the defendants, who acted *bonâ fide* in the transaction, and he converted the purchase-money to his own use. In a common law action against the defendants to recover damages for the conversion of the timber,

Held, Stirling, L.J., dissenting, that the plaintiffs had by their conduct in giving their clerk authority to sign delivery orders enabled him to commit the fraud, and that therefore the loss must fall upon them.—FARQUHARSON *v.* KING, *C.A.*, 673.

4. *Power of attorney—Transfer of stock—Forged signature—Implied authority—Stockbroker—Liability—Indemnity.*—A stockbroker who executes a transfer of stock as attorney under a power impliedly warrants that he is the duly authorized agent of the stockholder. If this is a misstatement of fact, even though honestly made in ignorance of the true state of facts—as, for instance, if a signature on the power has been forged without the knowledge of the stockbroker—he is nevertheless liable for any loss thereby occasioned.—OLIVER *v.* BANK OF ENGLAND, *Ch.D. Kekewich, J.*, 391; [1901] 1 Ch. 652; 70 L. J. Ch. 377; 84 L. T. 253.

5. *Secret commission—Bribe—Action against briber—Money had and received—Amount recoverable.*—The ascertained amount of bribes given by a vendor to the buying agent of a purchaser may be recovered by the purchaser from the vendor as money had and received.

The court will not inquire into the motive of the vendor in giving the bribe, and there is an irrebuttable presumption that the agent was influenced by the bribe.

Semble also, that as between vendor and purchaser, the true price of the thing purchased is less than the amount charged by the amount of the bribe.—HOVENDEN *v.* MILLHOFF, *C.A.*; 83 L. T. 41.

6. *Warranty of authority—Misrepresentation of fact—Liability of supposed agent.*—An agreement was signed by the plaintiff and L. L. signed "for self and wife and Dr. C." He had not in fact authority from his wife or Dr. C. He believed and represented that he had his wife's authority. He stated, and the plaintiff knew, that he had not Dr. C.'s authority. In an action by the plaintiff against L. to be indemnified by him for the non-concurrence of his wife and Dr. C.,

Held, that L. had warranted his authority to sign for his wife, but not for Dr. C., and that he was, therefore, liable in damages to the plaintiff in respect of the former, but not of the latter, signature.

Smout v. *Ilbery*, 10 M. & W. 1, taken to be overruled by *Collen* v. *Wright*, 6 W. R. 123, 8 Ell. & Bl. 647.—HALBOT *v.* LENS, *Ch.D. Kekewich, J.*, 214; [1901] 1 Ch. 344; 70 L. J. Ch. 125; 83 L. T. 702.

See also Banker, 3; Gaming, 4; Stock Exchange, 2, 3.

PROBATE:—

1. *Administration—Application to pass over the widow of the deceased—Sufficient cause.*—The court will not exercise its discretion, given by 21 Hen. 8, c. 5, s. 3, to pass over the widow of the deceased and grant administration to the next-of-kin, unless a very strong case of unfitness is made out against her.—CORY, IN GOODS OF, *P.D. & Ad.D.*; 84 L. T. 270.

2. *Administration—Death of husband intestate and without issue—Letters of administration not taken out by widow—Intestate's estate of less value than £500—Death of widow intestate—Intestates' Estates Act*, 1890 (53 & 54 *Vict. c.* 29), *s.* 1—*Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—A widow died intestate, without taking out letters of administration to her deceased husband's estate, which was of the net value of less than £500. The husband having died without issue, the whole of his estate belonged absolutely and exclusively to his widow under section 1 of the Intestates' Estates Act, 1890.

Held, that letters of administration would be granted to the administratrix of the widow without

citing the next-of-kin.—GREEN, IN GOODS OF, *P.D. & Ad.D.*; 84 L. T. 61.

3. *Administration—Grant to person without interest in the estate — Renunciation of next-of-kin solely entitled in distribution.*—The court granted administration to a person who had no interest in the estate of an intestate, where the only next-of-kin, the sole person entitled in distribution, had renounced the right to the grant.

In the Goods of Johnson, (1862) 2 Sw. & Tr. 595, followed.—TRIGG, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 42.

4. *Administration—Heir-at-law not cited—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 2, *sub-section* 4.—Notwithstanding the provisions of section 2, sub-section 4, of the Land Transfer Act, 1897, and the fact that the heir-at-law of an intestate had not been cited, the court granted administration under section 73 of the Probate Act, 1857, to one of the next-of-kin, the heir-at-law being abroad and his address being unknown.—BLENKINSOP, IN GOODS OF, *P.D. & Ad.D.*, 336.

5. *Administration—Husband and wife*—Commorientes—*Form of oath to lead grants of administration.*—Where a husband and wife with all their children were said to have perished in a massacre, the court, upon affidavits that they were believed to have died intestate and uninsured, granted letters of administration to the respective next-of-kin of the husband and wife; and, further gave leave to vary the usual form of oath to lead the grants, by allowing the administrator and administratrix to swear that the husband and wife perished at the same time (named), and that, after due inquiries, there was no reason to believe that either survived the other.—BEYNON, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 141; 70 L. J. P. 31; 84 L. T. 271.

6. *Administration—Intestacy—Renunciation by next-of-kin—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Grant needed to complete title to leaseholds—"Special circumstances"—Grant to more remote of kin (brother) refused.*—Under an intestacy, the sole property to which the deceased was entitled consisted of a one-third undivided share in certain leaseholds under the will of her grandfather, of whose estate the deceased's brother (the present applicant) was administrator *de bonis non* and himself entitled to another one-third undivided share. The sole next-of-kin renounced, and the husband of a deceased next-of-kin also renounced, and expressly consented to the brother taking a grant, which was required in order to complete the title on sale of the leaseholds in question.

Held, that no "special circumstances" had been shown for invoking the aid of section 73, and that the application by the brother for administration must be refused.—BROTHERTON, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 139; 70 L. J. P. 33; 84 L. T. 330.

7. *Administration—Intestacy—Resealing—Colonial grant.*—Where the executors of a will, under which a legacy of £250 was payable to the "personal representatives" of the testator's brother, who died intestate domiciled in one of the Australian colonies leaving no estate in this country, insisted on the re-sealing here of a grant of letters of administration which the brother's widow had obtained in the colony.

The court allowed the grant to be re-sealed.—SANDERS, IN GOODS OF, *P.D. & Ad.D.*; [1900] P. 292; 83 L. T. 716.

8. *Administration — Sureties dispensed with — Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 81.—In a case of an estate where all the debts had been paid, and the persons applying for administration were entitled, as the duly constituted legal personal representatives in two other estates, to receive the whole of the residue, the court dispensed with sureties and directed that the bond of the applicants alone should be accepted.—PATON, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 188; 70 L. J. P. 49; 84 L. T. 570.

9. *Practice — Administration bond — Creditor — Right to retain—Not "unduly" preferring.—Quære*, whether a creditor, having given an administration bond to administer the estate rateably, is not bound not to prefer his own debt, despite the decision of Romer, J., in *Davies* v. *Parry*, 47 W. R. 429, [1899] 1 Ch. 602.—BELHAM, IN GOODS OF, RICHARDES *v.* YATES, *P.D. & Ad.D.*, 448; 84 L. T. 300.

10. *Practice—Administration—Will—Citation of parties interested—No appearance—Practice.*—When the parties who are interested under an alleged will have been cited to appear and propound it, and, after being personally served with the citation, have neither appeared nor propounded the alleged will, the court will grant administration as to an intestate.—BOOTLE, IN GOODS OF, *P.D. & Ad.D.*; 84 L. T. 570.

11. *Practice—Administration with will annexed—Testatrix deserted by her husband—Grant to daughter —Husband not cited—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.—The court passed over the husband of a testatrix without citation, and granted administration with the will annexed to her daughter where it appeared that the husband of the testatrix had left her many years before her death, and had never since been heard of, the daughter swearing that she believed herself to be the sole next-of-kin.—BYRNE, IN GOODS OF, *P.D. & Ad.D.*; 84 L. T. 570.

12. *Practice—Will—Clerical error—Rectification—Refusal to insert another word.*—Upon an application to rectify a clerical error in the residuary clause of a will,

Held, that words might be struck out, but that no fresh word could be inserted.—SCHOTT, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 190; 70 L. J. P. 46; 84 L. T. 571.

13. *Will—Acknowledgment—Discrepancy between attestation clause and affidavit of attesting witness—No evidence of any writing on first page at time of execution.*—In the case of a holograph will, the whole operative portion of which was written on the first page of a sheet of paper, the attestation clause containing the signature of the testator was written on the second page and stated that the will was "signed" by the testator in the presence of the witnesses. An affidavit, made by one witness only, stated that they did not see the first page at all, and set forth facts pointing to acknowledgment only in the presence of the witnesses.

Held, that the will was entitled to probate without notice to the next-of-kin.—MOORE, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 44; 70 L. J. P. 16; 84 L. T. 60.

14. *Will—Cancellation—Mistake of testator as to effect of an earlier settlement.*—A testator, on the execution of a will in 1895, caused a will of 1882 to be cancelled under the erroneous belief that funds comprised in a settlement of 1855 would, in the absence of certain provisions in the will of 1882, he divided equally amongst the children of his first marriage. In 1896 he executed a fresh will, and

revoked the will of 1895, and later in 1896 he executed two codicils, but the settled funds were not mentioned in any of the documents of 1896.

In a suit by the executors propounding the will and codicils of 1896 together with the will of 1882.

Held, that the will of 1882 was, in law, a valid and subsisting testamentary document, and that it should be included with the three documents of 1896 in the probate.—STAMFORD *v.* WHITE, *P.D. & Ad.D.*; [1901] P. 46; 70 L. J. P. 9; 84 L. T. 269.

15. *Will—Codicil—Inconsistency of documents—Intention—Consent.*—When there are two inconsistent testamentary documents, and the court is satisfied that the second document, though purporting to be a last will and testament, was only intended to operate as a codicil of the former will, and there is no objection raised on the part of other parties interested, probate will be granted of both documents, the second being considered to be a codicil only.—SUMMERS, IN GOODS OF, *P.D. & Ad.D.*; 84 L. T. 271.

16. *Will—Lost will—Draft—Probate—Testatrix confined in a lunatic asylum—Lunacy Act,* 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-section* 1 (*e*).—After making her will, a testatrix became of unsound mind, and was confined in a lunatic asylum. The will was seen after the date of the removal to the asylum, but was missing after the death of the testatrix. With the consent of the master in Lunacy and of the receiver of the deceased's property, appointed under the Lunacy Act of 1890, the court granted probate of the draft of the will made by the testatrix to her next-of-kin.—CRANDON, IN GOODS OF, *P.D. & Ad.D.*; 84 L. T. 330.

17. *Will—Nuncupative will—Volunteer soldier—Minor—Wills Act* (1 *Vict. c.* 26), *s.* 11—"*In actual military service.*"—The test to be applied, in considering whether a nuncupative will of a soldier is entitled to probate under the 11th section of the Wills Act, is whether, before the will was made, some step has under orders been taken by the soldier in view of and preparatory to joining the forces in the field.

A printer's apprentice, who was a private in a volunteer battalion and resided with his father in Chichester, sent in his name for active service in the war then being waged in South Africa, was certified as fit by the medical inspector, and, pursuant to an order, went into barracks at Chichester, and while there made his will, being at that time under twenty-one years of age. An order was subsequently received from the military authorities pursuant to which he embarked with his regiment, and he died from a wound received in battle.

Held, that by taking the step of going into barracks with a view to being drafted to the seat of war, he had brought himself within the operation of section 11 of the Wills Act, and that he was, at the time he made his will, "a soldier in actual military service"; and, consequently, that his will, though made at a time when he was under age, was entitled to probate.—HISCOCK, IN GOODS OF, *P.D. & Ad.D.*; [1901] P. 78; 70 L. J. P. 22; 84 L. T. 61.

See also Administration, 1.

PROHIBITION.—See Ecclesiastical Law, 4.

PUBLIC AUTHORITIES PROTECTION ACT.—See Practice 14, 15.

PUBLIC HEALTH.—See Factory Acts, 3; Justices, 4; Local Government, 5, 7, 9-13, 16, 20-22; Metropolis, 14, 15; Settled Land, 2.

RAILWAY:—

1. *Colliery companies—Adjacent owners—Private line of railway—Way leave—Tolls chargeable to public.*—The appellants and respondents were owners of adjacent collieries, and their respective predecessors in title had obtained a private Act of Parliament authorizing them to construct and maintain a private line of railway for the use of their respective collieries. The Act provided that the railway should be open to the public upon payment of a toll to the two companies. The appellants subsequently acquired another colliery adjacent to their original holding, and brought coals from it over the joint line.

Held (reversing the judgment of the court below), that they were not liable to pay tolls to the respondents in respect of such coals.—CALEDONIAN COAL CO. *v.* SEAHAM COLLIERY CO., *P.C.*; 84 L. T. 785.

2. *Judgment creditor—Line not open to traffic—Receiver—Railway Companies Act,* 1867 (30 & 31 *Vict. c.* 27), *s.* 4.—Where the line of a railway company was incomplete and unlikely to be open to traffic for a considerable time, the court declined to appoint a receiver of the company's undertaking, on the ground that there were no duties for him to perform.

Whether the court has jurisdiction under section 4 of the Railway Companies Act, 1867, to appoint a receiver of the undertaking of a railway company, before the line is open to traffic, *quære.*—KNOTT END RAILWAY, RE, *C.A.*, 469; [1901] 2 Ch. 8; 70 L. J. Ch. 463; 84 L. T. 433.

3. *Passenger—Loss of life from explosives in a railway carriage—Negligence*—Onus probandi—*Appeal from Bengal.*—Railway companies are bound to use proper care and skill in carrying their passengers; they are not liable as common carriers of passengers independently of negligence.

Where a passenger was killed in a railway carriage by an explosive illegally introduced into it,

Held, that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to show that the parcels containing the fireworks suggested danger.

Collett v. *London and North-Western Railway Co.*, 16 Q. B. 984, explained.—EAST INDIAN RAILWAY CO. *v.* KALIDAS MUKERJEE, *P.C.*; [1901] A. C. 396; 84 L. T. 210.

4. *Passenger—Negligence—Closing of carriage door.*—Where a passenger is seated in a railway carriage, the fact that his finger is crushed owing to the shutting of the carriage door by a railway servant on the platform is not evidence of negligence in an action against the railway company.

There is no duty cast upon the servants of a railway company to give warning of the shutting of a carriage door to passengers who are actually seated inside the carriage and are not in the act of getting in or out of it.—DRURY *v.* NORTH-EASTERN RALWAY CO., *K.B.D.*; [1901] 2 K. B. 322; 84 L. T. 658.

5. *Passenger—Ticket—Incorporation of conditions—Delay caused by negligence of company—Liability of company for loss to passenger.*—D. travelled by an early workman's train which arrived late, and he consequently lost a day's wages.

Held, that the railway company were not liable, because the printed notice on the back of the ticket

—to the effect that the departure or arrival of the trains at the times specified in the time table was not guaranteed nor were the company under any circumstances to be held responsible for delay or detention, however occasioned, or any consequences arising therefrom — was a condition incorporated into the contract; and therefore the plaintiff could not recover, notwithstanding that the delay was caused by the admitted negligence of the defendants.—DUCKWORTH *v.* LANCASHIRE AND YORKSHIRE RAILWAY CO., *K.B.D.*, 541; 84 L. T. 774.

6. *Receiver and manager—Preferential payments—Working expenses — Proper outgoings — Damage caused by defective plant—Compensation—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.—A judgment debt for damages caused to the property of a person using a railway by the neglect of the railway company to keep its plant in proper repair is not a working expense or other proper outgoing of the railway within section 4 of the Railway Companies Act, 1867, so as to be entitled to priority over other debts payable by a receiver and manager appointed under that section; and the costs carried by the judgment stand on the same footing in this respect. The priority given by the section is confined to working expenses and other proper outgoings, without which it would be impossible to carry on the railway.—WREXHAM, MOLD, &C., RAILWAY CO., RE, *Ch.D. Farwell, J.*; [1900] 2 Ch. 436; 69 L. J. Ch. 671; 83 L. T. 49.

7. *Smoke—Locomotive emitting black smoke—Railway Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *s.* 114—*Regulation of Railways Act*, 1868 (31 & 32 *Vict. c.* 119), *s.* 19.—Certain locomotives belonging to the appellants emitted black smoke for three minutes on various occasions. Evidence was given that the coal used was smoky coal and that it was unnecessary for a locomotive to emit smoke for longer than one minute, but no evidence was given that the locomotives were not constructed on the principle of consuming their own smoke.

Held, that an offence had been committed within section 114 of the Railways Clauses Consolidation Act, 1845 as amended by section 19 of the Regulation of Railways Act, 1868.—SOUTH-EASTERN RAILWAY CO. *v.* LONDON COUNTY COUNCIL, *K.B.D.*; 84 L. T. 632.

8. *Superfluous land—Land over tunnel—Title by adverse possession against company—Separate ownership of surface stratum and tunnel—Telegraph wires over surface.*—Land situated over a tunnel, though not superfluous land within the meaning of the Lands Clauses Acts, is not necessary to the undertaking of a railway company, and a title by adverse possession can be acquired to it against the company, carrying with it all rights to the air above the surface stratum, and, subject to the company's rights in the tunnel, to the soil below; and the company is therefore not entitled to carry telegraph wires over land above a tunnel to which such a title has been acquired.—MIDLAND RAILWAY CO. *v.* WRIGHT, *Ch.D. Byrne, J.*, 474; [1901] 1 Ch. 738; 70 L. J. Ch. 411; 84 L. T. 225.

See also Lands Clauses Acts, 8; Master and Servant, 18; Mine, 3; Poor Law, 6, 7.

RATING.—See Local Government, 4, 14-18; Metropolis, 16, 17; Poor Law, 1-7; Tramway, 2.

REVENUE.—See Inland Revenue.

RIVER.—See Local Government, 21, 22.

SALE of GOODS:—

1. *Appropriation—Bills drawn against particular shipments—Lien—Passing of property in the goods.*—The defendants carried on business in London, and their practice was to sell in their own names goods shipped to them by P. & Co., who carried on business abroad. P. & Co. used to specify in advising drafts against what particular shipments the same were drawn, so as to enable the defendants to tell whether the particular shipments consigned to them did in fact cover the then outstanding drafts, but not to affect their right to treat all shipping documents as cover for the whole account between them and P. & Co.

P. & Co. used likewise to draw upon the plaintiffs, who also carried on business in London, against shipments of goods, bills which the plaintiffs accepted, P. & Co. afterwards forwarding to them, as security, before the bills reached maturity, bills drawn by P. & Co. on first-class firms (among them being the defendants), accompanied by the shipping documents of the goods shipped by them to such firms, and on such firms accepting the bills the plaintiffs would hand over to them the shipping documents which otherwise would have been retained.

The defendants having received instructions from P. & Co. to sell certain goods at a specified price, entered into contracts for the sale thereof. Subsequently P. & Co. wrote to the defendants that they had drawn upon them against the goods, and the bills were specified. The bills were drawn to the order of the plaintiffs by P. & Co. upon the defendants for various sums, and were together intended to provide for part of the credit or advances made by the plaintiffs to P. & Co.

Bills of lading for the goods, indorsed in favour of the defendants, were afterwards forwarded to them by P. & Co. The defendants took possession of the bills of lading, and applied them in satisfying, so far as they would go, the contracts into which they had entered; but, becoming doubtful as to the financial position of P. & Co.'s firm, they declined to accept the bills of exchange, and claimed to treat the proceeds of sale of the goods as available for payment of the general balance of account between themselves and P. & Co.

Held (affirming the decision of Buckley, J.), that there was no specific appropriation of the goods in favour of the plaintiffs; that the defendants were not compellable to accept the bills; and that nothing had been done to defeat the primary right of the defendants, in whose custody the goods were, to deal with them for their own purposes and irrespective of any rights of the plaintiffs.—KONIG *v.* BRANDT, *C.A.*; 84 L. T. 748.

2. *Contract—Goods to be delivered c.i.f.—Delivery to shipper—Shortage in goods—Property in goods—Insurance of price and "profit."*—In a contract for the sale and delivery of unascertained goods c.i.f., the shipment of a quantity of such goods substantially less than the quantity contracted to be sold is not a substantial or *pro tanto* execution of the contract.

Whether in such a contract the shipment of the full quantity would be, in the absence of any agreement to the contrary, a sufficient appropriation of the goods to vest the property in such goods in the purchaser, query.

Where such goods are insured by the vendor in his own name at their invoice price, together with an addition for "profit," and are lost during the voyage, the purchaser is not entitled to recover from the vendor the sum paid to him by the underwriters under this "profit" insurance.—HARLAND *v.* BURSTALL, *K.B.D.*; 84 L. T. 324.

3. *Impossibility of performance—Implied condition*

—*Shipment by named steamer—Damage to steamer rendering shipment impossible—Condition excusing vendor.*—The defendants sold to the plaintiffs a cargo of cotton seed to be shipped by a named steamer at Alexandria during the following January. The contract contained a clause that, in case of prohibition of export, blockade, or hostilities preventing shipment, the contract was to be cancelled. The steamer, before arriving at Alexandria, stranded, without the defendants' default, and was so damaged that it became impossible to load the cargo in January; and in December the defendants gave the plaintiffs notice of this fact.

Held, by A. L. Smith, M.R., and Romer, L.J. (Vaughan Williams, L.J., dissenting), that the contract was subject to the implied condition that the parties should be excused if, before breach, performance became impossible owing to the steamer ceasing to exist as a cargo-carrying steamer, without the defendants' default, when the time for the performance of the contract arrived.

Judgment of Mathew, J. ([1900] 2 Q. B. 298, 5 Com. Cas. 252, 48 W. R. Dig. 50), affirmed.—NICKOLL *v.* ASHTON, *C.A.*, 513; [1901] 2 K. B. 126; 70 L. J. K. B. 600; 84 L. T. 804.

4. *Rejection — Shipment — Passing of property—Goods not within the specification.*—A contract for the sale of goods, to be of "about the specification" mentioned in the contract, provided that the goods were to be shipped in vessels to be provided by the purchasers, that the property in the goods was to be deemed to pass on shipment, and that, if any dispute arose as to the stipulations of the contract, the purchasers were not to reject the goods, but that the dispute was to be referred to arbitration.

Goods were shipped under the contract, 33 per cent. of which were neither within nor "about" the specification, nor commercially within its meaning.

Held, that the clause as to non-rejection did not operate so as to prevent the purchasers from rejecting the goods; that the acceptance of the goods by the captain of the ship did not pass the property, the captain being only the purchasers' agent to receive the goods for the purpose of carriage.—VIGERS *v.* SANDERSON, *K.B.D.*, 411; [1901] 1 Q. B. 908; 70 L. J. K. B. 383; 84 L. T. 464.

5. *Stoppage* in transitu—*Termination of transit—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *s.* 4, *sub-sections* 1, 3—*Passing of property—Acceptance.*—Goods were sold by B. to S. "on rail" at a railway station to S.'s order. No memorandum in writing of the contract was signed by S. The railway company advised S. of the arrival of the goods at the station, and that they held them, not as carriers, but as warehousemen at owner's sole risk. S. did not acknowledge the advice note or inspect the goods, but he attempted to resell them. S. having become insolvent and not having paid B., the latter claimed to stop the goods *in transitu*, and the railway company redelivered the goods to B. In an action against the company by S.'s trustee in bankruptcy claiming damages for conversion,

Held, that the transit of the goods was at an end; that the attempt by S. to resell the goods was evidence of an act done by S. in relation to the goods which recognized a pre-existing contract, and, therefore, evidence that S. had "accepted" the goods within section 4 of the Sale of Goods Act, 1893.

Semble, non-compliance with the provisions of section 4 by a buyer of goods does not prevent the property in the goods from passing to the buyer.—TAYLOR *v.* GREAT EASTERN RAILWAY CO., *K.B.D.*, 431; [1901] 1 Q. B. 774; 70 L. J. K. B. 499; 84 L. T. 770.

6. *Trade description—Oral statement explaining meaning of mark upon goods—Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 3.—A mark applied to goods, although it is unintelligible in itself, and is not, according to the custom of the trade, commonly taken to be an indication of any of the matters mentioned in section 3 (1) of the Merchandize Marks Act, 1887, will, if orally explained by the seller to the buyer to be intended to indicate one of those matters, constitute a trade description within that sub-section.—CAMERON *v.* WIGGINS, *Q.B.D.*, 237; [1901] 1 Q. B. 1; 70 L. J. Q. B. 15; 83 L. T. 428.

See also Factor.

SCHOOL.—See Education.

SCOTLAND, LAW of:—

Master and servant—Appeal to the House of Lords from Scotland—Competency—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Schedule II*, *s.* 14 (c).—By section 14 (c) of the second schedule to the Workmen's Compensation Act, 1897, which applies to Scotland: "Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the 52nd section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either prrty, within the time and in accordance with the conditions prescribed by Act of *sederunt*, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced."

Held, that in cases within this enactment no appeal lies to the House of Lords from a decision of the Court of Session.—OSBORNE *v.* BARCLAY, *H.L.*; [1901] A. C. 269.

SETTLED LAND:—

1. *Building—Existing occupation—Additions or alterations—Present intention for future letting—Settled Land Act*, 1890 (53 & 54 *Vict. c* 69), *s.* 13 (ii.).—An alteration in a building may be made "to enable the same to be let" within section 13 (ii.) of the Settled Land Act, 1890, even although the building is occupied under existing tenancies, if the alterations are made with the present intention of enabling the building to be let at some future time. Such an alteration is necessary or proper if it is such as a prudent man absolutely entitled would make in his own interests.—STANFORD, RE, STANFORD *v.* ROBERTS, *Ch.D. Buckley, J.*, 315; [1901] 1 Ch. 440; 70 L. J. Ch. 203; 83 L. T. 756.

2. *Incumbrance—Discharge—Expenses of making street—Payment by tenant for life—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 11—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 257.—The tenant for life of an estate paid expenses which had been incurred by a local authority, and made a charge upon the estate by section 257 of the Public Health Act, 1875.

Held, that this was a charge on the inheritance, and that he was entitled to keep it alive as an incumbrance on the settled land, and to raise

money under section 11 of the Settled Land Act, 1890, by mortgage of the estate for the purpose of discharging it.—SMITH'S SETTLED ESTATES, RE, *Ch.D. Buckley, J.*; [1901] 1 Ch. 689; 70 L. J. Ch. 273.

3. *Lease—Charges of estate agent for procuring lease—Application of capital money—Leasing powers—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-section* 10.—The commission charged by an estate agent for procuring a lease of settled land for a tenant for life under the Settled Land Act, 1882, is payable out of capital money arising under the Act.—MARYON-WILSON'S SETTLED ESTATES, RE, *Ch.D. Joyce, J.*; [1901] 1 Ch. 934; 70 L. J. Ch. 500; 84 L. T. 708.

4. *Mansion-house — Structural alterations—Rebuilding—Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 13 (*iv*).—It was proposed to pull down a substantial portion of the mansion-house, consisting of some old and inconvenient rooms, and upon the site thereof to build other rooms; and, so far as they were available for the purpose, to use the old walls both internal and external.

Held, that this would not be a "re-building" within the meaning of section 13 (iv.) of the Settled Land Act, 1890. — WRIGHT'S SETTLED ESTATES, RE, *Ch.D. Farwell, J.*; 83 L. T. 159.

5. *Mining lease — Powers of leasing—Lease of minerals—Rents varying with selling price of minerals gotten—Statutory powers—Validity of leases—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss* 2, 9, 11, 56—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *s.* 8.—When a person has under several instruments a power of appointment over the same subject-matter, and makes an appointment in exercise of "every power" enabling him in that behalf, the power first in point of time is exercised; and if effectually exercised there remains no subject-matter on which the other powers can operate The court may also consider which power is most beneficial to the donee of the power.

By a settlement made in 1876 estates were limited, in the events which happened. to A. for life, remainder to B. for life, with remainders over. The settlement contained a power for every person "as and when he should be entitled to the possession or the receipt of the rents and profits" of the settled estates, to grant mining leases reserving the best rents or royalties "by the acre, ton, or otherwise" without taking any fine or premium. During A.'s life B. absolutely aliened his reversionary life interest for value. A. died in 1882. Between the coming into operation of the Settled Land Act, 1882, and of the Settled Land Act, 1890, and after the later Act, B. granted mining leases reserving rents varying with the selling price of the minerals gotten, which was in accordance with the custom of the county. All the leases were granted in exercise of "every power" enabling B. in that behalf. Questions having arisen as to the validity of the leases, and whether they were granted under the power in the settlement or under the power in the Settled Land Acts,

Held, (1) that it was competent for B. to exercise the power of leasing in the settlement notwithstanding that he has aliened his life estate; and (2) that the reservation of rents varying with the selling price of the minerals was within the power and valid:

Held, also, that the leases were granted under the power in the settlement, which was first in point of date. and not under the power in the Settled Land Acts:

Held, further, that, assuming the leases were granted under the Settled Land Acts, the "conflict" referred to in section 56 of the Act of 1882 means a conflict between provisions connected with the execution of the power—*e.g.*, the consent of a third party—and not with the result or subject-matter of the power. — LONSDALE *v.* LOWTHER, *Ch.D. Farwell, J.*; [1900] 2 Ch. 687; 83 L. T. 312.

6. *Mining lease—Tenant for life impeachable for waste—Open mines—Proportion of rent to be set aside as capital money—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.—A tenant for life entitled to work mines, whether the power arises from the terms of the settlement or from the circumstance that the mines are open, is—in the absence of any expression to the contrary in the settlement—not impeachable for waste within the meaning of the Settled Land Act, 1882, s. 11, and is liable to set apart only one-fourth of the rent under a mining lease as capital money.—CHAYTOR, RE, *Ch.D. Stirling, J.*, 125; [1900] 2 Ch. 804.

7. *Tenant for life—Lease*—Bonâ fide *exercise of power—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 53, 58 (*vi.*).—A person having the powers of a tenant for life under the Settled Land Act, 1882, whose interest terminates on her marriage, is not entitled to grant a lease of the property to her intended husband without the consent of the remainderman or the sanction of the court.—MIDDLEMAS *v.* STEVENS. *Ch.D. Joyce, J.*, 430; [1901] 1 Ch. 574; 70 L. J. Ch. 320; 84 L. T. 47.

8. *Tenant for life—Power of sale—Right to construct and maintain tunnels for railway under land—Easement—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 63—*Settled Land Act*, 1884 (47 & 48 *Vict. c.* 19), *s.* 7—*Lands Clauses Act*, 1845 (8 & 9 *Vict. c.* 8).—A tenant for life by virtue of section 63 of the Settled Land Act, 1882, of a settlement by way of trust for sale created by will, of undivided shares of settled land beneath which a railway company desired to construct tunnels for an electric railway, having joined with the owners of the remaining shares in entering into an agreement with the company for the sale to them of the right to construct, maintain, and use tunnels with railways therein under the land, took out a summons under section 7 of the Settled Land Act, 1884, asking for leave to enter into a contract in the form of the agreement with the company for the sale to them of that right. It was urged in support of the application that to proceed under the Settled Land Acts was cheaper and more simple than under the Lands Clauses Act, and that the right in question constituted an easement under section 3 of the Settled Land Act, 1882, or, if not, that the court had power under that section to make the order asked for.

Held, that the sale of the subsoil of the settled land was not the sale of an easement under section 3 of the Settled Land Act, 1882, but that the court had power under that section to make an order authorizing the sale as being a sale of a part of the settled land.—PEARSON, RE, *Ch.D. Cozens-Hardy, J.*; 83 L. T. 626.

9. *Tenant for life—Powers of tenant for life—Estate or interest in possession subject to term—Trust for accumulation to increase estate—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 58 (1) (*vi.*).—A tenant in tail in possession of real estates under a will disentailed them, and by his marriage settlement made in 1894 conveyed them, subject to certain annuities given by the will, to trustees for a term of twenty-one years and subject thereto to the use

of himself for life with remainder over in strict settlement. The trusts of the term were for insuring and maintaining buildings on the estate, for the benefit of the settlor and his issue, and for the accumulation of the residue of the rents in order to increase the estate.

Held, that the settlor having an estate or interest in possession subject to a trust for accumulation for "other purpose" could under section 58 (1) (vi.) of the Settled Land Act, 1882, exercise the powers of a tenant for life.—COODE *v.* MARTYN, *Ch.D. Kekewich, J.*; 83 L. T. 146.

10. *Tenant for life—Remaindermen—Trust for sale—Power to postpone—Interim rents and profits—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 63.—Where real estate is settled upon trust for sale, and to pay the income of the proceeds to a person for life, that person is "for the time being beneficially entitled to the income of the land until sale" within the meaning of the Settled Land Act, 1882, s. 63, and is therefore tenant for life under the Act.

The principle laid down in *In re Chesterfield's Trusts*, 32 W. R. 361, 24 Ch. D. 643, does not apply to real estate.—SEARLE, RE, *Ch.D. Kekewich, J.*, 44; [1900] 2 Ch. 829; 69 L. J. Ch. 712; 83 L. T. 364.

11. *Tenant for life—Subject to term for securing incumbrances—Capital moneys—Discharge of incumbrances—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 53.—Land which was subject to mortgages was settled, subject to a term for securing incumbrances, to the use, in the events which happened, of A. for life, with remainders over. The trusts of the term provided that so long as the mortgages remained unpaid the trustees should receive the rents and profits and manage the premises and keep down the interest of the mortgage debts and certain rent-charges created by the settlement, that they should then pay to the tenant for life for the time being subject to the term an annuity of £600 a year and should apply the residue of the rents and profits towards the payment of the principal moneys charged by the mortgages, and there was a proviso for the cesser of the term upon the discharge of the mortgage debts. The settlement conferred on the trustees an immediate power of sale and exchange, but no power of leasing. The court having held that A. was a person having the powers of a tenant for life under the Settled Land Act, 1882, ordered him to be let into possession upon his undertaking to perform the trusts of the term, and gave him the custody of the title-deeds. The court would have made the order apart from the annuity to A. A. subsequently contracted to sell, under the powers of the Settled Land Acts, certain portions of the settled lands, including parts of all the mortgaged lands and a portion which was unincumbered, and in order to complete the sale it was necessary that the mortgages should be paid off. A. therefore directed that the trustees should apply the proceeds of the sale in paying off the mortgages. He deposed that he considered that this would be for the benefit of all the parties entitled under the settlement, seeing that the mortgages bore interest at 4 per cent., whereas the purchase-money could not be invested in trustee securities to yield more than 3 per cent. Upon a summons to determine whether the mortgages ought not to be kept on foot for the benefit of the ultimate remainderman,

Held, that the beneficiaries under the settlement took subject to the power of sale conferred on the trustees, and that inasmuch as the trustees in the exercise of that power might properly, for the purpose of carrying into effect a beneficial sale, pay off the existing incumbrances out of the purchase-money, a tenant for life doing the same thing under the powers of the Settled Land Acts ought not to be held to be acting unjustly towards the remaindermen; that consequently the mortgages ought not to be kept on foot, and that upon the payment off out of the capital moneys of all the mortgages the term would cease.—RICHARDSON *v.* RICHARDSON, *Ch.D. Stirling, J.*; [1900] 2 Ch. 778.

See also Will, 25, 28.

SETTLEMENT:—

1. *Construction—Power to jointure wives in succession—Divorce—Power to jointure second wife during lifetime of first wife.*—A settlement empowered a person to appoint to "any woman whom he might marry" yearly rent-charges by way of jointure, but provided that the settled estates should not be liable to the payment of jointures exceeding on the whole a given sum.

Held, on the construction of the deed, that the exercise of such power in favour of a second wife after the dissolution of the first marriage by divorce was valid, and that there was nothing on the face of the clause which was contrary to public policy, being distinct from those cases which bargained for the event of future separation between husband and wife.—MARLBOROUGH (LILY, DUCHESS OF) *v.* MARLBOROUGH (DUKE), *C.A.*, 275; [1901] 1 Ch. 165; 70 L. J. Ch. 244; 83 L. T. 578.

2. *Fines and recoveries—Estate tail in personalty—Tenant for life—Disentailing deed—Capital of personal estate to be invested in the purchase of real estate after death of tenant for life—Real estate to be held to the uses of settlement—Fines and Recoveries Act*, 1833 (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 71.—A tenant in tail may, with the consent of the tenant for life under the settlement, disentail an estate tail in personalty whereof the income is directed to be paid to a person still living, and the capital after his death is directed to be invested in real estate to be settled to the uses of the settlement.

Fordham v. *Fordham*, 13 W. R. 197, 34 Beav. 59, followed.—HARVEY *v.* HARVEY, *Ch.D. Byrne, J.*, 695; [1901] 2 Ch. 290.

3. *Married woman—Covenant to settle after-acquired property—Assignment of future property—Gift from husband.*—An assignment by the intended wife in a marriage settlement of her property and fortune, both present and expectant or future,

Held, not to comprise a sum of money which the husband made a present of to the wife long afterwards.—COLES *v* COLES, *Ch.D. Joyce, J.*; [1901] 1 Ch. 711; 70 L. J. Ch. 324; 84 L. T. 142.

4. *Married woman—Covenant to settle after-acquired property—£500 or upwards—Legacies—Deduction of duty—Time and source of payment—Husband and wife.*—A legacy of £500, which by payment of duty at 10 per cent. has been reduced to £450, is not within a covenant to settle any after-acquired property of the value of £500 or upwards.

A legacy out of general estate given by a codicil to a will, and a legacy given by another codicil to the same will out of the proceeds of sale of real estate which has not yet been sold, are acquired at one and the same time—namely, the death of the testatrix—and from one and the same source—namely, the testatrix. They must therefore be added together and treated as one sum for the purpose of a covenant to settle any property to which a married woman should become entitled "at one and the same time and from one and the same source."—PARES, RE, SCOTT CHAD *v.* PARES, *Ch.D.*

Buckley, J.; [1901] 1 Ch. 708; 70 L. J. Ch. 426; 84 L. T. 385.

5. *Married woman—Husband entitled* jure mariti *to wife's reversionary interest in personalty—Antenuptial agreement—Post-nuptial settlement—Recital—Voluntary settlement by husband—Fraud on creditors—Trustee in bankruptcy—Estoppel—Statute* 13 *Eliz. c.* 5.—A husband entitled *jure mariti* to his wife's reversionary interest in personalty (subject only to the contingency of her surviving him before he had reduced it into possession, which did not happen), in 1873 joined with his wife, then an infant, in executing a post-nuptial deed of settlement. This settlement recited that, previously to the marriage in 1872, he had "agreed to make such settlement of the fortune of his said wife as is hereinafter contained," and contained a covenant by him with the trustees that, on the interest falling into possession, he and she, or the survivor, and all other necessary parties, would assign and transfer it to the trustees upon the trusts of the settlement, which were for her for life, and after her death, if the husband should not have been or become a bankrupt, for him until he should become a bankrupt, with remainder for the issue of the marriage in the usual way, the survivor of the husband and wife having a power of appointment among issue. The wife having died in 1877, the husband in 1897 appointed two-thirds of the trust funds to his sons and surrendered his life interest to them, and five months afterwards he was adjudicated a bankrupt. The reversionary interest had since fallen into possession.

Held, (1) that, even with such a recital as here, a parol contract before marriage cannot support a settlement made after marriage so as to satisfy the Statute of Frauds; (2) that the settlement here was a voluntary settlement, and, as it expressly provided that the husband's property should be withdrawn from his creditors in case he became a bankrupt, was fraudulent within 13 Eliz. c. 5; (3) that, even if the recital had been sufficiently precise to create an estoppel binding the husband, the trustee in bankruptcy, having a paramount right by statute overriding the title of the bankrupt and persons claiming under settlements made by him, was in a superior position to the bankrupt himself, and would not be bound by such an estoppel, but no such estoppel was raised; (4) that the fund, therefore, belonged to the trustee in bankruptcy for the benefit of the creditors.

Semble, no post-nuptial settlement can by itself satisfy the Statute of Frauds; it is the date of execution, and not the contents of the document, that is material.

Dundas v. *Dutens* (variously reported in 1 Ves. jun. 196 and 2 Cox Ch. Cas 235) explained.

Barkworth v. *Young*, 5 W. R. 156, 4 Drew. 1, disapproved.—HOLLAND, RE, GREGG *v.* HOLLAND, *Ch.D. Farwell, J*, 476; [1901] 2 Ch. 145; 70 L. J. Ch. 625.

6. *Portions term—Maintenance of infants entitled to portions on attaining full age.*—Maintenance can, in a proper case, be obtained by infants entitled to portions under the trusts of a term, if the settlement creating the term was made by their father, or a person *in loco parentis* to them.—GREAVES' ESTATE, RE, JONES *v.* GREAVES, *Ch.D. Farwell, J.*, 236; [1900] 2 Ch. 683.

7. *Rectification — Intention.* — Action by R., married in 1872, for rectification of a post-nuptial settlement.

On the 13th of March, 1875, R., being about to become a stockbroker, executed a voluntary settlement of certain property. The property was settled upon his wife for life, with remainder to her children. On the 29th of September, 1899, Mrs. R. died.

Held, that the object of the settlement was to provide for the plaintiff's wife and children in case of bankruptcy; on the evidence the life interest in favour of the plaintiff was intentionally omitted, and the court therefore would not interfere.—RAKE *v.* HOOPER, *Ch.D. Kekewich, J.*; 83 L. T. 669.

8. *Tenant for life—Equitable tenant in tail—Alternative gift in remainder—Contingent interest—Estates in defeasance of estate tail—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *s.* 15.—Testator by his will devised real estates to trustees on trust after providing for the management of the estates, &c., to pay surplus rents to testator's widow for her life. Testator directed that after the decease of his widow surplus rents should be accumulated for the purpose of paying off certain mortgages on the said estates, and further directed the trustees, after the determination of the period of accumulation and subject to his widow's life estate, to convey and assure the said real estates so that the sum should stand limited, settled, and assured to use of G in tail male, but if G. should be dead to the use of the person who should be the first heir male of the body of G. in tail male, with remainder to the person who should be entitled to the title of Earl of C. in tail male, with remainder to testator's right heirs. By a codicil to his will testator, after reciting the said devise to the said G. thereby revoked the said devise and gave and devised the said estates after the death of testator's widow to R. in tail male, with all the limitations as testator's will mentioned. The trusts for accumulations being treated by the court for the purpose of the application as at an end, and R, with the consent of testator's widow, having barred the estate tail in a fund in court representing the proceeds of the sale of part of the said estates, and assigned the same to trustees subject to widow's life interest,

Held, that R. took a vested estate tail in remainder expectant on the death of testator's widow, that subsequent estates had been barred by the disentailing assurance, and that the fund in court might be paid out to the assignees of testator's widow and R.—CARDIGAN (LADY) *v.* CURZON-HOWE, *Ch.D. Byrne, J*, 715.

9. *Tenant for life and remainderman—Apportionment—Unauthorized investment—Breach of trust—Loss.*—Where a trustee, in breach of trust and without the knowledge of the tenant for life or remainderman, sells out an authorized investment and invests the proceeds in an unauthorized investment, resulting in a loss of some capital and income, the tenant for life is entitled to such a proportion of the amount realized by the unauthorized investment plus the income he received therefrom during its continuance, as the dividends he would have received from the authorized investment in the same period bear to the capital value of the authorized investment plus those dividends, the tenant for life being liable to bring into account all income received by him from the unauthorized investment, although not liable to refund any portion of this income.—BIRD, RE. DODD *v.* EVANS, *Ch.D. Farwell, J.*, 599; [1901] 1 Ch. 916; 70 L. J. Ch. 514; 82 L. T. 294.

10. *Tenant for life—Term of years—Right of tenant for life to possession—Conditions—Order.*—The plaintiff was tenant for life of certain landed property. In 1868 a part of the property had

been devised to trustees for a term of 500 years, with directions to manage and receive the rents and profits and apply the surplus rent in paying off two mortgages of £16,000 and £14,000 respectively. The mortgages had now been reduced to £9,000 and £8,000 respectively, and the plaintiff applied to be let into immediate possession of the estates, and that such of the title-deeds relating thereto as were in the possession of the trustees might be delivered up to him.

Ordered, that the plaintiff, upon giving security to the satisfaction of the judge in chambers for the due performance of the undertaking to account for the rents and pay the surplus rents to the trustees, be let into possession of the settled estate, and that the trustees deliver up to him any deeds which were in their possession.

In re Richardson, W. N., 1900, p. 3, approved.—MONEY KYRLE *v.* MONEY KYRLE, *Ch.D. Cozens-Hardy, J.*, 44; [1900] 2 Ch. 839; 69 L. J. Ch. 780; 83 L. T. 74.

See also Deed; Fixtures; Frauds Statutes, 3; Joint Tenancy; Will, 42.

SHERIFF:—

Seizure—Goods "taken in execution"—Person liable to pay rates—Demand on sheriff—35 Geo. 3, c. 73, s. 195—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 161.—By a local Act (35 Geo. 3, c. 73), when the goods of any person liable to pay a rate by virtue of the Act are taken in execution by a sheriff before the rate is paid, the sheriff shall, upon demand made by the rate collector, in the first place pay to the collector the sum due in respect of the rate.

By section 161 of the Metropolis Management Act, 1855, the rate collectors are to have the same powers, remedies, and privileges for levying rates under that Act as for levying money for the relief of the poor.

Goods were seized by the sheriff under a writ of *fi. fa.*, in execution of a judgment. The judgment debtor owed to the plaintiffs a sum for rates, consisting of a poor rate payable under the local Act and a general rate under the Metropolis Management Act, 1855. The rate collector demanded payment of the rates from the sheriff. Before the goods were removed or sold the judgment debtor paid the sheriff the amount of the judgment debt, and the sheriff handed over the amount to the judgment creditor and withdrew from possession without having paid the rates.

Held, that the goods had been "taken in execution" within the meaning of the local Act, and the sheriff was liable to pay to the plaintiffs the amount of the rates.—ST. MARYLEBONE VESTRY *v.* SHERIFF OF LONDON, *C.A.*, 36; [1900] 2 Q B. 591; 69 L. J. Q. B. 848; 83 L. T. 355.

SHIP:—

1. *Admiralty—Insurance—Partial average—Total loss—Insured not entitled to more than indemnity—Money paid under a mistake of fact.*—A chartered ship, having received damage on the way to her loading port, was repaired there, and the cost of the repairs were paid for by the charterers, who were fully insured in that behalf under an arrangement with the shipowners, whose master drew a bill on them for the amount so paid, pledging the ship for the repayment of the amount of the bill "three days after the safe arrival of the ship at her port of discharge." The ship never did arrive at her port of discharge, being lost before she arrived there; and her underwriters, who had also insured her on the outward voyage on which the previous partial damage had occurred, and paid an instalment towards the costs of the repairs, settled with the shipowners as for a total loss. Afterwards the shipowners brought an action against the underwriters to recover the balance of the costs of the repairs, claiming such balance as a particular average under the policy.

Held, that the underwriters had never been liable for the costs of the repairs, the plaintiffs never having sustained any partial average loss against which they could ask to be indemnified.—"DORA FORSTER," THE, *P.D. & Ad.D.*, 271; [1900] P. 241.

2. *Bill of lading—Freight—Right of captain to sue for.*—The defendants chartered a ship to carry a cargo. The charter-party provided that the captain should sign bills of lading at any rate of freight without prejudice to the charter-party. A cargo was loaded, and bills of lading incorporating the terms of the charter-party were signed by the captain of the ship. The defendants were the shippers and also the consignees and receivers of the cargo.

Held, that the captain had signed the bills of lading merely as agent for the owners, and was not entitled to sue the defendants for freight.—REPETTO *v.* MILLARS, *K.B.D.*, 526; [1901] 2 K. B. 306; 70 L. J. K. B. 561; 84 L. T. 836.

3. *Bill of lading—Goods marked as in margin—Delivery of goods otherwise marked—Mistake in bill of lading—Identification marks—Liability of shipowner—Exemption in case of incorrectness in marking—Bills of Lading Act*, 1855 (18 & 19 *Vict. c.* 111), *s.* 3.—A bill of lading, signed by the defendant's manager, described the goods comprised in it as "being marked and numbered as in margin," and contained the following clause: "The ship will not be responsible for correct delivery or loss unless each package is distinctly, correctly, and permanently marked by the merchant before shipment with a mark or number and address." Delivery was offered to the plaintiff, who was the indorsee of the bill of lading, of goods which were marked and numbered otherwise than as in the margin of the bill of lading. It appeared that these goods had been intended by the shippers to form part of the consignment represented by the plaintiff's bill of lading, but that they had by some mistake been incorrectly described in the bill of lading. The plaintiff refused to take delivery of the goods in question, and brought an action for damages for short delivery.

Held, that the plaintiff could not maintain the action.

Per Collins and Romer, L.JJ.—The defendants were not precluded by section 3 of the Bills of Lading Act, 1855, from showing that the goods had in fact been shipped under the bill of lading, and that there was a mistake in the margin of the bill of lading.

Per A. L. Smith, M.R.—The defendants were relieved from liability by the exemption clause in the bill of lading as to correctness of marking.—PARSONS *v.* NEW ZEALAND SHIPPING CO., *C.A.*, 355; [1901] 1 Q. B. 548; 70 L. J. K. B. 404; 84 L. T. 218.

4. *Charter-party—Ballast—Obligation of shipowner to supply—Responsibility for navigation—Construction of charter-party.*—By a charter-party a ship was let to the charterers for their sole use and benefit for the conveyance of merchandise and/or passengers with liberty to sub-let (subject to owner's approval of trade) for two or three round voyages at charterers' option, to be placed by a certain day "with clear holds" at the disposal of the charterers,

they "having the whole reach or burthen of the vessel," proper and sufficient room being reserved to the owners for the officers, crew, tackle, &c.; the owners undertaking to maintain her in a thoroughly efficient state during the currency of the charter; the captain to use every reasonable despatch in prosecuting the voyages, and (though appointed by the owners) to be under the orders and directions of the charterers as regards employment, agency, and other arrangements; the freight for the hire of the ship to be paid monthly until she was returned by the charterers to the owners.

Held, that upon the true construction of the whole of the charter-party (without deciding whether the contract more nearly resembled one of demise than of carriage) the responsibility for the navigation of the ship was imposed upon the owners, and that the owners were therefore liable to provide any ballast that might be necessary for safe navigation.

Decision of the Court of Appeal ([1900] 1 Q. B. 28), affirmed.—WEIR *v.* UNION STEAMSHIP CO., *H.L.*; [1900] A. C. 525; 69 L. J. Q. B. 809.

5. *Charter-party—Colliery guarantee—Demurrage—"Colliery working days."*—By a charter-party which incorporated a "colliery guarantee" the charterers agreed to load a ship with coal "in twelve clear working days, Sundays and holidays excepted."

Held (reversing the judgment of the court below), that, in the absence of evidence of any special meaning attached to the words, "working days" meant days on which the collieries usually worked, not days on which they actually worked, and that the shipowners were entitled to demurrage in respect of a delay in the loading caused by a strike at the collieries.—SAXON STEAMSHIP CO. *v.* UNION STEAMSHIP CO., *H.L.*; 83 L T. 106.

6. *Charter-party—Damage to cargo—Goods carried into England and Wales—Admiralty Court Act,* 1861 (24 *Vict. c.* 10), *s.* 6—*Reasonable care of cargo—Cargo unloaded at port of refuge—Refusal to carry on—Excepted perils.*—Case in which a master of a vessel laden with a cargo of coals, having been compelled to put into a port of refuge and discharge the cargo in order to repair his ship, was held justified in refusing to carry on the cargo which had in parts been saturated with sea water and become heated.

Notara v. *Henderson*, 20 W. R. 433, L. R. 7 Q. B. 225, discussed.—"SAVONA," THE, *P.D. & Ad.D.*, 303; [1900] P. 252.

7. *Charter-party—Bill of lading—Negligence clause.*—Where a contract for carriage of goods by sea contains an exception of negligence of the master and crew, the shipowner is entitled to a contribution from the owner of the goods to general average expenses, though the necessity for the same has been occasioned by the negligence of the master.

So held by A. L. Smith and Romer, L.JJ., Vaughan Williams, L.J., dissenting.

A charter-party, which contained an exception of the negligence of the master and crew, provided that the captain should sign bills of lading at any rate of freight the charterers or their agents might choose without prejudice to the stipulations of the charter-party, and that the charterers should indemnify the shipowners from any consequences which might arise from the captain following the charterers' instructions and signing bills of lading.

The captain, upon the instructions of the charterers, signed bills of lading for goods shipped by a third person, which did not contain a negligence clause. The ship coming into collision with another ship through the negligence of the captain, general average expenses were incurred in putting back for repairs,

Held, that the charterers were liable to indemnify thes shipowners against the loss sustained by them through their not being able to obtain a general average contribution from the owner of the goods by reason of the bills of lading not containing a negligence clause.

The Carron Park, 15 P. D. 203, approved of.—MILBURN *v.* JAMAICA FRUIT IMPORTING CO. OF LONDON, *C.A.*; [1900] 2 Q. B. 540; 83 L. T. 321.

8. *Charter-party—Hire payable in advance—Breach—Waiver—Estoppel.*—By a charter-party, payment of the hire was to be made in cash fortnightly in advance, otherwise the owners were to have the faculty of withdrawing the steamer from the service of the charterers.

On the 21st of June a fortnight's hire became due in advance.

On that date the steamer commenced a voyage from B. to S. She arrived at S. on the 25th, and lay there until the 27th, on which day she proceeded to H. to load her homeward cargo. While at S. the master, who was the servant of the owners, telegraphed to H. to order the cargo to be ready.

On the 28th of June the owners by telegraph withdrew the vessel for non-payment of the hire.

Held, that the withdrawal was unlawful, as the owners by their conduct were estopped from so doing, for by allowing the charterers to alter their position after the right of withdrawal had accrued they must be taken to have waived their right.

Nova Scotia Steel Co. v. *Sutherland Steam Shipping Co.*, 5 Com. Cas. 106, considered.

The mere fact that punctual payment of hire has been waived on former occasions, does not amount to a waiver of punctual payment of future instalments.—TYRER *v.* HESSLER, *K.B.D.*; 84 L. T. 653.

9. *Charter-party—Option of charterers to cancel on non-arrival of vessel by fixed date—Impossibility of arrival—Refusal to proceed—Injunction.*—By a charter-party the shipowner agreed that his vessel should proceed to a named port and there load a cargo for the charterer, and it was provided that, if the vessel should not be at that port ready to load by a specified date, the charterer should be at liberty to cancel the charter-party.

The vessel was then at another port unloading, and was delayed in doing so for so long that it became impossible for her to arrive at the agreed port by the specified date. The charterer refused to extend the time for cancellation, or to promise to load the vessel if she proceeded to the agreed port, and said that if he did load the rate of freight must be reduced, and he insisted on the vessel proceeding to the agreed port. The shipowner thereupon refused to send his vessel there.

Held, that an injunction ought not to be granted to restrain the shipowner from using the vessel for any purposes other than those of the charter-party.—BUCKNALL *v.* TATEM, *C.A.*; 83 L. T. 121.

10. *Charter-party—Pilot paid by charterers—Damage to vessel due to pilot—Payment of hire during repairs.*—The plaintiffs chartered the defendant's ship for the period of twenty-five years, with the option of purchase, the ship to be employed "between safe ports of the Continent of Europe where she may always safely lie." By the charter-party the charterers were to pay for pilotages, and, in the event of loss of time from damage preventing the working of the vessel, the payment of hire should cease until the vessel should be again in an efficient state to resume her services. The

negligence of the pilot, master, mariners, and other servants of the owner was mutually excepted.

While under charge of a pilot, the ship grounded in getting to her berth in a harbour, and, in consequence, she was prevented working for three weeks. The berth was a safe berth, and the grounding was due to the negligence of the pilot.

Held, that the pilot, though paid by the charterers, was not their servant, and therefore the charterers were not bound to pay hire during the period that the ship was in dock undergoing repairs. —FRASER *v.* BEE, *Q.B.D.*, 336.

11. *Charter-party—Mortgage—Chartering ship on half profits—Impairing security—Validity of mortgage—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 34.—The mortgagor of a steamship, which was used for tourist and pleasure traffic, chartered her for six weeks in the summer to run from Liverpool to places on the coast of North Wales, the mortgagor to receive one-half of the net profits.

Held, that, though no freight was reserved by the charter-party, the mortgage was not one which impaired the sufficiency of the security, and was therefore valid against the mortgagee.

Judgment of Jeune, P. (*ante*, p. 352), affirmed.—"HEATHER BELL," THE, HORTON *v.* WARD, *C.A.*, 577; 70 L. J. P. 57; 84 L. T. 794.

12. *Collision—Anchor light—Towing lights—"Under way"—Salvage—Regulations for Preventing Collisions at Sea*, 1897, *preliminary article, and arts.* 3, 11.—A steam tug is "under way" within the meaning of the preliminary article of the Regulations for Preventing Collisions at Sea, 1897, when she is fast alongside a vessel which she is moving up to her anchor preparatory to towing her away; and the tug should, therefore, exhibit the towing lights and side lights required by article 3 of the same regulations, though, *semble*, the vessel herself, whilst her anchor is still in the ground, should continue to exhibit the anchor light required by article 11 of the same regulations.—"ROMANCE," THE, *P.D. & Ad.D.*; [1901] P. 15; 70 L. J. P. 1; 83 L. T. 486.

13. *Collision—Barges in tow—Thames Bye-laws*, 1898, *r.* 11—*Anchor ring awash.*—The plaintiffs' and the defendants' barges, in tow of a tug in the River Thames, came into collision, owing to the defendants' barge being affected by the wind and tide whilst the tug was temporarily brought up, and the anchor hanging, ring awash, from the bows of the defendants' barge pierced the quarter of the plaintiffs' barge doing damage.

Held, that the plaintiffs were entitled to recover, for though, by rule 11 of the Thames Bye-laws, the anchor must be as low as ring awash, it may—according to the interpretation put upon the rule in *The J. R. Hinde*, [1892] P. 231—be as much lower as is thought proper, and those in charge of the defendants' barge were negligent in not having it sufficiently low in the water to avoid danger to other barges in case of contact in the course of the ordinary incidents of navigation in the river.—"SIX SISTERS," THE, *P.D. & Ad.D.*; [1900] P. 302.

14. *Collision—Both ships to blame—Consequential damage—Tortfeasors—Division of loss—Antinomy.*—In an action of damage by collision both vessels were found to blame. The decree, in the usual form, condemned the owners of the defendants' vessel and their bail in a moiety of the plaintiffs' claim in respect of the said damage, and the owners of the plaintiffs' vessel and their bail in a moiety of the defendants' counterclaim in respect of the said damage. At the reference the registrar added to the moiety of the plaintiffs' claim, payable by the defendants, a moiety of the amount of damage recovered from the plaintiffs by the owners of a barge against which the plaintiffs' vessel was driven in consequence of the collision.

The defendants appealed on the ground that, as the plaintiffs and defendants were joint tortfeasors, no contribution could be claimed from the defendants in respect of the damage to the barge paid by the plaintiffs.

Held, that the decree in Admiralty had been properly carried out by adding to the moiety of their damage claimed by the plaintiffs a moiety of the consequential damage recovered by the barge owner from the plaintiffs, and that it was not material that the damage arose out of a tort.—"FRANKLAND," THE, *P.D. & Ad.D.*; [1901] P. 161; 70 L. J. P. 42; 84 L. T. 395.

15. *Collision—Fog—Speed—Regulations for Preventing Collisions at Sea, art.* 16.—A passenger steamship, fitted with twin screws, which was proceeding at the rate of nine and a half knots an hour in a dense fog, was held not to be going at a moderate speed, and to have committed a breach of art. 16 of the Regulations for Preventing Collisions at Sea, although it was proved that her engines were so constructed that she could not go slower without stopping from time to time.

That article is imperative, and, therefore, although such consequences as loss of handiness and the risk of loss of position may result from proceeding at a lower rate of speed, which may be attained by occasionally stopping her engines, considerations of that nature do not justify a vessel in proceeding at more than a moderate speed.—"CAMPANIA," THE, *C.A.*; 84 L. T. 673.

16. *Collision—Limitation of liability—Loss of mails—Locus standi of Postmaster-General as bailee—Negligence of stranger.*—The Postmaster-General, being under no liability to his bailors for property bailed to him as Postmaster-General, cannot on behalf of the bailors recover for the loss of the property bailed, the loss being caused by the negligence of a stranger.

Claridge v. *The South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422, 40 W. R. Dig. 11, followed.—"WINKFIELD," THE, *P.D. & Ad.D.*, 685.

17. *Collision—Negligence—Contributory negligence—Thames Bye-laws*, 1898, *art.* 47.—The plaintiffs' steam vessel, proceeding down the River Thames against the tide, neglected—in breach of art. 47 of the Thames Bye-laws—to wait, before rounding Blackwall Point, "until any other vessels rounding the point with the tide (had) passed clear," and came into collision with the defendants' steam vessel which had come up the river, and was, at the material time, in process of turning preparatory to entering the West India Dock.

Held, by Jeune, P., that the defendants' vessel was to blame for negligently failing to execute the manœuvre of turning with due regard to the passing traffic; but that the plaintiffs' vessel was also to blame, for, through the breach of art. 47, she had brought herself into a position in which she would not otherwise have been, and by hampering the manœuvre of the defendants' vessel contributed to the collision and damage.

The Margaret (*Cayzer* v. *Carron Co.*), 9 App. Cas. 873, distinguished.—"OVINGDEAN GRANGE," THE, *P.D. & Ad.D.*; [1901] P. 127; 70 L. J. P. 27.

18. *Collision—Narrow channel—Vessel turning round—Regulations for Preventing Collisions at Sea, art.* 25.—Art. 25 of the Regulations for Preventing

Collisions at Sea is not infringed by a vessel turning round in a narrow channel whereby some portion of her length must necessarily during the process fail to remain on that side of the fairway or mid-channel which lies on her starboard side.—"WHITLIEBURN," THE, *P.D. & Ad.D.*; 83 L. T. 748.

19. *Collision—Steering rules—Sound signals—"Taking any course authorized or required by these rules"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 28.—The plaintiffs' steam vessel, after giving a prolonged blast on her whistle, left a dock entrance in the Mersey under easy starboard helm, and—whilst continuing to round under that helm in order to bring up alongside a wall a short distance further up—came into collision with the defendants' down-coming steamer. It was alleged on behalf of the defendants that those in charge of the plaintiffs' vessel should have indicated that she was directing her course to port by giving two short blasts of her whistle in accordance with art. 28 of the Regulations for Preventing Collisions at Sea, by which, "when vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by" the appropriate signal.

Held, by Jeune, P., that the rule was not applicable, as the starboard action of the helm began before leaving the entrance, and, when the other vessel was in sight, the plaintiffs' vessel was not, with reference to that other vessel, taking a course authorized or required by the rules.

Cases in which the rule would apply considered.—"MOURNE," THE, *P.D. & Ad.D.*; [1901] P. 68; 70 L. J. P. 7; 83 L. T. 748.

20. *Collision—Vessel at anchor with tug attached—"Attached for the purpose of towing or manœuvring"—Failure of tug to exhibit towing lights—Liability of tow—Mersey Rules*, 1900, *art.* 4 (a)—*Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 419, *sub-section* 4.—The plaintiffs' vessel, while laying at anchor in the River Mersey with a tug made fast alongside to keep her to her anchor till she could be towed into dock, was negligently run into by the defendants' vessel. The tug was carrying the ordinary lights for a steamship under way.

Held, that, under rule 4 of the Mersey Rules, the tug ought to have carried towing lights; that the infringement of the rule was one which might possibly have contributed to the collision; and that for this infringement the plaintiffs' vessel was to blame, both apart from statute and under section 419, sub-section 4, of the Merchant Shipping Act, 1894.—"DEVONIAN," THE, *C.A.*, 665; [1901] P. 221; 84 L. T. 675.

21. *Demurrage—Cargo "to be discharged with all despatch as customary"—Delay caused by deficiency of railway wagons—Liability of consignees.*—By a charter-party the cargo was "to be discharged with all despatch as customary." By the custom of the port of discharge cargo was discharged into railway wagons belonging to certain railway companies. Owing to a scarcity of wagons caused by stress of work at the port, and through no default or negligence of the consignees, the discharge of the cargo was delayed. In an action by the shipowners against the consignees to recover damages for the delay,

Held, that the consignees were not liable.—LYLE SHIPPING CO. *v.* CARDIFF CORPORATION, *C.A.*, 85; [1900] 2 Q. B. 638; 69 L. J. Q. B. 889; 83 L. T. 329.

22. *Demurrage—Liability of charterers of ship and consignees of cargo.*—The defendants chartered the plaintiffs' vessel, and guaranteed that the charter-party would be carried out in its entirety and on the conditions as to time provided therein and as to payment of demurrage legally incurred according to the terms of the charter-party. The defendants sold the cargo to the consignees, who were the holders of the bills of lading. On the arrival of the ship at the port of discharge, the consignees, having other ships in dock, were not permitted by the dock regulations to at once berth the plaintiffs' ship, and delay in discharging was thereby incurred, in respect of which demurrage was claimed from the defendants.

Held, that, inasmuch as the consignees had become agents of the charterers to receive the cargo and pay the freight in accordance with the terms of the charter-party, the charterers were not liable.—"DEERHOUND," THE, *P.D. & Ad.D.*, 511; 84 L. T. 360.

23. *General average—Sacrifice of freight.*—The plaintiffs, the owners of a ship, chartered her to carry a cargo of coals from Cardiff to Esquimault, and insured the chartered freight with the defendants. During the voyage the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison part of the cargo and bear up for the River Plate. It was necessary, for the safety of the whole adventure, for the vessel to put into Buenos Ayres, where the coal was surveyed, and was found to be in such a condition that it would have been impossible to have carried it with safety to Esquimault. The vessel abandoned her voyage and returned to the United Kingdom with another cargo, and the chartered freight was wholly lost. While at Buenos Ayres the ship and her cargo—both the portion landed and the portion remaining on board—were in safety, but no part of the cargo could be reloaded and carried with safety to Esquimault.

Held, that there was no general average sacrifice. The bearing up for the River Plate was not a general average sacrifice as regards the cargo, so as to be the subject of a general average contribution. The common danger had ceased when the cargo was sold.

Judgment of Bigham, J. (48 W. R. 48, [1899] 2 Q. B. 356), affirmed.—IREDALE *v.* CHINA TRADERS' INSURANCE CO., *C.A.*, 107; [1900] 2 Q. B. 515; 83 L. T. 299.

24. *Pilotage—Compulsory—Foreign vessel—Port of Blyth—Trinity House of Newcastle-upon-Tyne—*41 *Geo.* 3, *c. lxxxvi., s.* 6.—A foreign vessel resorting to, or coming into, or departing from, the port of Blyth, is bound by compulsion of law to employ a pilot licensed by the Trinity House of Newcastle-upon-Tyne.—"HOLAR" THE, *P.D. & Ad.D.*, 224: [1901] P. 7; 83 L. T. 436.

25. *Salvage—Charterers having an interest in goods saved—Liability to contribute—Action* in personam.—The defendants chartered a ship, in which they agreed to carry, amongst other cargo, certain Government stores from London to Jamaica upon the terms that they were to be responsible for the safe delivery of the cargo, subject to certain exceptions. During the voyage the ship, through her own default, came into collision with another vessel, and salvage services were rendered to her by the plaintiffs. A salvage award was made against the ship, cargo, and freight, the award including a sum in respect of the Government stores. The Government having refused to pay salvage, the plaintiffs brought an action *in personam* against the defendants to recover the amount payable in respect of the Government stores.

Held, affirming the judgment of Jeune, P., that, as the defendants had an interest in the Government stores saved, they were liable to pay salvage remuneration, and an action *in personam* lay.

The Five Steel Barges, 15 P. D. 142, 38 W. R. Dig. 192, approved.—"PORT VICTOR," THE CARGO EX, *C.A.*, 578; [1901] P. 243; 70 L. J. P. 52; 84 L. T. 677.

26. *Salvage—Damage suffered by salving vessel during services—Liability of vessel salved for damage—Onus of proof.*—Where a vessel suffers damage while rendering salvage services and there is no proof that those in charge of her have been guilty of any negligence or unskilful management, there is a presumption that such injury is caused by the necessities of the services, and, in the absence of proof to the contrary, the vessel salved is liable to compensate the salving vessel for such damage. It is not the custom of a Court of Appeal to vary the decision of a court below on a question of amount merely because, had the case come before them in the first instance, they might have awarded a different sum.—"BAKU STANDARD," THE, *P.C.*; 84 L. T. 788.

27. *Salvage—Pilot on salving ship—Claim as salvor.*—A pilot employed to pilot a vessel which is towing another vessel in distress is entitled as against the salved property to remuneration as a salvor in respect of his services to that property, if in the performance of them he runs risk outside what can be reasonably considered to have been within the ordinary scope of his employment.—"SANTIAGO," THE, *P.D. & Ad.D.*; 70 L. J. P. 12; 83 L. T. 439.

28. *Salvage—Towage—Pilot—Contributory—Negligence.*—Where a ship in tow of a steam tug suffers damage by reason of the negligence of those on board the tug, her owners are entitled to recover in respect of that damage from the owners of the tug, notwithstanding the fact that the negligence of a pilot in charge of the ship by compulsion of law contributed to the mischief.—"ADAM SPIES," THE, *P.D. & Ad.D.*; 70 L. J. P. 25.

29. *Seaworthiness—Presumption—Evidence—Cause of vessel's loss unascertainable—Appeal from Mauritius.*—Where a vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe, there is a presumption of unseaworthiness on which a jury may be directed to act in the absence of evidence. Where evidence is given, all the facts must be considered, including the unexplained sinking, and unless it establishes unseaworthiness the defence founded on it must fail.

Anderson v. *Morice*, (1874) L. R. 10 C. P. 58, approved.

The defence in this case was overruled, since the real cause of the loss was not ascertainable on the evidence, though it appeared to be attributable to mistakes made in managing the vessel after she sailed rather than to her unseaworthiness when she sailed.—AJUM HOSSEN *v.* UNION MARINE INSURANCE CO., *P.C.*; [1901] A. C. 362; 70 L. J. P. C. 34; 84 L. T. 366.

30. *Seaman—Desertion from foreign ship.*—It is no offence under section 236 of the Merchant Shipping Act, 1894, to persuade a seaman to desert from a foreign ship, for such offence is punishable only under section 238 when applied by Order in Council.—POLL *v.* DAMBE, *K.B.D.*; 70 L. J. K. B. 721; 84 L. T. 870.

See also Bankruptcy, 31; Insurance, 3-7.

SLANDER.—See Libel, 2.

SOLICITOR:—

1. *Costs—Taxation—Company—Debenture-holders—Retainer—Joint and several—Liability.*—Motions on behalf of the defendants, that an order made in chambers upon minutes upon further consideration of the action, directing taxation and payment of costs of the plaintiffs and of the defendants other than the company, whose costs were disallowed, might be altered by adding a direction that the defendants, the trustees, should have a full set of costs allowed them.

The action was brought by debenture-holders to enforce the security of the debentures by foreclosure or sale.

The defendants were the company, the mortgagors; the trustees for the first mortgage debentures; and the trustees for the second mortgage debentures.

The same solicitor acted for all the defendants.

The assets of the company were insufficient to pay the first mortgage debentures in full.

Held, that a full set of costs should be allowed to the defendants, notwithstanding that the defendants, the trustees, and the defendant company had appeared by the same solicitor; but that the solicitor was not entitled to be paid out of the funds any costs for which the company were, but the trustees were not, liable.—MORTGAGE INSURANCE CO. *v.* CANADIAN AGRICULTURAL COLONIZATION CO., *Ch.D. Kekewich, J.*; 84 L. T. 861.

2. *Costs—Taxation—Mining lease—Negotiations—Third-party order—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 38.—Where, under the usual third-party order for taxation of a lessor's solicitor's bill of costs in the preparation of a mining lease, the lessees objected that they were not liable for certain items for preliminary negotiations which were included in the bill, and in particular for fees paid to a mining expert and correspondence with him; and the question was whether their liability was altered by reason of a third-party order to tax having been obtained by them; and the taxing-master having decided that the lessees had rendered themselves liable for these fees by reason of their having obtained the third-party order to tax,

Held, that the third-party order did not alter or enlarge the scope of the liability upon the existence of which the order was based. The court was bound to look at the nature of the items, and to consider whether, apart from the order, the applicant was under any liability to pay them. Although the solicitor may put in one bill, as against his own client, a series of items, some of which may go beyond the liability of the third party, the third party does not, by obtaining an order to tax, render himself liable to the whole bill, unless there is a contract—express or implied—to this effect. The bill accordingly was referred back to the taxing-master to review his taxation.

In re Negus, 43 W. R. 68, [1895] 1 Ch. 73, considered.—GRAY, RE, *Ch.D. Cozens-Hardy, J.*, 298; [1901] 1 Ch. 239; 70 L. J. Ch. 133; 84 L. T. 24.

3. *Costs—Taxation—Payment on account—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *s.* 41.—The plaintiff had paid the amount of an account sent in by his solicitor, which account was not, however, a "bill of costs" inasmuch as it did not set out the particular items charged. More than twelve months after such payment, the plaintiff took out a summons for delivery and taxation of the

solicitor's bill of costs. No bill of costs had been delivered at the date of the hearing of the summons.

Held, that the payment on account could not in the circumstances be made referable to the bill of costs which would be delivered after the hearing of the application; and that the plaintiff was entitled to the common form order for delivery and taxation, notwithstanding the payment made upwards of twelve months before the issue of the summons.—CALLIS, RE, *Ch.D. Joyce, J.*, 316.

4. *Costs—Taxation—Trustee—Payment by trustee more than twelve months previously—Claim of* cestui que trust *to taxation—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 39, 41.—Section 41 of the Solicitors Act, 1843, has a general application, and refers to all modes of taxation previously specified in sections 37 to 40. The court, therefore, has no power to order taxation under section 39 more than twelve calendar months after payment.

Decision of Kekewich, J. (48 W. R. 375, [1900] 1 Ch. 857) reversed.—WELLBORNE, RE, *C.A.*, 113; [1901] 1 Ch. 312; 70 L. J. Ch. 172; 83 L. T. 611.

5. *Lien—Charging order on fund in court—Client a company—Application after winding-up order—Delay—Discretion—Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 163.—In an application for a charging order under the Solicitors Act, 1860, s. 28, delay by the applicant is no ground for refusing the order unless other rights in respect of the property have arisen in the meantime.

An order made under this section on the interest of a company in a fund in court is not such an execution on the assets of the company as would be void under section 163 of the Companies Act, 1862.—BORN, RE, CURNOCK *v.* BORN, *Ch.D. Farwell, J.*, 23; [1900] 2 Ch. 433; 69 L. J. Ch. 669; 83 L. T. 51.

6. *Lien — Infants — Compromise — Judgment — Reserving liberty to solicitor to apply—Form of order.*—A solicitor acting for infants in an action, in consenting to a judgment-compromise whereby a specific fund brought into court in the action is ordered to be paid out to trustees for the benefit of the infants, is entitled to the ordinary solicitor's lien for his costs upon the interests of the infants in the fund as fully and effectually as he would have been entitled thereto had his clients been persons *sui juris*; and it is not necessary, though it may be desirable, that his right under such lien should be expressly reserved by the judgment.—SANDERSON, RE, WRIGHT *v.* SANDERSON, *C.A.*; [1901] 1 Ch. 317; 83 L. T. 515.

7. *Probate—Practice—Attachment—Solicitors Act*, 1860 (23 & 24 *Vict c.* 127), *s.* 26—*Unauthorized person—Lodging caveat—Ministerial act.*—Lodging a caveat is a ministerial act, and a person, not being a solicitor, who performs this act on behalf of another, is not liable to attachment under section 26 of the Solicitors Act, 1860.—PANTON, RE, *P.D. & Ad.D.*; [1901] P. 239; 84 L. T. 725.

8. *Professional misconduct—Conflicting interests—Undisclosed agreement to share profits—Solicitors Act*, 1888 (51 & 52 *Vict c.* 65).—Where solicitors represent conflicting interests in litigious proceedings of any kind, any arrangement or understanding or practice whereby a share of profit, whether called "agency" or by any other name, is paid by one of the solicitors to another, is wrong in principle and fraught with risk to the welfare of clients and to the administration of justice, and constitutes professional misconduct. — INCORPORATED LAW SOCIETY, EX PARTE, FOUR SOLICITORS, RE, *Q.B.D.*, 219; [1901] 1 Q. B. 187; 70 L. J. Q. B. 5; 83 L. T. 484.

See also Bankruptcy, 9; Mortgage, 13; Partnership, 3; Practice, 34.

STAMP ACTS.—See Inland Revenue, 19-27.

STOCK EXCHANGE:—

1. *Bankruptcy—Broker—Debt for differences due to client—Collection of assets by official assignee of Stock Exchange—Claim by trustee in bankruptcy.*—A sum of money due from a stockbroker to a customer for differences is not impressed with any trust in favour of the customer, but on the bankruptcy of the broker passes to the trustee in bankruptcy for the benefit of the general body of creditors.

Decision of Phillimore, J. (48 W. R. 95), affirmed.—KING *v.* HUTTON, *C.A.*; 69 L. J. Q. B. 786; 83 L. T. 68.

2. *Principal and agent—Broker lumping several orders under one contract—Liability of principal to jobber on default of broker—Custom—Stock Exchange Rules, r.* 177.—A stockbroker who was instructed by a client to purchase and carry over for him 210 Louisville shares for a particular account, executed the order by purchasing in his own name from a jobber a large number of these shares and appropriating in his books the specified number to the client and the remainder of the shares to a third party. The stockbroker having been declared a defaulter,

Held, by Kennedy, J. ([1900] 2 Q. B. 18, 5 Com. Cas. 217, 48 W. R. Dig. 185), in an action by the jobber to recover damages for non-acceptance of the 210 shares by the client, that the alleged Stock Exchange usage, by which a broker, instructed by two or more different clients to purchase certain shares to be carried over from time to time, lumps the orders together and purchases the shares in his own name from the jobber, does not create any privity of contract between the jobber and the broker's clients, so as to enable the former to sue the latter in the event of the broker's failure to meet his liability.

Held, on appeal, that the judgment of Kennedy, J., must be affirmed, as the alleged custom of the Stock Exchange relied on by the jobber had not been proved at the trial to exist.

Semble (per A. L. Smith, M.R.), if, in some other action, the existence of this custom could be proved, it seemed to him to be a reasonable custom, and might be pleaded.

Levitt & Thornton v. *Hamblet*, 17 Times L. R. 307, referred to.—BECKHUSEN *v.* HAMBLET, *C.A.*, 481; [1901] 2 K. B. 73; 70 L J. K. B. 600; 84 L. T. 617.

3. *Principal and agent — Default of broker — Liability of client to jobber—Privity of contract.*—Defendant employed a broker to purchase for him certain shares on the Stock Exchange, and afterwards directed him to carry over the shares to the next account. The broker, in accordance with the regulations of the Stock Exchange, purchased the shares in his own name from the plaintiffs, who were jobbers on the Stock Exchange, and afterwards carried over with them the same shares. The defendant's name was not disclosed. Before the next settling day the broker was declared a defaulter on the Stock Exchange, and in accordance with the rules of that body his contract with the plaintiffs was closed, at a price fixed by the official assignee of the Stock Exchange. The plaintiffs having ascertained that the broker was acting for

the defendant in this transaction called upon him to take up the shares. He declined to accept any responsibility for them; and the plaintiffs, on the settling day, tendered the shares to the defendant, and, on his refusing to accept them, sold them for the best price then obtainable. In an action to recover from the defendant the difference between the price at which the shares had been carried over and that at which they had been sold,

Held, affirming the judgment of Mathew, J., that the defendant was liable as principal on the contract made for him by his broker with the plaintiffs, and that the privity of contract between the plaintiffs and the defendant was not affected by the rules of the Stock Exchange as to the compulsory closing of the transactions of a defaulting broker.

There is no established usage under which the client of a broker on the Stock Exchange who has become a defaulter, and whose transactions have been closed at prices fixed by the official assignee, can claim the right to close at the price so fixed a transaction entered into for him by the broker with another member of the Stock Exchange.—LEVITT v. HAMBLET, *C.A.*; [1901] 2 K. B. 53; 70 L. J. K. B. 520; 84 L. T. 638.

4. *Voluntary gift—Purchase of shares—Passing wife's name as name of purchaser—Death of donor before transfers executed — Will — Construction — Tenant for life and remainderman—Liability for dilapidations existing prior to testator's death.*—A testator a few days before his death bought through a broker on the Stock Exchange certain stocks and shares. On the day before his death, this being also "name day" on the Stock Exchange, in accordance with the testator's instructions his wife's name was passed as the transferee of the stocks and shares. The testator died before the transfers were executed.

Held, that the gift of the stocks and shares was complete.

Further, testator by his will declared that his trustees might permit his widow to reside in his leasehold house as long as she might desire, "she paying the rent and all rates, taxes, outgoings and repairs in connection therewith, and my trustees shall not be concerned to see to the upkeep of, or be responsible for, the said premises in any way during such time as my wife shall reside in the said premises."

Held, that the widow was not liable to pay for dilapidations existing prior to the testator's death. —SMITH, RE, BULL v. SMITH, *Ch.D. Byrne, J.*; 84 L. T. 835.

See also Principal and Agent, 4.

TELEGRAPH —See County Court, 12.

TOLL:—

Turnpike road—Exemption—Carriage employed in her Majesty's military service—Army Act, 1881 (44 & 45 *Vict. c.* 58), *s.* 143.—A private carriage belonging to an officer in the regular forces is not, when used by him while on duty, exempted by section 143 of the Army Act, 1881, from payment of toll in passing along a turnpike road.—CRAIG v. NICHOLAS, *Q.B.D.*, 48; [1900] 2 Q. B. 444; 69 L. J. Q. B. 608; 82 L. T. 765.

TRADE-MARK:—

1. *Invented word—Patents, Designs, and Trade-Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *as amended by Patents, Designs, and Trade-Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10.—The word "Uneeda" being a mere misspelt combination of the English words "You need a," is not an "invented word" within the meaning of section 64, sub-section 1 (*d*), of the Trade-Marks Act. Moreover, it is descriptive of the quality or character of goods; and on both these grounds it is not the proper subject of registration as a trade-mark.—"UNEEDA" TRADE-MARK, RE, *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 550; 70 L J. Ch. 318; 84 L. T. 259.

2. *Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *ss.* 2, *sub-section* 2; 3, *sub-section* 1—*False trade description—"Application to goods—Description implied from conduct.*—A purchaser asked at a shop for two half-pounds of tea. The salesman, without making any verbal statement, handed him two packets of tea, for which he paid. Each packet was stamped in ink, "The weight of this package, including the wrapper, is ½ lb." There was slightly less than ½ lb. of tea in each packet, but the weight of the tea and the wrapper combined was more than ½ lb.

Held, that the salesman had not by his conduct applied to the tea a false description of its weight within the meaning of the Merchandize Marks Act, 1887.—LANGLEY v. BOMBAY TEA CO., *Q.B.D.*, 27; [1900] 2 Q. B. 460; 69 L. J. Q. B. 752; 83 L. T. 175.

3. *Merchandize marks—Selling goods with forged trade-mark applied to them — Reason to suspect genuineness of trade-mark—"Acting innocently"—Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 28), *s.* 2, *sub-section* 2.—By section 2, sub-section 2, of the Merchandize Marks Act, 1887, every person who sells any goods to which any forged trade-mark or false trade description is applied shall be guilty of an offence against the Act, unless he proves that, having taken all reasonable precautions against committing an offence against the Act, he had no reason to suspect the genuineness of the trade-mark or trade description, or—clause (*c*)—"that otherwise he had acted innocently."

Held, that a person who sells goods to which a forged trade-mark or false trade description is applied may show that he "acted innocently," and be exonerated under clause (*c*), although at the time of the sale he had reason to suspect the genuineness of the trade-mark or trade description. —CHRISTIE v. COOPER, *Q.B.D.*, 46; [1900] 2 Q. B. 522; 69 L. J. Q. B. 708.

4. *Merchandize marks—Watch—Parts imported from abroad—Finished in England—"English lever"—Merchandize Marks Act*, 1887 (50 & 51 *Vict. c.* 20).—The appellants sold a watch for £2 5*s.* to which they applied the description "English lever."

Certain parts were imported into this country from abroad in a more or less unfinished state. The value of these parts in their rough condition, including the mainspring, hairspring, and certain screws, was 8d. The price of these parts when finished in England was estimated to be 4*s.* 5*d.* All these parts were dealt with in this country to enable them to go into a watch, and the watch was put together here.

The magistrate held that the imported parts were of foreign origin and of such importance that a description which failed to indicate them was a false description in a material respect, and that the finishing operations in this country were not of such a character as to destroy the characteristics of the foreign country in which they were made and produced.

He accordingly convicted the appellants of applying a false trade description to the watch.

Held, on remitting the case to the magistrate,

that if he had come to this conclusion as one of fact on the evidence, and had simply stated the case to determine whether there was anything in point of law to prevent him coming to such conclusion, the court would not disturb his decision; but that if he decided upon the view that the inclusion of certain parts partly manufactured abroad compelled him as a matter of law to hold that "English" was a false description, then his decision could not be supported.—WILLIAMSON *v.* TIERNEY, *Q.B.D.*; 83 L. T. 592.

5. *Registration—Double registration—Non-essential particulars—Disclaimer—Time—Patents, &c., Acts,* 1883-1888 (46 & 47 *Vict. c.* 57; 51 & 52 *Vict. c.* 50), *s.* 62.—Registration will not be allowed of a trade-mark identical in essential particulars with, but differing in non-essential particulars from, a registered mark of the applicant himself.

The exclusive use of non-essential particulars on a trade-mark must be disclaimed in the application for registration. Subsequent amendment will not be allowed.—PLAYER & SONS' TRADE-MARK, RE, *Ch.D. Cozens-Hardy, J.*; [1901] 1 Ch. 382; 70 L. J. Ch. 359; 84 L. T. 190.

6. *Registration—Rectification of register — Disclaimer—"Distinctive word"—Descriptive word—"Calculated to deceive or otherwise"—Patents, Designs, and Trade-Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *ss.* 73, 74 —Under the Patents, &c., Act, 1883, a trade-mark for jams was registered by the plaintiffs, consisting of a copy of a written signature with the word "Silverpan" added. The plaintiffs did not claim under the registration the exclusive use of the word "Silverpan." On motion by the defendants to rectify the register by removing the trade-mark, or by adding a disclaimer of any right by the plaintiffs to the exclusive use of the word "Silverpan,"

Held, that the word "Silverpan" was not a "distinctive word" within the meaning of section 74 of the Patents, &c., Act, 1883, and was "not calculated to deceive or otherwise" within the meaning of section 73 of the Act, and that the motion must be refused.—FAULDER'S TRADE-MARK, RE, *Ch.D. Kekewich, J.*; 83 L. T. 726.

TRADE NAME:—

1. *Action for deceit—Passing off—Calculated to deceive—Functions of judge and witness respectively.*—Observations of Lord Macnachten on the respective functions of judge and witness in passing-off cases.—PAYTON & CO. *v.* SNELLING, *H.L.*; [1901] A. C. 308; 70 L. J. Ch. 644.

2. *Same name—Goods of same class—Misleading public—Injunction.*—In 1895 J. & J. Cash, an old firm at Coventry dealing in textile goods, was converted into a limited company, the plaintiffs in this action. The defendant, Joseph Cash, was one of the directors. He retired in 1898 and set up in the same class of business at Coventry as "Joseph Cash & Co."

Held, that it was impossible for the defendant trading under his own name of Cash to sell "frillings" without their being known as "Cash's frillings"; that, that term having been proved to mean goods of the plaintiffs, to sell "Cash's frillings" was to represent such frillings to be the goods of the plaintiffs, and that the defendant must therefore be restrained from selling frillings under the name of Cash.—CASH *v.* CASH, *Ch.D. Kekewich, J.*; 84 L. T. 349.

3. *Similar name—True personal name—Tendency to deceive—Injunction.*—The plaintiffs were the proprietors and manufacturers of a preparation of meat juice, which for many years had been advertised and sold under a name whereof "Valentine" formed part.

The defendant company was promoted by the defendant C. R. Valentine, who was appointed managing director, for the purpose of manufacturing and selling extract of meat in the shape of globules in a protecting cover, according to his patented invention.

The globules were at first packed in boxes bearing labels describing them as "Valentine's Valtine Meat Globules," the word "Valtine" being a registered trade-mark which was acquired by the defendant company, on its formation, from the defendant C. R. Valentine.

Previously there was no preparation of meat juice or extract on the market, connected with the name of "Valentine," other than that manufactured and sold by the plaintiffs. Accordingly they brought an action for an injunction to restrain the defendant company from carrying on business as manufacturers or vendors of any preparation of extract of meat or meat juice under any name or title of which the name "Valentine" or "Valentine's" formed part; and to restrain the defendant C. R. Valentine from carrying on any such business under any such name or title without clearly distinguishing that business from the business of the plaintiffs.

Since the commencement of the action the description on the labels issued by the defendant company had been altered to "Valtine Meat Globules." The plaintiffs did not complain that the defendant company had got up their goods so as to resemble the plaintiffs', but only that they had made use of the name "Valentine" in such a way as to deceive the public into the belief that the goods sold by them were manufactured by the plaintiffs.

Held, that there was, in principle, no distinction between a case in which the name, of the use of which the complaint was made, was the name of the person who was carrying on business and a case in which it was not; that in both cases the principle of *Reddaway* v. *Banham*, [1896] A. C. 199, applied; that the term "Valentine Extract" could not be used in connection with meat juice without representing the goods to be those of the plaintiffs; and that, therefore, they were entitled to the relief which they asked, and, under the circumstances, the injunction must extend to the use of the word "Valtine." — VALENTINE MEAT JUICE CO. *v.* VALENTINE EXTRACT CO., *C.A.*; 83 L. T. 259.

TRADE UNION:—

1. *Action against trade union in registered name—Picketing—Injunction—Trade Union Acts,* 1871 *and* 1876 (34 & 35 *Vict. c.* 31; 39 & 40 *Vict. c* 22).—An action will not lie against a trade union in its registered name.—TAFF VALE RAILWAY CO. *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS, *C.A.*; 101; [1901] 1 K. B. 170; 70 L. J. Q. B. 219; 83 L. T. 474.

2. *Association—Agreement in restraint of trade—Expulsion of member—Directly enforcing agreement between members—Jurisdiction of court—Trade Union Act,* 1871 (34 & 35 *Vict. c.* 81), *s.* 4 (1)—*Trade Union Act,* 1876 (39 & 40 *Vict. c.* 22), *s.* 16.—An association established to give facilities to trade which by its rules provides that its members shall charge specified rates, subject only to a discount fixed by the rules, is a combination for imposing restrictive conditions on the conduct of a trade, and is therefore a trade union according to the definition in section 16 of the Trade Union Act, 1876.

An action by a member of such an association to restrain the committee from expelling him from the association is an action for "directly enforcing" the agreement between the members of a trade union, and consequently cannot be entertained by the court by reason of the Trade Union Act, 1871, s. 4 (1).—CHAMBERLAIN'S WHARF *v.* SMITH, *C.A.*, 91; [1900] 2 Ch. 605; 69 L. J. Ch. 783; 83 O. T. 238.

3. *Newspaper carried on to further the interest of union*—Ultra vires—*Libel—Trustees sued as registered proprietors—Damages—Liability of funds of union to indemnify trustee for damages and costs—Trades Union Act*, 1871 (34 & 35 *Vict. c* 31), *ss.* 8, 9.—The trustees of a trade union were registered as the proprietors of a newspaper printed and published to further the interests of the members of the trade union. A libel upon the plaintiff appeared in the newspaper which the trustees had not authorized the publication of. The plaintiff sued the defendants as the trustees of the union, and recovered damages and costs.

Held, that, as the property in the newspaper was vested in the trustees, they were liable, and were entitled to be indemnified out of the funds of the society.

Held, also, that the carrying on of the newspaper was not *ultra vires*.—LINAKER *v.* PILCHER, *K.B.D*, 413; 70 L. J. K. B. 396; 84 L. T. 421.

TRAMWAY:—

1. *Contract by road authority to repair road—Liability for non-repair—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 28, 29, 55.—By section 28 of the Tramways Act, 1870, the promoters of tramway companies are put under a liability to repair so much of the road on which their tramway is as lies between their rails, together with eighteen inches on the outside thereof.

By section 29 they are entitled to enter into contracts with the road authority with respect to the paving and keeping in repair of the roadway of any road on which their trams run.

By section 55: "The promoters or lessees . . . shall be answerable for all accidents, damages, and injuries happening through their act or default, by reason or in consequence of any of their works or carriages, and shall save harmless all road and other authorities, companies, or bodies collectively and individually . . . from all damages and costs in respect of such accidents, damages, and injuries."

Held, that the road authority, when it had contracted with the tramway company to keep in repair that part of the road on which the tramway ran, could be sued for non-repair.—BARNETT *v.* POPLAR (MAYOR), *K.B.D.*, 574; [1901] 2 K. B. 319; 70 L. J. K. B. 698; 84 L. T. 845.

2. *Rating—Engine-houses—County court*—Mandamus—*Victoria, law of.*—A county court having materially reduced the respondents' assessment of the appellants' tramway,

Held, that the Supreme Court had jurisdiction to issue a *mandamus* directing it to state the facts for their determination.

A decision of the county court in a rate appeal is not final under sections 60, 61 of Act No. 1243 of 1891. Those sections must be read with and are qualified by section 139 of No. 1105 of 1890, which in effect enacts that the court may be required to state a case in "all appeals": an expression which on its true construction includes rating appeals.

Held, also, that the land of the appellants' tramways, though its ownership is vested in the Crown, is occupied by the company and used for the profit of its members, and is rateable property, not falling within the exception in section 246 of Act No. 1112. The rateable value of its occupation is the gross profit of the concern, from which 10 per cent. on the capital outlay is rightly deducted. That value cannot be affected by the amount of consideration paid to acquire occupation whether in the shape of rent or instalments of purchase-money.

Pimlico, &c, Tramways Co. v. *Greenwich Union*, L. R. 9 Q. B. 9, approved.

Where a tramway runs through several municipalities, but has its engine-houses in one of them,

Held, that the separate rating value of the engine-houses taken at 5 per cent. on the fee simple value should be deducted from the rating value of the whole concern and allotted to the municipality in which they stand, and that the remainder of the rating value should be shared among the different municipalities according to the length of the tramway in each.—MELBOURNE TRAMWAY CO. *v.* MAYOR, &c., OF THE CITY OF FITZROY, *P.C.*; [1901] A. C. 153; 70 L. J. P C. 1.

See also Highway, 9; Local Government, 8.

TROVER:—

Conversion—Police constable—Article taken by police from a person accused of theft.—A gig, the property of the plaintiff, disappeared and was found in the possession of B. B. was prosecuted for stealing the gig and was acquitted. The gig had been removed by the police to the police-station. Both the plaintiff and B. demanded possession of the gig from the defendant, who was the sergeant in charge at the police-station. The defendant, acting under instructions from his superior officer, an inspector, refused the demand of the plaintiff and delivered the gig to B.

Held, that the defendant was liable in trover.—WINTER *v.* BANCKS, *K.B.D.*, 574; 84 L. T. 504.

TRUSTEE:—

1. *Appointment—Infant—Practice—Management of land during minority—Infant taking by descent—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 42, *sub-section* 1.—Section 42, sub-section 1, of the Conveyancing and Law of Property Act, 1881, enabling the court to appoint trustees on the application of a guardian or next friend of an infant beneficially entitled to the possession of any land, applies to the case of an infant taking by descent.

In re Glover, [1899] 1 Ir. R. 337, followed.—COWLEY, RE, *Ch.D. Cozens-Hardy. J.*; [1901] 1 Ch. 38; 70 L. J. Ch. 88; 83 L. T. 729.

2. *Attachment—Trustee ordered to pay into court—Money in possession or under control—Actual receipt—Evidence—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54).—In an action against executors and trustees to recover the plaintiff's share of the testator's residuary estate, the master had by his certificate found that the defendants had received personal estate of the testator not specifically bequeathed to a certain amount, and had paid, or were entitled to be allowed in account, certain other sums, leaving a balance due from them, one-fourth of which was due to the plaintiff. The certificate was based upon, *inter alia*, an affidavit of the defendants, in which they set forth a full account of the testator's personal estate which had come to their hands or the hands of either of them, or to the hands of any person or persons by their order or the order of either of them, or for their use or the use of either of them. The account contained particulars of their receipts, including various sums of cash.

The defendants having failed to comply with an order to pay into court the amount found to be due from them to the plaintiff, a motion for attachment was made against them.

Held, that there was no evidence of actual receipt by the defendants, and that consequently the money was not shown to be "in their possession or under their control" within the exception to section 4 of the Debtors Act, 1869; and no order made on the motion.—FEWSTER, RE, HERDMAN *v.* FEWSTER, *Ch.D. Joyce, J.*; [1901] 1 Ch. 447; 70 L. J. Ch. 254; 84 L. T. 45.

3. *Executor—Devastavit—Reliance on solicitor—Relief from liability—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 3, *sub-section* 1.—During five years' administration of a testator's estate by the court, the executors, who knew that large sums were necessary for the payment of debts, disbursements, and other administration purposes, paid various sums from time to time to their solicitors in reliance on their statements that these sums were in each case required for those purposes, to which they were in fact in great part applied. Shortly before the close of the administration the solicitors became bankrupt, and, the total amount paid to them being substantially in excess of the amount required and applied for administration purposes, the balance was lost to the estate,

Held, under the special circumstances, that the executors had acted honestly and reasonably, and ought fairly to be excused for making the payments in reliance on their solicitors' statements, and ought to be relieved from personal liability in respect of the balance lost.

Bacon v. *Bacon*, 5 Ves. 831, followed.

Observations on section 3, sub-section 1. of the Judicial Trustees Act, 1896. — DE CLIFFORD'S ESTATE, RE, DE CLIFFORD *v.* LANSDOWNE, *Ch.D. Farwell, J.*; [1900] 2 Ch. 707; 83 L. T. 160.

4. *Indemnity—Shares—Creation of relation of trustee and* cestui que trust—*Proof—Personal liability.*—All that is necessary to establish the relation of trustee and *cestui que trust* is to prove that the legal title is in one person and the equitable in another.

A person *sui juris* by accepting the beneficial ownership in shares, the legal ownership whereof is vested in another as trustee, renders himself personally liable in the absence of any contract to the contrary, to indemnify the trustee against calls.

Should the beneficiaries be tenants for life, infants, or if there are special trusts limiting the right to indemnity, the trustee's right does not extend beyond the trust estate—*i.e.*, beyond the respective interests of his *cestuis que trustent.*

An assignee, therefore, of the beneficial ownership in shares, with full knowledge that they were registered in another's name as trustee for their original purchasers and their assigns, must make good to the trustee any liability he has to meet as legal owner thereof.—HARDOON *v.* BELILIOS, *P.C.*, 209; [1901] A. C. 118; 70 L. J. P. C. 9; 83 L. T. 573.

5 *Investment—Bonds payable to bearer—Custody of bankers.*—Where trustees were expressly authorized to retain or invest in convertible securities such as bonds transferable by delivery with coupons attached,

Held, that the trustees might deposit such securities in their joint names in a bank upon a simple acknowledgment by the bank of the receipt thereof.

Field v. *Field*, [1894] 1 Ch. 425, distinguished.—DE POTHONIER, RE, DENT *v.* DE POTHONIER, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 529; 69 L. J. Ch. 773; 83 L. T. 220.

6. *Investment—Sale and conversion—Shares in partnership—Conversion into limited company—Unauthorized investment—Jurisdiction.*—The court has no jurisdiction to authorize trustees of a testator, who was a member of a partnership carrying on a business, to agree to take shares in a limited company into which it is proposed to convert the business, in exchange for the interest of the testator therein, where such shares are not investments authorized by the will or by law; and the court will not consider whether such a course is beneficial for the estate of the testator or not.

The cases where the court has approved of such agreements have been benevolent cases.—MORRISON *v.* MORRISON, *Ch.D. Buckley, J.*, 441; [1901] 1 Ch. 701; 70 L. J. Ch. 399; 84 L. T. 383.

7. *Investment — Will — Administration — Trust funds—Prohibited investments—Lord St. Leonards' Act*, 1860 (23 & 24 *Vict. c.* 38), *s.* 10.—A testator directed that the income of a portion of his estate was to be invested in Consols (and in no other securities).

The court refused to order the sale of the Consols and the reinvestment of the proceeds in securities authorized by section 11 of Lord St. Leonards' Act, 1860.

In re Wedderburn's Trusts, 27 W. R. 53, 9 Ch. D. 112, not followed.—OVEY *v.* OVEY, *Ch.D. Cozens-Hardy, J.*, 45; [1900] 2 Ch. 524; 69 L. J. Ch. 804; 83 L. T. 311.

8. *Judicial trustee—Appointment of new trustee—Rejection of nominee of applicant—Jurisdiction of court—Appointment of third person—Judicial Trustees Act*, 1896 (59 & 60 *Vict. c.* 35), *s.* 1 (1) (3)—Sub-section 3 of section 1 of the Judicial Trustees Act, 1896, applies only to the particular cases mentioned in the section, and does not cut down the general power of appointing any fit and proper person to be a trustee, given to the court by sub-section 1 of section 1 of the Act.

Consequently, if the court is not satisfied of the fitness of the nominee of the person making the application, it is not bound, in such a case, to appoint only an official of the court, but can appoint some other person whose name has been brought before the court by some other of the parties interested.—DOUGLAS *v.* BOLAM, *C.A.*, 163; [1900] 2 Ch. 749; 70 L. J. Ch. 1; 83 L. T. 448.

9. *Leaseholds—Power of sale—Underlease to purchaser.*—Trustees who are assignees of leasehold property held under one lease cannot, in exercise of an ordinary power of sale, sell the property in lots, retaining in themselves the original term, and granting underleases for the whole term less one day to the purchasers of the respective lots at apportioned rents, for by adopting such a method of assurance the trustees do not perform their duty and get rid of their liability by privity of estate to the lessor.—WALKER AND OAKSHOTT'S CONTRACT, RE, *Ch.D. Kekewich, J.*; 70 L. J. Ch. 666; 84 L. T. 809.

10. *New trustee—Absence from the United Kingdom for more than twelve months—Temporary return, with transaction of trust business—Statutory power of appointment of new trustee—Trustee Act*, 1893 (56 & 57 *Vict. c.* 53), *s.* 10, *sub-section* 1.—A trustee travelling on the Continent for a period exceeding twelve months, but who has made a temporary visit to England for one week within the twelve months, and on that visit has transacted trust business, is not a trustee who "remains out of the United

Kingdom for more than twelve months" within the meaning of section 10 (1) of the Trustee Act, 1893. —WALKER, RE, SUMMERS *v.* BARROW, *Ch.D. Farwell, J.*, 167; [1901] 1 Ch. 259; 70 L. J. Ch. 229.

11. *Partnership—Discharge—Liability of retired partners for trust debt—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 17, *sub-section* 3.—A power to lend trust money to a firm consisting of certain individuals does not authorize a loan to a firm indifferently constituted, whether including more individuals or less.

A testator, who had been a partner in the firm of A. & W. Smith & Co., nominated his wife and two of the three remaining partners in the firm as his trustees, and he specially authorized his trustees to allow his share of the capital to remain as a loan to the firm so long as his trustees should think it safe to allow it to remain. The wife died. The amount of the capital was ascertained and continued as a loan to the firm, but without any bond or other obligation being given for it. The third partner, not a trustee, was dissatisfied with the conduct of the firm's business, the result being that he agreed to retire under an agreement by which the two trustee partners paid him a sum of £9,000 for his interest in the firm, and by which the trustee partners undertook to meet all the liabilities of the firm, take over all the assets, and relieve the third partner of all debts. The new firm was carried on by the two trustee partners under the old name, and it paid a half-year's interest on the debt due to the trust estate. A year after the retirement of the third partner the trustee partners, as trustees, granted to the old firm and the third partner a discharge of the debt due to the trust. And about a month afterwards the new firm became insolvent and the two partners bankrupt. The trustee partners resigned their trusteeship, and new trustees were appointed, who acted as creditors on the new firm, and received a dividend out of the new firm's assets. They then raised against the retired third partner this action, claiming reduction of the discharge and payment of the balance of the trust debt.

Held, affirming the decision of the First Division of the Court of Session, (1900) 37, s. 4, R. 557, that the discharge was a breach of trust on the part of the trustee partners from which the third partner could not profit, the discharge being gratuitous; that the actings of the new trustees in ranking as creditors on the new firm's assets did not discharge the liability of the old firm; and that the third partner was liable to make good the loss to the trust estate.—SMITH *v.* PATRICK, *H.L.*; [1901] A. C. 282; 70 L. J. P. C. 19; 84 L. T. 740.

See also Executor, 2; Solicitor, 4; Vendor and Purchaser, 20, 21; Will, 26, 28

VACCINATION:—

1. *Neglect to procure — Information — Period at which offence complete—Limitation of time—Vaccination Acts*, 1867, 1871, 1898 (30 & 31 *Vict. c.* 84, *s.* 29; 34 & 35 *Vict. c.* 98, *s.* 11; 61 & 62 *Vict. c.* 49, *s* 1). —The appellant was convicted on an information laid on the 12th of July, 1900, under the Vaccination Act, 1867, s. 29, charging him that, being the parent having the custody of a child born on the 30th of December, 1890, he did unlawfully neglect to cause the child to be vaccinated within six months after birth, not rendering a reasonable excuse for his neglect.

On the 1st of May, 1899, the public vaccinator visited the appellant's house, pursuant to notice, and offered to vaccinate the child, and vaccination was refused.

On the 7th of July, 1899, the vaccination officer served a notice, under the Vaccination Order, 1898, on the appellant, requiring him to have the child vaccinated within fourteen days. No certificate of postponement or successful vaccination was received in respect of the child.

The appellant objected that the information was out of time, having been laid more than twelve months after the offence was committed. The justices disallowed the objection, on the ground that the offence was complete, and the time began to run, on the 21st of July, the date of the expiration of the notice served on the appellant by the vaccination officer.

Held, that the offence was complete, and the time began to run, six months after the birth of the child, and the information was out of time.—LANGRIDGE *v.* HOBBS, *Q.B.D*; [1901] 1 Q. B. 497; 70 L. J. K. B. 362; 84 L. T. 319.

2. *Proceedings to enforce vaccination — Condition precedent—Visit of public vaccinator—Vaccination Act*, 1867 (30 & 31 *Vict. c.* 84), *s.* 31—*Vaccination Act*, 1898 (61 & 62 *Vict. c.* 49), *s.* 1, *sub-section* 3.—The visit of the public vaccinator to the home of a child, required by section 1, sub-section 3, of the Vaccination Act, 1898, is not a condition precedent to proceedings under section 31 of the Vaccination Act, 1867, in respect of such child.

Quære, whether the provisions of section 1 of the Vaccination Act, 1898, apply in the case of children born before the passing of the Act.—PYM *v.* WILSHER, *K.B D.*, 654.

VENDOR and PURCHASER:—

1. *Bankruptcy — Specific performance — Vendor's trustee in bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 13.—Specific performance may be enforced against the trustee in bankruptcy of a vendor of property, and, if the property is leasehold, he cannot disclaim the contract without disclaiming the lease.

Holloway v. *York*, 25 W. R. 627, distinguished.—PEARCE *v.* BASTABLE, *Ch.D. Cozens-Hardy, J.*; [1901] 2 Ch. 122; 70 L. J. Ch. 446; 84 L. T. 525.

2. *Building estate—Deposit—Purchaser's option to rescind if houses not built—Lien for deposit.*—A purchaser has a lien for a deposit paid under a contract for the sale of a plot of land when the contract goes off for want of title, and also when the contract is rescinded under a condition enabling the purchaser to rescind.

Rose v. *Watson*, 12 W. R. 585, 10 H L. Cas. 672, followed.

Dictum of KAY, L.J., in *Rodger* v. *Harrison*, 41 W. R. 291, [1893] 1 Q. B. 161, dissented from.—WHITBREAD *v* WATT, *Ch.D. Farwell, J.*, 534; [1901] 1 Ch. 911; 70 L. J. Ch. 515; 84 L. T. 419.

3. *Building scheme — Auction sale — Restrictive stipulations—Prior purchaser—Restrictive covenants —Benefit of covenants—Assigns of vendor.*—A vendor, the owner in fee of an estate, conveyed part of it to D., who, for himself, his executors, administrators, and assigns, entered into certain restrictive covenants with the vendor, his heirs and assigns. About the same time the vendor conveyed two other portions of the estate to two other purchasers, subject to restrictive covenants similar to D.'s covenants. The vendor subsequently sold the remainder of the estate in lots by auction, subject to restrictive stipulations binding on each purchaser similar to D.'s covenants. The auction sale plan showed the whole estate sold and unsold.

An action was brought by the assigns of

purchasers at the auction sale to enforce against a lessee of an assign of D. the covenants entered into by D. with the vendor. The benefit of these covenants had never been expressly assigned to the purchasers at the auction sale.

Held, that there was a general building scheme affecting the whole estate; that D. was not bound by it for want of reciprocity; but that the plan and particulars of the auction sale raised an irresistible inference that the vendor intended the purchasers at that sale to have the benefit of D.'s covenants so that the purchasers at that sale could enforce D.'s covenants as assigns of the vendor.—NALDER'S BREWERY CO. *v.* HARMAN, *C.A.*; 83 L. T. 257.

4. *Conditions of sale—Condition as to compensation in case of "errors," "misstatements," and "omissions" in particulars of sale—Omission by vendor to disclose previous service of notices under the Public Health Act*, 1875 (38 & 39 *Vict. c.* 55)—*Compensation.*—Leasehold property was sold subject to a condition that, if any "error, misstatement, or omission" should be discovered in the particulars, the same should not annul the sale, but should be a subject for compensation. It was subsequently discovered, before the completion of the purchase, that notices to sewer, flag, and pave the adjoining street had prior to the sale been served upon the vendor by the local authority under the provisions of the Public Health Act, 1875. These notices had not been complied with, nor had they been disclosed to the purchaser at the time of the sale. The purchaser elected to complete his purchase, without prejudice to any claim that he might have to compensation for the non-disclosure of the notices in question.

Held, that, inasmuch as the property would always have continued liable to the service of these notices in the hands of the purchaser from the moment of his purchase, supposing they had not been previously served; and, inasmuch as it was accordingly impossible to believe that the market value of the property could be affected in the slightest degree by the question whether such notices, as a matter of fact, had or had not been given at the time of the sale, the purchaser must be taken to have suffered in fact no practical injury (*damnum*) from the non-disclosure of what had actually happened.

Held, accordingly (Collins, L.J., *dubitante*), that even if such non-disclosure constituted an "error" or "omission" within the meaning of the condition, yet, since no practical injury (*damnum*) had in fact been done, no compensation could be given the purchaser under the provisions of that condition.

Per Collins, L.J.—The non-disclosure of the notices constituted an "error" or "omission" on the part of the vendor within the meaning of the condition.—LEYLAND AND TAYLOR'S CONTRACT, RE *C.A.*, 17; [1900] 2 Ch. 625; 69 L. J. Ch. 764; 83 L. T. 380.

5. *Condition of sale—Conveyance—Concurrence of mortgagee—Costs.*—A condition in a contract for sale of land that the assurance and every instrument required for completing the vendor's title or for any other purpose is to be "prepared" by and at the expense of the purchaser is not sufficiently wide to throw the costs of perusing and executing the conveyance on behalf of a mortgagee who concurred in the conveyance on the purchaser.—SANDER AND WALFORD'S CONTRACT, RE, *Ch. D. Farwell, J.*; 83 L. T. 316.

6. *Conditions of sale—Defect of title—Conveyance—Compensation—Rescission.*—Certain freehold hereditaments were sold by the court in a partition action, subject to a condition that, if any error or misstatement should appear to have been made in the particulars or conditions of sale, such error or misstatement was not to annul the sale or to entitle the purchaser to be discharged from his purchase, and that a compensation should be made to the purchaser, and the amount of such compensation was to be settled by the judge in chambers. More than a year after the conveyance to the purchaser it was discovered that a certain part of the hereditaments belonged to a third party, whose interest the purchaser bought out.

Held, that the purchaser was not entitled either to compensation under the condition or to the rescission of his contract.—DEBENHAM *v.* SAWBRIDGE, *Ch.D. Byrne, J.*, 502; [1901] 2 Ch. 98; 70 L. J. Ch. 525; 84 L. T. 519.

7. *Conditions of sale—"Notwithstanding intermediate or pending litigation"—Power to rescind—Notice to rescind pending proceedings—Costs.*—The conditions of sale of certain property gave the vendors power to rescind the contract "if the purchaser shall insist on any objection or requisition which the vendors shall be unable or unwilling to comply with, and shall not withdraw the same after being required so to do, the vendors shall (notwithstanding any attempt to remove the same, or that there shall have been any intermediate or pending negotiation, proceeding, or litigation, and although they may have insisted that all or any of the objections and requisitions are or is untenable) be at liberty, by notice in writing signed by their solicitors, to rescind the contract, and shall thereupon return to the purchaser his deposit, but without any interest, costs of investigating the title, or other compensation or payment whatsoever." The vendors allowed a summons, taken out under the Vendors and Purchasers Act, 1874, by the purchaser for a declaration that his objections to the title had not been answered and that the title was defective, to be proceeded with after filing evidence and up to the moment of hearing, and then gave notice to rescind.

Held, that the vendors must pay the costs incurred up to the date of the notice to rescind.—SPINDLER AND MEARS' CONTRACT RE, *Ch.D. Farwell, J.*, 410; [1901] 1 Ch. 908; 70 L. J. Ch. 420; 84 L. T. 295.

8. *Conditions of sale—Specific performance—Misdescription—Compensation—Possessory title.*—If what a vendor offers to convey is substantially different from what he offered to sell, he cannot enforce specific performance, and the purchaser is entitled to have the contract rescinded and his deposit paid back.

It is not an invariable rule that a condition excluding compensation for misstatements only applies to trivial errors; but such a condition cannot be relied on by a vendor seeking to force upon the purchaser what he did not contract to buy.

Flight v. *Booth*, 1 Bing. N. C. 370, and the cases on conditions providing for compensation or no compensation, considered.

On an open contract a possessory title must be shown, not for twelve years only, but for forty years.—JACOBS *v.* REVELL. *Ch.D. Buckley, J.*, 109; [1900] 2 Ch. 858; 83 L. T. 629.

9. *Contract—Misdescription in particulars—Auctioneer's statement — Compensation — Specific performance.*—A material misdirection in the particulars of a property sold by auction may be corrected by the auctioneer's verbal statement at the sale, and if this

is done the purchaser will not be entitled to specific performance with compensation, even if he did not hear the auctioneer's statement; in such a case the vendor is entitled to annul the sale, notwithstanding the existence of a condition that a misstatement in the particulars should not annul the sale, but form the subject of compensation.

Manser v. *Back*, 6 Hare 443, applied—HARE AND O'MORE'S CONTRACT, RE, *Ch.D. Joyce, J.*, 202; [1901] 1 Ch. 93; 70 L. J. Ch. 45; 83 L. T. 672.

10. *Conveyance—Expressed grant of fee—Leasehold title in equity—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 63—*Merger.*—The question whether the merger of an equitable interest has taken place is one of intention.

Where the grantor purports to convey in fee by way of mortgage, but has only in equity a leasehold interest in the property, such interest passes to the grantee under section 63 of the Conveyancing Act, 1881.—THELLUSSON *v.* LIDDARD, *Ch.D. Stirling, J.*, 10; [1900] 2 Ch. 635; 69 L. J Ch. 673; 82 L. T. 753.

11. *Conveyance—Freeholds—Conveyance by executors to devisee subject to a charge—Land Transfer Act*, 1897, *ss.* 2 (2) (3), 3 (1)—*Lord St. Leonards Act* (22 & 23 *Vict. c.* 35), *s.* 29.—The purchaser from a devisee (of a testator who died in 1898) to whom freeholds have been conveyed by the executors under the Land Transfer Act, 1897, s. 3 (1), "subject to a charge for the payment of any money which the personal representatives of the testator are liable to pay," is not entitled, where the executors have given proper notices under Lord St. Leonards Act, s. 29, and have paid all debts of which they have received notice, to an indemnity in respect of that charge; in such circumstances the executors are exempt from liability for any debts of which they have received no notice, and such exemption extends to the real estate of the testator. —CARY AND LOTT'S CONTRACT, RE, *Ch.D. Kekewich, J.*, 581; 70 L. J. Ch. 653; 84 L. T. 859.

12. *Conveyance—General words—Conveyancing Act*, 1881 (44 & 45 *Vict. c* 41) *s.* 6—*Practice—Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9.—A vendor is entitled, in the absence of indications in the contract of a contrary intention, to insist on express insertion in his conveyance of general words of lesser import than those which would be implied, in the absence of such express insertion, by virtue of section 6 of the Conveyancing Act, 1881.

The court has jurisdiction under the Vendor and Purchaser Act, 1874, to decide on summons a question arising on a contract, even in cases in which one of the parties asserts himself to be in a position to rescind the contract or to set up a successful defence to an action for specific performance.

In re Wallis and Barnard's Contract, 48 W. R. 57, [1899] 2 Ch. 515, approved. — HUGHES AND ASHLEY'S CONTRACT, RE, *C.A.*, 67; [1900] 2 Ch. 595; 69 L. J. Ch. 741; 83 L. T. 390.

13. *Covenant—Restrictive covenant—Construction—Buildings on land "adjoining" vendors' land.*—In a conveyance on sale of a portion of plaintiffs' land to the defendant, the purchaser covenanted that he would not, "in the erection of buildings adjoining the hereditaments of the vendors," permit the insertion of any "lights" overlooking such premises. The defendant constructed a number of houses, the backs of which were 20ft. from the boundary fence separating the two properties. Their gardens or yards reached this fence, and there were windows in the houses which overlooked the plaintiffs' land.

Held, that the houses did not "adjoin" the plaintiffs' land within the meaning of the covenant. —IND *v.* HAMBLIN, *C.A.*; 84 L. T. 168.

14. *Easement—Light and air—Non-disclosure of deed of acknowledgment—Specific performance—Compensation—Costs—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 3.—A contract for the sale of a house with windows looking over land of a third person does not imply any representation or warranty that such windows have any right to access of light over such land.

The vendor of new houses having windows which overlooked a recreation ground vested in a town corporation, had, before his open contract with the purchaser, entered into a deed of covenant with the corporation that the owner of the houses should pay one shilling yearly as an acknowledgment that no easement of light or air over the recreation ground attached to the houses. This deed was not disclosed to the purchaser before the contract.

Held, that the vendor was entitled to enforce specific performence of the contract and without making compensation, but the court declined to order the purchaser to pay the vendor's costs of the action.—GREENHALGH *v.* BRINDLEY, *Ch.D. Farwell, J.*, 597; [1901] 2 Ch. 324; 84 L. T. 763.

15. *Notice of adverse title—Rents paid to house agent—Inquiry.*—Though an intending purchaser or mortgagee, who has actual knowledge that the rents are paid by the tenants to some person whose receipt is inconsistent with the title of the vendor, has notice of such person's rights, yet such payment must be actually inconsistent. Thus, the knowledge that the rents are paid to a house agent puts the purchaser to no inquiry and fixes him with no notice.

Barnhart v. *Greenshields*, 9 Moo. P. C. 18, and *Knight* v. *Bowyer*, 6 W. R. 28, at p. 33, 23 Beav. 609, at p. 642, discussed and explained.

Mumford v. *Stohwasser*, 23 W. R. 833, L. R. 18 Eq. 566, discussed and dissented from.—HUNT *v.* LUCK, *Ch.D. Farwell, J.*, 155; [1901] 1 Ch. 45; 70 L. J. Ch. 30; 83 L. T. 479.

16. *Payment by instalments—Repudiation of contract—Damages.*—The plaintiff was the purchaser and the defendant the vendor, under a written agreement, of certain land for £150, payable by quarterly instalments of £9 4s. 3d. The plaintiff paid all the instalments except the last, but made default in paying this, and left the neighbourhood. The defendant then took possession of the land and let it to a tenant. More than two years after the last instalment had become due, the plaintiff wrote to the defendant that he was prepared to make the final instalment and settlement of the ground purchased.

Held, that, though the plaintiff could not, by reason of his delay, obtain specific performance, his conduct did not amount to an abandonment or repudiation on his part; and that the defendant, having dealt with the property in a way he was not entitled to, was liable in damages.

Decision of Cozens-Hardy, *J.* (48 W. R. 42), reversed.—CORNWALL *v.* HENSON, *C.A.*, 42; [1900] 2 Ch. 298; 69 L. J. Ch. 581; 82 L. T. 735.

17. *Requisition of title—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70—*Sale by order of court—Conditions of sale—Abstract of title.*—By order of the court certain landed property was put up for sale. In the contract for its sale a clause was inserted that "all facts or matters appearing to be proved or to be certified by a chief clerk or master attached to the chambers of the

said judge, or to be stated or implied in any judgment or order in the action in which this sale is made, are to be deemed thereby sufficiently and conclusively evidenced." The master certified that the property to be sold formed part of the estate of one Joseph Whitham, deceased, from whom the title was derived.

Held, that, having regard to section 70 of the Conveyancing Act, 1881, and to the terms of the contract, a good title has been shown.—WHITHAM, RE, WHITHAM *v.* DAVIES, *Ch.D. Cozens-Hardy, J.*, 597; 84 L. T. 585.

18. *Reversionary interest—Sale—Expectant heir—Reversioner of full age—Under value—Unfair dealing—Unconscionable bargain—Sale of Reversions Act*, 1867 (31 *Vict. c.* 4), *s.* 1.—The plaintiff, who was thirty years of age, being entitled to a reversion expectant on the death of his mother, who was seventy-two years of age, executed a deed by which he sold £1,000 of his reversionary interest to the defendant for £300. On the execution of the deed the defendant gave the plaintiff a letter by which he agreed to resell the £1,000 to the plaintiff within two months on payment to the defendant of £600.

The plaintiff had no independent advice in the matter, but wrote a letter to the defendant prior to the sale showing he understood the nature of the bargain into which he was about to enter.

There was evidence that the value of the reversion of £1,000 in the market was over £600; and it also appeared that the defendant dictated a letter for the plaintiff to send to the solicitors of the trustees of the fund making inquiries as to it, which did not say he wanted the information for the purpose of borrowing money, but gave another reason.

Held, that the purchase was not only made at an undervalue, but there had been unfair dealing on the part of the defendant, and therefore the transaction must be set aside on payment by the plaintiff of £300 and interest at 5 per cent.—BRENCHLEY *v.* HIGGINS, *C.A.*; 83 L. T. 751.

19. *Sale of land—Warranty—Particulars of sale—Conveyance.*—Where land is sold by auction with a warranty that it answers a certain description and a conveyance is afterwards executed which contains no covenant corresponding to the warranty, no action can be brought upon the warranty.—GRESWOLDE-WILLIAMS *v.* BARNEBY, *Q.B.D.*, 203; 83 L. T. 708.

20. *Trustee—Purchase by a trustee of settled estate—Specific performance—Charge on trust estate—Vendor's lien—Trustee's right to indemnity—Subrogation.*—A vendor was entitled to a lien on land purchased by the trustee of settled estates. The purchase, under the circumstances, was invalid as against the persons having an interest under the settlement.

Held, that, as the trustee had no right to an indemnity against the settled estates, the vendor could have no right of subrogation, but only a lien for unpaid purchase-money.

Decision of Byrne, J. ([1899] 2 Ch. 729. 48 W. R. Dig. 198), affirmed.—ECCLESIASTICAL COMMISSIONERS *v.* PINNEY, *C.A.*, 82; [1900] 2 Ch. 736; 69 L. J. Ch. 844; 83 L. T. 384.

21. *Trustee—Specific performance—Trustee purchasing from* cestui que trusts—*Onus on trustee—Taking over contract.*—Where a trustee for sale seeks to justify a sale as a purchase by him from his *cestui que trusts*, the burden of proof that the transaction was a proper one rests upon the trustee, and he is bound to produce clear affirmative proof that the parties were at arm's length, that the *cestui que trusts* had the fullest information upon all material facts, and that, having this information, they agreed to and adopted what was done. It ought not to be assumed, in the absence of evidence to the contrary, that the transaction was a proper one, and that the *cestui que trusts* were informed of all necessary matters.

A title to property depending on such a sale will not be forced on a purchaser.—WILLIAMS *v.* SCOTT, *P.C.*, 33; [1900] A. C. 499; 69 L. J. P. C. 77; 82 L. T. 727.

22. *Vendor's lien—Conversion of purchased property—Lunatic not so found—Receivership order—Priorities—Lunacy Act*, 1890 (53 *Vict. c.* 5), *s.* 116.—A vendor is not deprived of any lien which he may have for unpaid purchase-money by the fact that the property sold is subject to a trust for sale which has become operative before the property is made over to the purchaser.

An *ex parte* order under section 116 of the Lunacy Act, 1890, directing a person, in the name and on behalf of a lunatic not so found, to receive and give a discharge for the property of a lunatic does not affect any rights which a third party may have in respect of such property.

In re Winkle, 42 W. R. 513, [1894] 2 Ch. 519, distinguished.—DAVIES *v.* THOMAS, *C.A.*, 68; [1900] 2 Ch. 462; 69 L. J. Ch. 643.

See also Bankruptcy, 33.

VICTORIA, LAW of:—

1. *Inland revenue—Duty on sugar—"Molasses refined in bond"—Customs Act*, 1890.—Molasses which have undergone a mechanical process to remove material impurities, without producing any chemical change, are not "refined" molasses within the meaning of the Victorian Customs Act, 1890 (No. 1081).—COLONIAL SUGAR REFINING CO. *v.* ATTORNEY-GENERAL FOR VICTORIA, *P.C.*; 84 L. T. 787.

2. *Inland revenue—Income tax—Company—Investments by company in the colony—Taxable income—Victorian Income Tax Act*, 1895, *ss.* 5, 10.—Section 10 of the Victorian Income Tax Act, 1895, provides a special mode of computing taxable income in favour of those companies which, not having their principal office or place of business in Victoria, nevertheless have part of their "receipts or assets and liabilities" within the colony.

Held, that by the true construction of that section, the appellant company, in order to have the benefit thereof, must show that it carries on part of its trade in the colony; the above expression representing the component parts of a trading company's balance-sheet;

Held, further, that the appellant being a mutual insurance company which did not insure or otherwise trade in the colony, but only invested certain funds there, was not within the section. Its income derived from its Victorian investments was taxable income under section 5 in the mode applicable to taxpayers generally.—SCOTTISH PROVIDENT INSTITUTION *v.* COMMISSIONER OF TAXES, *P.C.*; [1901] A. C. 310; 70 L. J. P. C. 50; 84 L. T. 241.

3. *Vermin Destruction Act*, 1890 (54 *Vict. No.* 1153)—*Local Government Act*, 1890 (54 *Vict. No.* 1112), *s.* 428—*Vermin-proof swing gates—Law of Victoria.*—Under the provisions of the Victoria Vermin Destruction Act, 1890, vermin-proof swing gates can be lawfully put across roads other than main roads by owners of lands, whether adjoining owners or single owners, with the consent of the

shire council, whether such lands are in special areas as defined by the Act or not.

Section 428 of the Local Government Act, 1890, does not, having regard to the exception therein contained, interfere with landowners' rights in this respect.—KING v. CHEYNE, *P.C.*; [1900] A. C. 622; 69 L. J. P. C. 136.

WATER:—

Supply for certain purposes—Use for other purposes—Agreement between water company and district council—Waterworks Clauses Act, 1863 (26 & 27 *Vict. c.* 93), *s.* 18.—By an agreement made between the T. District Council and the W. G. Water Co., the company covenanted to supply water sufficient for purposes of domestic use and the washing of carts, as well as in the case of fire, but not for street watering or sewer flushing purposes.

The respondents were ratepayers of T., and used the water for trade purposes.

Held, that they had been guilty of an offence within section 18 of the Waterworks Clauses Act, 1863.—ANDREWS v. WITTS, *K.B.D.*; 84 L. T. 124.

WAY—See Easement, 3-5; Local Government, 19.

WEIGHTS and MEASURES:—

Inspector—Resolution by local authority to forego stamping and verification fees—Surcharge by auditor of such fees to inspector—Weights and Measures Act, 1878 (41 & 42 *Vict. c.* 49), *s.* 47—*Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 13.—A local authority has no power, under section 13 of the Weights and Measures Act, 1899—which section repealed section 47 of the Weights and Measures Act, 1878—to order an inspector not to collect the fees specified in the first schedule "for the verification and stamping of weights, measures, and weighing instruments by inspectors of local authorities."—REX v. ROBERTS, KYLE, EX PARTE, *K.B.D.*, 488; [1901] 2 K. B. 117; 70 L. J. K. B. 590; 84 L. T. 530.

WESTERN AUSTRALIA, LAW of:—

Lease, Forfeiture of—Notice of forfeiture to lessee—Law of Western Australia—Goldfields Act, 1886—*Regulations of* 1892, *clauses* 69, 70.—The decision of the Governor in Council, under clauses 69 and 70 of the Regulations of 1892, to forfeit a lease granted under the Goldfields Act of 1886, must be unequivocally expressed by some overt act.

Held, that its transmission to the Warden's office was not such an act, and that the decision did not take effect till the day on which it was notified to the lessee.

The seven days' preferent right granted to the applicant for forfeiture by clause 69 to apply for a lease of part of the forfeited land runs from the date of notification: if exercised before that date, the application is invalid and of no effect.

After the expiry of the seven days the respondents applied for a lease of the same land, which had been included in an invalid previous application; the Governor gazetted his approval thereof, and subsequently cancelled the same on the ground of mistake.

Held, that the cancellation was *ultra vires*, and that the Governor was liable in damages to the respondents on their petition of right.—MINISTER OF MINES v. HARNEY, *P.C.*; [1901] A. C. 347; 70 L. J. P. C. 33; 84 L. T. 369.

WILL:—

1. *Accumulations—Leaseholds—Insurance—Accumulations Act*, 1800 (*Thellusson Act*) (39 & 40 *Geo.* 3, *c.* 98).—A direction in a will to apply a yearly sum out of the rents of leaseholds, held for a term of more than twenty-one years from the testator's death, in effecting and keeping on foot a policy of insurance to secure the replacement at the end of the term of the capital that would be lost through not selling the leaseholds, is not a direction to accumulate and does not fall within the Thellusson Act.—GARDINER, RE, GARDINER v. SMITH, *Ch.D. Buckley, J.*; [1901] 1 Ch. 697; 70 L. J. Ch. 407.

2. *Accumulations of rents and income—Investment in purchase of real estate—Purchase of land—Accumulations Act*, 1892 (55 & 56 *Vict. c.* 58)—*Interpretation Act* (52 & 53 *Vict. c.* 63), *s.* 3.—A direction to accumulate and invest the rents and annual income of property to be employed in the purchase of real estate is bad under the Accumulations Act, 1892.

In re Danson, Bell v. *Danson*, (1895) W. N. 102, discussed. — CLUTTERBUCK, RE, FELLOWS v. FELLOWS, *Ch.D. Byrne, J.*, 583; [1901] 2 Ch. 285; 70 L. J. Ch. 614; 84 L. T. 757.

3. *Accumulations of surplus income—Trust void for perpetuity—Investment of accumulations—Income of investments—Persons entitled—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—A testator, in 1865, left real property to his trustees upon trust in their absolute discretion to apply the whole or part of the income arising therefrom for the benefit of his daughter F. during her life, and after her decease to hold the property, with any surplus or accumulation of unapplied income, upon trusts for her children, and in default upon the trusts declared as to the residue of his whole estate which were for the benefit of his three daughters in equal shares for the life of each, and then for their children, with remainders over.

His daughter F. was of weak intellect, and from 1865 till her death in 1900 was maintained by the trustees, who now had a fund of £2,700, representing surplus accumulations of the income for her maintenance. Upon a summons to determine who were entitled to the fund,

Held, (1) that the trust for accumulations was void after the expiration of twenty-one years from the death of the testator, so that the surplus rents and profits from 1886 formed part of the capital and residue; (2) that such surplus was not to be treated as income, and to go to the tenants for life of the residuary estate, but was to fall into the *corpus* of the residuary estate.

In re Phillips, Phillips v. *Levy*, 28 W. R. 340, 49 L. J. Ch. 198, disapproved; *Crawley* v. *Crawley*, 7 Sim. 427, and *O'Neill* v. *Lucas*, 2 Keen, 313, followed.—POPE, RE, SHARP v. MARSHALL, *Ch.D. Farwell, J.*, 122; [1901] 1 Ch. 64; 70 L. J. Ch. 26.

4. *Accumulation beyond the period allowed by the Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Intestacy as to surplus income after expiration of permitted period—"Trust estate" and "income of trust estate."*—A testator, after directing the payment of a certain annuity to A., directed that the surplus "income" of his "trust estate" should accumulate till the annuitant's death, and that his "trust estate" was then "to be held upon trust" for such children of A., living at his decease or born afterwards, as should attain the age of twenty-one years, or should die under that age leaving issue, and, in case there should be no such children, then to certain other beneficiaries.

Held, that, having reference to the nature of the ultimate limitation to the children of A., or the other beneficiaries, there was an intestacy as to the income of the trust estate between the expiration of the period of twenty-one years from the testator's

death allowed for accumulation by the Thellusson Act and the death of the annuitant.

Weatherall v. *Thornburgh*, 26 W. R. 593, 8 Ch. D. 261, followed.

Harbin v. *Masterman*, [1894] 2 Ch. 184 (*Wharton* v. *Masterman*, 43 W. R. 449, [1895] A. C. 186), distinguished.

Held, also, that, on the true construction of the will, the testator intended to give the accumulated "income" of the "trust estate" for the period permitted by the Thellusson Act, as well as the *corpus* of the "trust estate" itself, to the persons ultimately entitled to the *corpus*.—TRAVIS, RE, FROST *v.* GREATOREX, *C.A.*, 38; [1900] 2 Ch. 541; 69 L. J. Ch. 663; 83 L. T. 241.

5. *Ademption—Satisfaction—Gift by will to testator's daughter—Direction to settle part of legacy—Subsequent settlement of different amount by testator on daughter—Different limitations—Ademption of settled portion of legacy.*—Testator by his will and a codicil thereto dated in 1885 gave to each of his daughters on attaining twenty-five the sum of £20,000, and directed that £15,000 part thereof should be settled upon certain trusts declared by his will for the benefit of his daughters and their children. One of the testator's daughters, S., was married in his lifetime, and on the occasion of her marriage the testator settled upon her a sum of £7,300 2¾ per cent. Consols upon trusts differing from those declared by his will.

The testator died in 1900. The question now arose, it being admitted that the settlement of the £7,300 Consols upon S. must be taken as an ademption or satisfaction of the provision made for her by the will and codicil, whether such ademption was to apply to the £15,000, directed to be settled by the will, or *pro tanto* to the £5,000 given to S. absolutely, or to both rateably.

Held, that the £7,300 Consols was to be taken as an ademption *pro tanto* of the £15,000 settled by the will and codicil.—FURNESS, RE, FURNESS *v.* STALKARTT, *Ch.D. Joyce, J.*; [1901] 2 Ch. 346; 70 L. J. Ch. 580; 84 L. T. 680.

6. *Annuity to wife "so long as she remains unmarried"—Sum not exhausted—Death of wife unmarried—Duration.*—Where a testator desired his executor to set aside £200 and thereout pay the testator's wife the sum of £3 monthly so long as she remained unmarried or until the sum of £200 became exhausted, the payment to cease on her marrying again, and where the wife died without remarrying before the sum was exhausted,

Held, that her executrix was entitled to the balance.

Rishton v. *Cobb*, 5 My. & Cr. 145, at p. 152, followed.—HOWARD, RE, TAYLOR *v.* HOWARD, *Ch.D. Farwell, J.*, 480; [1901] 1 Ch. 412; 70 L. J. 317; 84 L. T. 296.

7. *Construction—Absolute gift or estate for life with power of appointment.*—Testator by his will, dated in 1894, devised certain real estate to his two sons in strict settlement, and also gave them certain personal estate. He gave the residue of his real and personal estate to his wife absolutely, and appointed her executrix during her life and his sons executors on her death. By a codicil, dated in 1898, he revoked his will and gave all his property to his wife, "so that she may have full possession of it and entire power and control over it, to deal with it or act with regard to it as she may think proper." In the event, however, of her not surviving him, or dying "without having devised or appointed" the whole or any part of his said property, then he declared that his said will should take effect as if his codicil had not been made; and he appointed his wife executrix of his codicil during her life.

Held, that the wife took an estate for life only with a general power of appointment.—SANFORD, RE, SANFORD *v.* SANFORD, *Ch.D. Joyce, J.*; [1901] 1 Ch. 939; 70 L. J. Ch. 591; 84 L. T. 456.

8. *Construction—Ambiguity—Admissibility of evidence—Selection by legatee.*—A testatrix bequeathed "140 of my shares" in a brewery company to a legatee. At the date of her will and death the testatrix had 280 of such shares, of which forty were fully paid up and the rest partly paid. The legatee claimed the right to select and to take the forty fully paid-up shares as part of the bequest. Extrinsic evidence was tendered to show that the testatrix intended the bequest to be satisfied out of the partly-paid shares.

Held, that the extrinsic evidence of the intention of the testatrix was not admissible; but that the will itself manifested an intention that the bequest was to come out of the partly-paid shares, and therefore that the legatee had no right of selection.

Tapley v. *Eagleton*, 28 W. R. 239, 12 Ch. D. 683, distinguished.

Asten v. *Asten*, [1894] 3 Ch. 260, 43 W. R. Dig. 198, followed.—CHEADLE, RE, BISHOP *v.* HOLT, *C.A.*, 88; [1900] 2 Ch. 620; 69 L. J. Ch. 753; 83 L. T. 297.

9. *Construction—Annuity to maintain infants—Want of a trustee.*—A testator by his will directed his trustees to pay to his widow during her widowhood an annuity until his daughter should attain twenty-one, to be applied by the widow in and about the maintenance and education of the said daughter. The widow died, leaving the daughter still an infant.

Held, that the widow was a trustee for the infant in respect of the annuity, and that the annuity continued to be payable notwithstanding that the widow had died.—YATES, RE, YATES *v.* WYATT, *Ch.D. Byrne, J.*, 646.

10. *Construction—Children—Gift to "A. and the children of B."—Death of A. in testator's lifetime—Intention of testator.*—A testator appointed "his wife and his niece A." executrixes, and gave them property in trust for his wife (who survived him) for life, and after her death for "A. and the children of his sister B. who should attain the age of twenty-one years equally to be divided among them as tenants in common." At the date of the will A. was nearly twenty-one; she died in the testator's lifetime. At the death of the tenant for life B.'s children had attained twenty-one.

Held, that the bequest to A. did not lapse, since upon the true construction of this particular will the testator's intention appeared to be to make one class of nephews and nieces, so that if any of them died in his lifetime the survivors should take.

Decision of the Court of Appeal ([1899] 2 Ch. 314) affirmed.—KINGSBURY *v.* WALTER, *H.L.*; [1901] A. C. 187; 70 L. J. Ch. 546; 84 L. T. 697.

11. *Construction—Children—Illegitimate children—Mistake—Number of legatees—Illegitimate children—Presumption—Evidence of intention.*—Bequest to the three children of A. born prior to her marriage. A. had in fact four such children in existence at the date of the will. The testator had acknowledged the paternity of the three younger children, but he was not the father of the eldest child.

Held, that, in the absence of proof that the testator was aware of the eldest child's existence, the

onus of which proof lay on that child, there was no presumption that he intended to include her in the gift.

Semble, if the testator had been aware of the actual number of children, direct evidence of his intention to benefit three particular children would have been inadmissible.—MAYO, RE, CHESTER *v.* KEIRL, *Ch.D. Farwell, J.*; [1901] 1 Ch. 404; 70 L. J. Ch. 261; 84 L. T. 117.

12. *Construction—Children—Illegitimate children—Repute—Child born after the date of the will, but before the death of testator.*—Following *Holt* v. *Sindrey*, 17 W. R. 249, L. R. 7 Eq. 170, and *Hill* v. *Crook*, 22 W. R. 137, L. R. 6 H. L. 265, illegitimate children born before the date of a will, who have acquired the repute of being the children of a certain man, may take a bequest given to them as children of that man, notwithstanding that they take as members of a class with the legitimate children of other persons. A child, however, born after the date of the will, but before the death of the testator or testatrix, is not entitled to take, although he or she may have acquired such repute before the death of the testator or testatrix.

Occleston v. *Fullalove*, 22 W. R. 305, L. R. 9 Ch. App. 147, distinguished.

In re Bolton, Brown v. *Bolton*, 34 W. R. 325, 31 Ch. D. 542, followed.—DU BOCHET, RE, MANSEL *v.* ALLEN, *Ch.D. Joyce, J.*, 588; 70 L. J. Ch. 647; 84 L. T. 710.

13. *Construction — Children or their "natural representatives" if dead—Widow of child excluded.*—A testator gave all his property after certain life interests upon trust for all and every his children, whether sons or daughters, who should then be living or their "natural representatives" if dead according to the statute rule of distribution. He left seven children, one of whom (a son) died before the property became divisible, leaving a widow (his second wife) and children by his first wife.

Held, that as the widow's position was a contractual one, and that of the children, owing to nature, one by affinity of blood, the testator intended such persons as by nature represented the children, and excluded contractual relations. The widow was therefore held not entitled to share with the children.—WILSON *v.* BROMLEY, *Ch.D. Farwell, J.*; 83 L. T. 315.

14. *Construction—Devise of term to persons in succession—Remainder to "the heirs and assigns of the survivor."*—A testator by his will devised certain lands to certain persons in succession for the term of ninety-nine years if they should so long live, and from and after the determination of the last of the said terms or the death of the survivor, "to the heirs and assigns of the survivor of them for ever."

Held, upon the construction of the will as a whole, that the limitation to the heirs and assigns of the survivor should be read as one to the heirs of the survivor and their assigns, and not to the heirs or appointees of the survivor; and that, therefore, the heir of the survivor was entitled to the land as against a person who had purchased the land in fee simple from the survivor in his lifetime.—MILMAN *v.* LANE, *C.A.*, 545; 70 L. J. K. B. 731.

15. *Construction—"Eldest son" entitled to possession.*—A will limited successive estates to the sons of A. other than and except an eldest or only son for the time being entitled to the possession or receipt of the rents and profits of the C. estate. A son became entitled as tenant in tail in remainder of the C. estate, and, before becoming entitled to possession, joined with his father, the tenant for life, in a sale, from which he derived a benefit.

Held, that the words of the exception must bear their natural meaning, and that the son, not coming within those words, was not excluded from taking under the will.

Decision of Cozens-Hardy, J. ([1900] 1 Ch. 795, 48 W. R. Dig. 205), reversed.—SHUTTLEWORTH *v.* MURRAY, *C.A.*, 388; [1901] 1 Ch. 819; 70 L. J. Ch. 453; 84 L. T. 605.

16. *Construction—Estate in special tail—Issue—Male descendants—Gift to A. if he marries a gentlewoman and has issue male, to such issue male and their male descendants.*—"Issue" is *primâ facie* a word of limitation equivalent to heirs of the body, and not a word of purchase in limitations of real estate.

The effect of limitations of real estate to A. if he marries a fit and worthy gentlewoman, and has issue male, to such issue male and their male descendants, in failure of which then over, is to give A. an estate in special tail male.

Page v. *Hayward*, 2 Salk. 570, applied.—PELHAM CLINTON *v.* NEWCASTLE (DUKE), *Ch.D. Buckley, J.*, 12; 69 L. J. Ch. 875; 83 L. T. 627.

17. *Construction—Life interest—Gift over—"Survivors"—Intestacy.*—A testator settled shares in his business upon his three sons A., B., and C. respectively for life with remainder to their children who should attain twenty-one or marry, and in case either of the said sons should die and "no child or other issue of such of them so dying shall acquire a vested interest in the shares hereby settled upon them respectively under the trusts or powers aforesaid," then the share of such son or sons "shall be held for the benefit of the survivor or survivors of them, my said sons."

A. and B. died before C. They left issue. C. died leaving no issue.

Held, that there was an intestacy as to C.'s share.

The third rule in *In re Bowman*, 37 W. R. 583, dissented from.

Hodge v. *Foot*, 34 Beav. 349; *In re Arnold's Trusts*, 18 W. R. 912; and *In re Walker*, 28 W. R. 91, considered.—HARRISON *v.* HARRISON, *Ch.D. Cozens-Hardy, J.*, 613; [1901] 2 Ch. 136; 70 L. J. Ch. 551.

18. *Construction—Piece of land purchased as part of one property, occupied by testator as part of adjoining property—Will speaking from death of testator.*—A testator who had purchased two adjoining freehold houses, known as Broad Green Lodge and The Cedars respectively, each having a garden and piece of meadow land in the rear, and had occupied until his death Broad Green Lodge with the garden and meadow land at the rear and also the piece of meadow land at the rear of The Cedars, and had let The Cedars with its garden, but without the piece of meadow land at the rear, to a tenant for twenty-one years, by his will made prior to the lease by him of The Cedars devised (*inter alia*) his two freehold houses to trustees upon trust as to his "residence known as Broad Green Lodge" for the residence of his wife for life, and at her death for sale, with a direction that the proceeds should form part of his residuary estate, which he divided amongst his children. And after the death of his wife, the testator gave to one of his daughters the income to arise from his "freehold property known as The Cedars."

Upon a summons taken out by the trustees of the will for the determination of the question

whether the piece of meadow land at the rear of The Cedars was, upon the true construction of the will, included in the gift of the income of The Cedars in favour of the daughter, or whether such piece of meadow land became, upon the death of the testator's widow, subject to the trusts declared as to Broad Green Lodge,

Held, that the will, as to the property comprised in it, must speak from the date of the testator's death, at which time the piece of meadow land was occupied by him as part of the Broad Green Lodge property, and that the gift of the income of his freehold property known as The Cedars comprised the premises let by him as The Cedars, but not the piece of meadow land at the rear, which formed part of the testator's residuary estate.—STEVENS *v.* POTTER, *Ch.D. Cozens-Hardy, J.*; 83 L. T. 405.

19. *Construction—Secret trust.*—A testator built a museum and laid out pleasure grounds on parts of his estate, to which he admitted the public free, reserving his private rights. By a codicil to his will he gave the museum and grounds, with £300 per annum for their maintenance, to his son and his heirs male, and also appointed two trustees for the purposes only of the museum and grounds. Evidence showed that the testator intended his son to maintain the grounds and museum as in his lifetime, but that he wished the public to acquire no rights therein, and that the son accepted the gifts on those terms.

Held, that the son took the gifts subject to a secret trust to maintain and use the museum and grounds as in the testator's lifetime, to be enforced for the benefit of the public; and that the two trustees took no estate and had no duties to perform.—PITT-RIVERS, RE, SCOTT *v.* PITT-RIVERS, *Ch.D. Kekewich, J.*, 425; [1901] 1 Ch. 352; 70 L. J. Ch. 257; 84 L. T. 110.

20. *Construction — Specific legacy — Charge of legacies — Undisposed of residue — Exoneration.*—Where a testator has bequeathed a specific fund charged with pecuniary legacies, and has made no general residuary bequest, the legatee of the residue of the specific fund is not entitled to have the undisposed of general residuary estate resorted to for payment of the said pecuniary legacies, which, in the circumstances, must be treated as specific legacies.—GRAINGER, RE, DAWSON *v.* HIGGINS, *C.A.*, 197; [1900] 2 Ch. 756; 83 L. T. 209.

21. *Construction — "Surviving" — Surviving in person or by stock.*—A testatrix by her will gave one-third of the income of a money fund to her daughter A. for life, and after her death one-third of the capital to the children of A. whom she might leave her surviving, and who had attained or should attain twenty-one, with similar gifts to her two other daughters, B. and C., and their children; and, in case any or either of the said daughters, A., B., or C., died without leaving such issue, the share of the income given to the daughter so dying was to go to the surviving daughters, and the capital to their children in like manner as the original gift, with an ultimate gift over. All three daughters survived the testatrix. A. died in the lifetime of B. and C., leaving two children who attained twenty-one, but predeceased C. B. died in the lifetime of C., leaving two children, who attained twenty-one and survived C. C. died leaving no children her surviving, but having had one daughter who attained twenty-one.

Held that, on the death of C., the one-third of which she received the income during her life passed to the children of B.

O'Brien v. *O'Brien*, [1896] 2 Ir. R. 459, not followed.—BILHAM, RE, BUCHANAN *v.* HILL, *Ch.D. Joyce, J.*, 483; [1901] 2 Ch. 169; 70 L. J. Ch. 518; 84 L. T. 499.

22. *Construction—Things* quæ ipso usu consumuntur *—Farming stock—Gift for life.*—Farming stock and implements of husbandry are not things *quæ ipso usu consumuntur*, and a bequest of them for life does not confer upon the legatee an absolute interest in them, even though the legatee takes no interest under the will in the farm itself in connection with which they were used.—MYERS *v.* WASHBROOK, *Q.B.D.*; [1901] 1 Q. B. 360; 70 L. J. Q. B. 357; 83 L. T. 633.

23. *Contingency—"Die leaving issue"—Divesting —Period of defeasibility—Gift over on death coupled with a contingency.*—Testator gave his residuary estate upon trust for his widow for life or widowhood, and after her decease or second marriage to apply the income in the maintenance and education of his children until the youngest who should be living, being a son, should attain the age of twenty-one years, or being a daughter, should attain that age or marry. Subject thereto the testator directed that the trust fund and the income thereof, and any accumulations which should not have become vested or applied pursuant to his will, should be held in trust for all his children who being sons should attain twenty-one, or being daughters should attain that age or marry, to whom he gave and bequeathed his residuary real and personal estate in equal shares; and the testator directed that if any of his children should die leaving issue, such issue should take his or her deceased parent's share equally as tenants in common.

At the date of his will the testator had three children, all of whom were now living.

Held, that there was nothing in the will to limit the contingency—namely, death leaving issue—to less than the whole life of the first taker, whether son or daughter; and that the divesting clause or gift over might operate not only during the lifetime of the widow, but also after her death. Consequently that children who survived the testator would only attain vested indefeasible interests if and when they should die without leaving issue.—SCHNADHORST, RE, SANDKUHL *v.* SCHNADHORST, *Ch.D. Joyce, J.*; [1901] 2 Ch. 338; 70 L. J. Ch. 583; 84 L. T. 587.

24. *Devise—Divesting—Alternative devise—"Such as should be living at widow's death and attain twenty-one"—Appeal from New South Wales.*—Where there is a devise to five persons *nominatim*, or to such of them as should be living at the death of the testator's widow and attain twenty-one,

Held, that all the devisees take vested interests in fee subject to be divested as regards each devisee dying in the lifetime of the widow in favour of those (if any) who survive her and attain twenty-one.

But where later clauses gave to each devisee a specifically described portion of the land devised for life in the event of all the devisees surviving the widow, and declared that "in case of the death of any of the before-mentioned persons he gave and devised the share to which he would have been entitled" to his heir,

Held, that the effect of this declaration was to alter the original devise, and to give the share of a devisee dying in the widow's lifetime to his heir, and not to the surviving devisees.—PENNY *v.* COMMISSIONER FOR RAILWAYS, *P.C.*; [1900] A. C. 628; 69 L. J. P. C. 113; 83 L. T. 182.

25. *Devise of freeholds upon trust to one for life*

subject to condition of residence—Trust upon breach of condition to sell and pay one-third only of income to devisee for life—Settled Land Act (45 & 46 *Vict. c.* 38), *s.* 51—*Gifts of legacies to males and females——Direction to pay legacies, devises, and bequests in favour of females free of legacy duty—Gift of residue to males and females as tenants in common.*—S. D. by her will devised certain freeholds to trustees upon trust for T. S. for life, subject to a condition of residence, and in case T. S. should cease to reside there, then on trust to sell and invest the proceeds and pay one-third of the income thereof to T. S. for life, and the remaining two-thirds to other persons therein mentioned.

Held, that the provision was such as to induce the tenant for life to abstain from exercising his power under the Settled Land Act, 1882, within the meaning of section 51, and was void.

After giving certain legacies to males and females the testatrix declared that all legacies, devises, and bequests thereinbefore or thereinafter given or made in favour of females should be free of legacy duty, the residue being given to three males and three females as tenants in common.

Held, that the legacy duty in respect of the shares of the females in the residue were to be paid out of their respective shares.—DALRYMPLE, RE, BIRCHAM *v.* SPRINGFIELD, *Ch.D. Kekewich, J.*, 627.

26. *Forfeiture — Trustee — Garnishee order.*—A testatrix devised and bequeathed her real and personal estate to trustees for sale and conversion, and then upon trust to pay the annual income to her son during his life or "until he does or attempts to do or suffer any other act or thing, or until any other event happens whereby, if the same income were payable to him absolutely for his life, he would be deprived of the right to receive the same or any part thereof," in any of which cases it was given over.

A creditor obtained an order garnishing the income accrued due and in the hands of the trustees.

Held, that a garnishee order could not be obtained unless a debt was actually due from the trustee to the beneficiary, and that the garnishee order did not create a forfeiture.

Sampson v. *Sampson*, 44 W. R. 557, [1896] 1 Ch. 630, followed.

Bates v. *Bates*, (1884) W. N. 129, not followed.—GREENWOOD, RE, SUTCLIFFE *v.* GLEDHILL, *Ch.D. Farwell, J.*, 461; [1901] 1 Ch. 887; 70 L. J. Ch. 326; 84 L. T. 118.

27. *Forfeiture clause—Gift of life interest to K. subject to forfeiture if she "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces"—Condition void for uncertainty.*—A testator by his will gave his residuary estate to trustees upon trust to pay the income to K. for life, and after her death to divide the corpus among her children. By a codicil he declared that if she "shall in any way associate, correspond, or visit with any of my present wife's nephews or nieces," &c., then the life interest was to be forfeited and a gift over was to take effect.

On an originating summons taken out to ascertain the effect of the codicil upon the original gift.

Held, that the condition was void for uncertainty.—JEFFREYS *v.* JEFFREYS, *Ch.D. Farwell, J.*; 84 L. T. 417.

28. *Intestacy — Settlement — Trustee — Crown —* Escheat—Bona vacantia—*Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2, 22 (5).—A testator gave a life interest in all his property, which included freeholds, to his wife. The will contained no gift over or residuary devise or bequest. The trustees of the will were appointed by the court trustees for the purposes of the Settled Land Act.

The tenant for life subsequently sold some of the freehold property, and at her death money resulting from the proceeds of sale remained in the hands of the trustees. On the death of the tenant for life it was duly found that the testator had no heir-at-law or next-of-kin.

On the trustees claiming a beneficial interest in the moneys arising from the proceeds of sale,

Held, that such moneys belonged to the Crown as *bona vacantia*.—BOND, RE, PANES *v.* ATTORNEY-GENERAL, *Ch.D. Kekewich, J.*, 126; [1901] 1 Ch. 15; 70 L. J. Ch. 12.

29. *Joint tenancy—Ultimate limitation to "right heirs" of testator—Joint tenants—Coparceners—Inheritance Act*, 1833.—A testator by his will devised real property upon certain trusts, with an ultimate limitation in trust for his "own right heirs for ever." He died in 1847, leaving as his right heirs two daughters, M. P. and A. G., of whom A. G. was the survivor. All the prior limitations being exhausted, the heir-at-law of A. G. claimed the property, on the ground that by virtue of section 3 of the Inheritance Act, 1833, the two daughters took by the devise as joint tenants, and not by descent as coparceners. The representatives of M. P. claimed a moiety of the property, contending that section 3 was not applicable to this case, where the effect of the last limitation was equivalent to a declaration of intestacy, and that consequently the daughters took by descent as coparceners.

Held, that the Act applies to the case of right heirs if the effect of the gift is to give the heir in fact an estate. In this case the daughters took by the devise, and, it being impossible for coparcenary to be created by purchase, they took as joint tenants.—OWEN *v.* GIBBONS, *Ch.D. Farwell, J.*; 84 L. T. 381.

30. *Legacy—Interest—Gift by appointment under a power.*—A testatrix, having under her marriage settlement a general power of appointment over a sum of £5,000 and certain funds comprised in the first schedule thereto, appointed that the trustees should stand possessed of the sum of £5,000, and "of such portion of the stocks and securities comprised in the first schedule of the said indenture as shall, with the sum of £5,000 or the securities representing the same, make up the sum of £9,000" in favour of certain appointees.

Held, that the appointment was a specific gift of a portion of the stocks and securities, and that the appointees were entitled to the interest on the whole £9,000 from the death of the testatrix.—MARTEN, RE, SHAW *v.* MARTEN, *Ch.D. Byrne, J.*; [1901] 1 Ch. 370; 70 L. J. Ch. 354.

31. *Longest period allowed by law—Lives of all persons living at date of testator's death—Uncertainty —Perpetuity.*—A trust to endure until the period of twenty-one years from the death of the survivor of all persons living at the death of the settlor is void, on account of the uncertainty of its duration.—MOORE, RE, PRIOR *v.* MOORE, *Ch.D. Joyce, J.*, 484; [1901] 1 Ch. D. 936; 70 L. J. Ch. 358; 84 L. T. 501.

32. *Lost will—Evidence—Presumption that it was destroyed by testator—Presumption against fraudulent abstraction—Appeal from New Zealand.*—Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by him-

self. To rebut it there must be sufficient evidence that it was not destroyed by the testator *animo revocandi*; and

Held in this case that concurrent findings that it had not been rebutted could not be disturbed. This is a presumption against its fraudulent abstraction either before or after his death, but the circumstances which render such abstraction possible must be taken into account in arriving at the result of the evidence.—ALLAN *v.* MORRISON, *P.C.*; [1900] A. C. 604; 69 L. J. P. C. 141.

33. *Partnership—Bequest to partner of "all my share and interest in the business"—Whether undrawn capital and profits included.*—Testator carried on the business of a solicitor with C. under partnership articles, C. being the active partner. The capital was a fixed sum, the profits to be divided equally after C. had taken £400 a year. Accounts were submitted annually to the partners, but were not signed by them. In these circumstances the testator made his will whereby he gave to C. all his share and interest in the business conditional on his acting as solicitor to his estate free of charge. At his death moneys were standing to the credit of the testator's capital account, and there were undrawn profits.

Held, that as goodwill had been held in such a business to be practically non-existent (*Arundell* v. *Bell*, 49 L. T. Rep. 345), to include that only would be to give no effect to the gift, and that accordingly, having regard to the facts known to the testator, his intention was that the gift should pass both the share of capital and the undrawn profits.—BARFIELD, RE, GOODMAN *v.* CHILD, *Ch.D. Farwell, J.*; 84 L. T. 28.

34. *Power—Codicil—Intention to vary—Trusts declared afresh—No reference to power—Revocation.*—By his will dated the 6th of February, 1892, the testator declared (*inter alia*) that, as to one-eighth share of his residuary estate, it should be held by his executors on certain trusts. These trusts provided that the income of the said share should be paid to the testator's son, T. W., until "he should become bankrupt or do or suffer something whereby the said income if belonging absolutely to him or some part thereof would become payable to or vested in some other person"; and, on determination in the lifetime of T. W. of the above trust, that the income should be applied during the remainder of T. W.'s life in favour of certain other specified persons; and after the decease of T. W., that the share should be divided among his children; "provided always that the said T. W. might by deed or will appoint that the whole or any part of the income of the said share should after his death be paid to his widow (if any) during her life or for any less period."

T. W. became bankrupt early in 1893.

By a codicil dated the 27th of July, 1893, the testator declared his intention to vary the trusts of the share of T. W., and in pursuance thereof declared that such share should be held by his trustees upon the trusts thereafter recited. The trusts so recited made provision in the event of T. W. being prevented by reason of antecedent bankruptcy or by the happening of any other event from enjoying the life interest if it were given to him. In other respects, the trusts so cited followed the trusts in the will, except that no mention whatever was made of the power given by the will to T. W. to appoint to his widow.

The trusts in the will were not expressly revoked by the codicil.

Held, that the power of appointment still subsisted.—WOOD *v.* WOOD, *Ch.D. Farwell, J.* L. T. 157.

35. *Residue—Contingent bequest—Disposition of income of funds—Accumulation.*—A testator bequeathed the residue of his estate on the failure of certain events to the children of his sister when they should attain twenty-one, and failing issue of his sister then over. His sister had no children living.

Held, that the income of the residuary funds ought to be accumulated for the benefit of the persons who should ultimately be entitled up to the lawful period of twenty-one years, or till the gift over took effect.

Green v. *Tribe*, 27 W. R. 39, discussed.—TAYLOR, RE, SMART *v.* TAYLOR, *Ch.D. Cozens-Hardy, J.*, 615; [1901] 2 Ch. 134; 70 L. J. Ch. 535; 84 L. T. 758.

36. *Residue—Gift over of residue as a whole—Sum set apart—"Survivor"—Devolution on next-of-kin.*—A sum directed to be set apart out of residue will, where the testator has shown an intention that the residue should go over as a whole, and on the failure of the trusts affecting it, fall back into and go with the remainder of the residue, and will not devolve upon the next-of-kin of the testator as upon an intestacy.

Skrymsher v. *Northcote*, 1 Swanst. 566, 1 Wils. Ch. 248, discussed.—PARKER, RE, STEPHENSON *v.* PARKER, *Ch.D. Farwell, J.*, 215; [1901] 1 Ch. 408; 70 L. J. Ch. 170; 84 L. T. 116.

37. *Residue—Settlement of shares in residue—Legatee of life interest predeceasing testator—No lapse.*—Testator gave his residuary estate to trustees upon trust for his three daughters in equal shares; but he directed the trustees to retain the share of each daughter and to pay her the income thereof for life, then to her husband for life, with remainder, as to the capital, on trust for her children in the usual way, and in default of children attaining a vested interest, on trust for the other daughters of testator in equal shares, but so that the share so accruing should be subject to the same trusts as those declared concerning their original shares. One of the daughters predeceased the testator, leaving a husband but no issue.

Held, that the share of the deceased daughter had not lapsed, and that her husband was entitled to the income thereof for life, and that the capital thereof accrued for the benefit of the other daughters, their husbands, and children.—POWELL, RE, CAMPBELL *v.* CAMPBELL, *Ch.D. Cozens-Hardy, J.*; [1900] 2 Ch. 325; 69 L. J. Ch. 788.

38. *Residue—Specific devise—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 25.—A devise of the residue, or the remainder of the freeholds, or of all other the freeholds of a testator is a good "residuary devise" within the meaning of section 25 of the Wills Act, 1837, though it does not extend to copyholds. There may be in the same will two good residuary devises, the one limited to freeholds, the other limited to copyholds. A testator, who possessed several freehold houses at Wimbledon and two freehold houses at Kingston-on-Thames, devised one of the houses at Wimbledon to his son in fee. And he devised "all other my freehold messuages and tenements at Wimbledon aforesaid and elsewhere" to other persons. The devise to the son became void because he attested the will.

Held, that the second devise was a good residuary devise within section 25, and that it included the house, the devise of which to the son had failed.

Decision of Kekewich, J. ([1900] 2 Ch. 196), reversed.

In re Brown's Trusts, 1 K. & J. 522, and *Springett* v. *Jenings*, L. R. 6. Ch. 333, explained and distinguished.—MASON, RE, OGDEN *v.* MASON, *C.A.*; [1901] 1 Ch. 619; 70 L. J. Ch. 343; 84 L. T. 175.

39. *Residue—Testamentary expenses—Estate duty on real estate—Bequest of residue of personal estate after payment thereout of all testamentary expenses.*—A direction in a will that all testamentary expenses shall be paid out of the residuary personalty does not include the payment of estate duty in respect of the realty.—SHARMAN, RE, WRIGHT *v.* SHARMAN, *Ch.D. Kekewich, J.*, 555; [1901] 2 Ch. 280; 70 L. J. Ch. 671; 84 L. T. 859.

40. *Remoteness—Gift over on a compound event—Perpetuity—Splitting gift over—Cutting down absolute gift—Settlement—Intestacy.*—A testator who died in 1852 gave his residuary estate, which consisted wholly of personalty, to trustees in trust for his wife for life, and after her death (which happened) to be divided into five equal portions, which he allotted thus: "To S. D. (a married woman) I give two of such portions"; and having allotted the remaining three-fifths in similar words to other persons, he directed that the two-fifths allotted to S. D. should remain in trust for her life for her separate use, and from and after her decease in trust for her children upon attaining twenty-five if sons, or upon attaining twenty-one or marriage if daughters; "but in default of any such issue" such two-fifths to be divided among the children of C. payable to sons at twenty-five or to daughters at twenty-one or marriage.

S. D. died in 1899 without ever having had a child. At her death there were children of C., daughters, who had all attained twenty-one or married.

Held, (1) that the whole gift over on the death of S. D. was void for remoteness, and could not be split up into separate contingencies so as to be construed as a gift over on one contingency—such as that of S. D. having no child—that might in itself be good as being within the limit of perpetuity; and, (2) that upon the death of S. D. there was no intestacy as to the two-fifths, but that, by reason of the invalidity of the gift over on her death, the original absolute gift remained, and, upon her death, passed to her representatives.

When there is an absolute gift followed by a settlement of the subject of the gift, but the trusts of that settlement for some reason wholly or partially fail, there is, so far as they fail, no intestacy, but an interest in the nature of a reversion to the person who is the object of the previous absolute gift.

Evers v. *Challis*, 7 H. L. C. 531, distinguished on the first point, and *Lassance* v. *Tierney*, 1 Mac. & G. 551, on the second.—HANCOCK, RE, WATSON, *v.* WATSON, *C.A.*; [1901] 1 Ch. 482; 70 L. J. Ch. 114; 84 L. T. 163.

41. *Rule in* Shelley's case.—A testator devised certain property to trustees upon trust to receive the rents, &c., and to pay the outgoings and certain annuities for life to the testator's cousins, and then to pay the residue of the rents and profits to D. for life, and after the respective deceases of the said cousins and D., upon trust to convey the property, together with any accumulations of rents in the hands of the trustees, unto the right heirs of D.

Held, that, by virtue of the rule in *Shelley's case*, the hereditaments belonged to D. in fee, subject to the annuities.—YOUMANS' WILL, RE, *Ch.D. Joyce, J.*, 509; [1901] 1 Ch. 720; 70 L. J. Ch. 430; 84 L. T. 201.

42. *Settlement—Executory trust—Direction to duly and properly settle share of daughter marrying—Provision for children of marriage.*—A testator gave his residuary estate to trustees upon trust for his sons and daughters who should attain twenty-one in equal shares, and declared that no daughter should be entitled in any case to receive her share, but should receive the income thereof only with power to dispose of the principal by will, if unmarried; but, in the event of any daughter marrying, then the testator especially empowered his trustees to see that her share was duly and properly settled upon her by deed, so that the same should be preserved for her separate use independently of her husband.

Held, that the share of a daughter marrying should be settled so as to give her a life estate for her separate use without power of anticipation, with trusts in favour of the children of the marriage, and the ultimate trusts usual in a settlement of the wife's property.—SPICER *v.* SPICER, *Ch.D. Buckley, J.*; 86 L. T. 195.

43. *Substitution—Annuity—Appeal from Quebec.*—A testator set apart a fund as a provision for his wife and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share limited to 6,000 dollars a year, each child being charged with a substitution in favour of his or her children.

Held, in a suit brought by the eldest son to recover arrears of his annuity of 6,000 dollars a year, that according to the true intention of the testator as disclosed by the words of the will—

(1) The annuity of each child is a charge on the revenue of his own share and its arrears, not on the total revenue of the estate;

(2) Each child was entitled from the testator's death to an equal share of the net revenue current and accumulated: without regard to the benefits which during minority he receives from the fund set apart or under other clauses of the will;

(3) The substitution is confined to the share of each child in the capital of the residue, and does not extend to the accumulation of its revenue.—BEAUDRY *v.* BARBEAU, *P.C.*; [1900] A. C. 569; 69 L. J. P. C. 131; 83 L. T. 236.

44. *Substitutional gift—Gift to issue of deceased brothers and sisters—Sister dead at date of will leaving issue.*—A testator gave the residue of his estate upon trust for his brothers and sisters. The share of one brother was directed to be settled, and this clause was immediately followed by a proviso that "if any of my other brothers or sisters shall die in my lifetime leaving issue any of whom shall be living at my death, such issue living shall take equally amongst themselves if more than one the share which such other brother or sister would have taken if then living."

Held, that the gift to issue was substitutional, and that the children of a sister who was dead at the date of the will were not entitled to share in the residue.—OFFILER, RE, *Ch.D. Buckley, J.*; 83 L. T. 758.

See also Bankruptcy, 35; Ceylon, Law of, 2; Charity, 2, 3, 7, 8; Inland Revenue, 4, 7, 9-11; Married Woman, 7, 12; Power, 3, 7; Probate, 12-17; Stock Exchange, 4; Trustee, 7.

WORKING CLASSES HOUSING ACTS.—See Local Government, 24.

WORKMAN.—See Master and Servant, 1-22, 26, 27.

ZANZIBAR, LAW of :—

Lands taken for public purposes—Zanzibar Order in Council, 1884—*Indian Land Acquisition Act*, 1894, s. 6—*Compensation—Incidents of land governed by the local law—Mohammedan law of compensation—Buildings erected by Government on the plaintiffs' land without authority.*—The lands of the plaintiffs in the Island of Mombasa, part of the dominions of the Sultan of Zanzibar, were taken for a railway by the British Government under section 6 of the Indian Land Acquisition Act, 1894, which had been brought into force in Zanzibar by Order in Council.

In a suit for compensation for the value of the lands so taken, and also of the buildings previously erected thereon by the said Government without authority,

Held, (1) as regards the lands, the plaintiffs are entitled under the said Act to the market value thereof at the date of service of notice, under section 6, including such actual speculative advance therein as had already taken place in consequence of the railway scheme; but excluding any future speculative advance from the like cause.

(2) As regards the buildings, English law applied under the Order in Council of 1884 and the subsequent treaty of 1886. By that law, notwithstanding treaty rights of exterritoriality, the *lex loci rei sitæ* governs the incidents of land, that is in this case Mohammedan law, of which law a Zanzibar judge has judicial cognizance.

(3) By Mohammedan law the houses did not become the plaintiffs' property. The plaintiffs are entitled to have them removed, and the value to them of the right to have them removed from lands which have ceased to be their property is the measure of the compensation due.—SECRETARY OF STATE FOR FOREIGN AFFAIRS *v.* CHARLESWORTH, *P.C.*; [1901] A. C. 373; 70 L. J. P. C. 25; 84 L. T. 212.

[THE END.]

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